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1953. 80s. net. 1954. 80s. net. 1955. 105s. net.

Editor: Sir HERSCH LAUTERPACHT, Q.C., LL.D., F.B.A.

Published by
BUTTERWORTH & CO. (PUBLISHERS) LTD.

Previous volumes published under the title:

ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES

1919 to 1922. 45s. net. 1923 and 1924. 42s. net.

Editors: Sir JOHN FISCHER WILLIAMS, C.B.E., K.C., and H. LAUTERPACHT, LL.D.

1925 and 1926. 35s. net. 1927 and 1928. 42s. net.

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1929 and 1930. 42s. net.

Editor: H. LAUTERPACHT, LL.D.

(These five volumes are out of print)

Published by
LONGMANS, GREEN & CO., LTD.

1931 and 1932. 50s. net. 1933 and 1934. 50s. net.
1935 to 1937. 60s. net. 1938 to 1940. 70s. net.
1941 and 1942. 70s. net.
1919 to 1942 (Supplementary Volume). 70s. net.
1943 to 1945. 70s. net. 1946. 70s. net.
1947. 70s. net. 1948. 70s. net. 1949. 70s. net.

Editor: H. LAUTERPACHT, Q.C., LL.D., F.B.A.

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INTERNATIONAL LAW REPORTS

YEAR 1955

EDITED
BY
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BENCHER OF GRAY'S INN; MEMBER OF THE INSTITUTE
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LONDON
BUTTERWORTH & CO. (PUBLISHERS) LTD.
1958

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THE INTERNATIONAL LAW REPORTS
1958

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Printed in Great Britain by R. J. Acford Ltd., Chichester, Sussex

PREFACE

The present volume, which covers the year 1955, occupies over one thousand pages and is the largest issue of the *International Law Reports* published so far. The Advisory Committee decided not to proceed with the suggestion to publish this volume in two parts. Such a departure, while in keeping with the extended scope of the *International Law Reports*, would have added substantially to the cost to subscribers, and would have entailed some inconvenience in the matter of the Tables of Cases and Classification and the Index.

There are a number of factors which have been responsible for the enlargement of the size of the *International Law Reports*. In the first instance, apart from some isolated cases, the Editor has adhered to the policy of publishing verbatim reports of decisions wherever relevant. Secondly, the present volume includes reports from Italy for the years 1953 and 1954 which it was not possible to include in the previous volumes. I an much indebted to Dr. Luigi Citarella for having so ably undertaken that exacting task. Thirdly, the present volume continues the policy of including in the *International Law Reports* certain subjects which, when the *Annual Digest of Public International Law Cases* first appeared, might have been considered to be outside the scope of international law. Thus on pp. 705–737 there will be found a number of cases relating to the interpretation and application of the Articles of Agreement of the International Monetary Fund. These cases, in addition to supplying an interesting example of the legal regulation of international co-operation in a field of growing importance, illustrate a change, by virtue of the Agreement, in international practice in the matter of recognition of foreign exchange control regulations and of the traditional right of a State to regulate its own currency. I am deeply indebted to Dr. Joseph Gold, of the staff of the International Monetary Fund, for enriching the *International Law Reports* with reports of these cases. Similarly, the present volume includes a number of decisions of the Court of the European Coal and Steel Community. Although these decisions, ably reported and commented upon by Mr. D. G. Valentine, touch only incidentally upon general questions of international law as commonly understood, they are a significant example of legal adjudication, not restricted to sovereign States, by an international tribunal administering a body of rules which are not only of an international but also of what many believe to be a supra-national character. I have also continued the policy of reproducing, with the devoted help of M. Jacques Lemoine, the Judgments of the Administrative Tribunals of the United Nations and the International Labour Organization. These Judgments are concerned with the rights and obligations of international civil servants and the international organizations which employ them. After taking advice from many quarters I reached the conclusion that they are of sufficient interest for what may be described as constitutional international law to warrant inclusion. Finally, the present volume includes a large number of cases decided by conciliation commissions, such as the Anglo-Italian, the Franco-Italian and the United States-Italian Conciliation Commissions. Although conciliation commissions are not, in general, confined to the application of strict rules of international law, they constantly apply international law as one of the principal factors—occasionally the only factor—underlying their decisions. Mr. A. B. Lyons, in addition to assisting me in various other ways, such as the preparation of the report of the decision of the United Nationals Tribunal for Libya, assumed responsibility for preparing reports of the decisions of these Commissions. I am much indebted to him for his help. I also wish to express my warm thanks to Professor André Gros, Principal Legal Adviser to the French Foreign Office, for putting at my disposal the decisions of the Franco-Italian Conciliation Commission, and to Mr. Michael Adams, British Agent before the Anglo-Italian Conciliation Commission, for assisting me in the same way.

The List of Contributors follows this Preface. Without referring to individual contributors, I must—as in the past—stress the fact that such credit as may be claimed for the publication of the *International Law Reports* belongs to them and is due to their selfless efforts. This is so even in the case of those countries with regard to which patient search by the contributor has not succeeded in discovering any cases qualifying for inclusion. I am particularly grateful to those contributors who have borne with understanding the negative decision of the Editor to that effect. I wish also to express my special thanks to Dr. F. Honig who, in addition to assuming responsibility for the contribution from a number of countries, has given indispensable assistance by translating a great number of them—as, for instance, in the case of the contribution from France, which he has shared with Dr. Muracciole. I am indebted to Professor Hans Schlochauer, of the University of Frankfort, for his advice with regard to the decisions from Germany. I am also obliged to Dr. J. F. Lalive for the case from Jordan.

The increase in the size and the scope of the *International Law Reports*—as, indeed, its continuation—would not have been possible without the assistance of the Ford Foundation, and it is with sincere satisfaction that I am able to give expression to the gratitude which the Advisory Committee and the Editor owe to the Trustees of the Ford Foundation. It is largely owing to their help that it has been found possible to expand this publication from one which covered the years 1919 to 1922 in one volume of five hundred pages into a publication which—as does the present volume—devotes over a thousand pages to one year of national and international judicial activity. We are also deeply indebted to the Trustees of the International Law Fund for their continued assistance.

As in past years, I have been able to rely on the assistance and advice, in every respect, of Lord McNair, the Chairman of the Advisory Committee. I am very deeply indebted to him.

Mrs. Gladys Lyons, B.Sc.(Econ.), has continued to give her expert and conscientious assistance by seeing through the press a volume of this size. Mr. A. B. Lyons, M.A., LL.B., in addition to the help to which I have already referred, undertook the preparation of the Index. Mrs. E. E. Jansen, in addition to the exacting work of dealing with the manuscripts, has given valuable help by compiling the Tables of Cases and rendering secretarial assistance. I am very grateful to all of them.

Finally, I wish to place on record my sense of obligation to Messrs. Butterworth & Co., and their printers and compositors, for their unfailing co-operation and courtesy.

H. LAUTERPACHT

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LIST OF ABBREVIATIONS

OF TITLES OF COLLECTIONS OF DECISIONS, LAW REPORTS, PERIODICALS, ETC., QUOTED IN THE TEXT

A.C. =British House of Lords and Judicial Committee of the Privy Council.
A.I.R. =The All India Reporter.
App.D.C. =United States Court of Appeals for the District of Columbia Circuit Reports.
App.Div. =Supreme Court Reports (New York), Appellate Division.
Avi. =Aviation Cases (United States).
BGHZ =Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany).
B Verf. G. =Bundesverfassungsgericht (Germany).
Cal.App. =Reports of Cases Determined in the District Courts of Appeal of the State of California (United States).
C.C.P.A. =United States Court of Customs and Patent Appeals Reports.
Ch. (or Ch.D.) =Chancery Division of the English High Court of Justice.
Clunet =Clunet, Journal du Droit International.
C.M.R. =Court Martial Reports (United States).
Ct. Cl. =Court of Claims Reports (United States).
Dalloz et Sirey =Recueils Dalloz et Sirey de doctrine, de jurisprudence et de législation.
D.L.R. =Dominion Law Reports (Canada).
E.A.C.A. =East African Court of Appeal.
F. (or Fed.) =Federal Reporter (United States).
F. 2d =Federal Reporter (Second Series).
F. Supp. =Federal Supplement (United States).
I.C.J. Reports =International Court of Justice; Reports of Judgments, Advisory Opinions and Orders.
I.R. =Irish Reports.
JB =Juristische Blätter (Austria).
JZ =Juristenzitung (Germany).
L.Ed. =Supreme Court Reporter, Lawyers' Edition (United States).
L.N.T.S. =League of Nations Treaty Series.
L.R. =Law Reports (England).
MDR =Monatsschrift für Deutsches Recht.
N.J. =Nederlandse Jurisprudentie (Holland).
NJW =Neue Juristische Wochenschrift (Germany).

N.Y.S[upp]. =New York Supplement.
ÖJZ =Österreichische Juristenzeitung.
P.C.I.J. =Publications of the Permanent Court of International Justice: Reports of Judgments, Advisory Opinions, Orders, and Other Acts and Documents.
Q.B. (or Q.B.D.) =Queen's Bench Division of the English High Court of Justice.
RGZ =Entscheidungen des Reichsgerichts in Zivilsachen.
S.C.J. =Supreme Court of Justice (India).
S.C.R. =Supreme Court Reports (India).
Sup.Ct. =Supreme Court (United States).
Tijdschrift =Nederlands Tijdschrift voor Internationaal Recht (Netherlands International Law Review).
U.N.T.S. =United Nations Treaty Series.
U.S. =United States Reporter (Supreme Court).
U.S. & C.Av.R. =United States and Canadian Aviation Reports.
U.S.C.M.A. =United States Court of Military Appeals Reports.

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PART I

INTERNATIONAL LAW IN GENERAL

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International Law—Binding Force of—Interpretation of Treaties to Conform with Rules of.

See p. 867 (*Re Competence of Conciliation Commission*).

II.—Sources

[*See also* PART X, DISPUTES: A, I, ii, Arbitration; The Law Applied by Arbitral Tribunals.]

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III.—Subjects of International Law

[*See also* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General; *and* PART VIII, TREATIES: IX, Operation and Enforcement of Treaties.]

International Law—Subjects of—Sovereign Order of Malta—Sovereignty without Territory—Exemption from Jurisdiction of Municipal Courts—Distinction between Private Law and Public Law Activities.

SOVEREIGN ORDER OF MALTA *v.* SOC. AN. COMMERCIALE.

Italy, Tribunal of Rome. November 3, 1954.

THE FACTS.—The appellants were an Order of Chivalry founded in Jerusalem in 1048 A.D. The Order moved its seat to Malta in 1530 and established its own independence and sovereignty, with a number of attributes, which have continued to the present day. Its sovereign privileges and character were confirmed by a number of Popes; all the Catholic States recognized the Grand Master of the Order as a Prince; and by a series of formal acts during the nineteenth and twentieth centuries, Italy recognized, *inter alia*, the Order's right of active legation and other privileges and confirmed the title of the Sovereign Order.[1]

The respondent company sued the Order before the Pretorial Court of First Instance of Rome in respect of certain goods the subject of a transaction the details of which do not appear from the report. The Pretore held that the Order was in the circumstances of the case subject to the jurisdiction of the Italian courts. The Order appealed from this decision, contending that it had absolute immunity. The respondent company contended that the Order could enjoy no greater immunity from jurisdiction than that accorded to ordinary foreign States, which was limited to activities done in the exercise of *jus imperii*.

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[1] For greater detail see *Nanni and Others* v. *Pace and the Sovereign Order of Malta*: *Annual Digest*, 1935–1937, Case No. 2 and Note.

Held: that the appeal must fail. The Order of Malta is a subject of international law, but it is not exempt from the jurisdiction of the courts in respect of its commercial activities.

The Court said: " For the solution of the problems raised by this appeal, it is necessary first to examine a number of questions relative not only to the nature of the Sovereign Order of Malta, but also to the conception of jurisdiction with reference to the rules of the so-called ' external law of the State ' or international civil procedural law. On these two questions there seems to be substantial agreement because, on the one hand, the Order has accepted Italian jurisdiction and, on the other, it is recognized that the Sovereign Military Order of Malta has the character of a sovereign State and therefore an international legal personality. Nevertheless, the judge's task is to solve *motu proprio* such questions and, therefore, the Court must briefly examine the matter without taking into consideration the contentions of the two parties. As to the first question, the Court notes that the Sovereign Military Order of Malta is a subject of international law having the characteristics of a sovereign State; to be more precise, its position is similar to that of Governments-in-exile during the Second World War: although they did not exercise actual sovereignty on their territories, which were occupied by the enemy, nevertheless they arrogated to themselves that sovereignty which they exercised through a large number of international activities—they had their own diplomatic missions, participated in international conferences and agreements, intervened on the battlefields with their own armed forces, and so on. Similarly, although with many substantial differences, the sovereign State of the Sovereign Military Order of Malta, which affirms its rights as sovereign of Malta, has its own government, which maintains twenty-four diplomatic missions in foreign States (although not in England, which it regards as an unlawful occupier and usurper of its territory); it enacts instruments which have the force of law; it confers titles, military and chivalric honours; it has an air fleet for relief purposes, and it participates in international conferences and agreements. The Sovereign Military Order of Malta has recently affirmed its sovereignty *vis-à-vis* the Grand Pontiff and the Holy See, of which, however, it recognizes the High Spiritual Sovereignty. On the basis of the foregoing observations, there is no doubt as to the character of the Sovereign Military Order of Malta as a sovereign entity and therefore of its right to be treated by other States as *par inter pares*.

" As far as jurisdiction over the Order is concerned, it is well known that a part of the rules of the Italian municipal legal system concerns aliens, or, better, nationals and aliens at the same time, and from those norms the foreigner derives his legal personality and the capacity to sue and be sued, *i.e.*, to be a party in law suits which are brought according to the rules of our legal system.

" Therefore, in principle, we find a parity between the alien and the Italian national. The alien can sue in our courts because, like the national, he has the right to commence an action; and he can be sued in so far as an alien, like a citizen, is subject to the jurisdiction of the State. All this does not exclude the possibility of exceptions for both the national and the alien (*e.g.*, jurisdictional exemption of diplomatic agents, jurisdictional exemption of the national when the subject-matter of the action is a building situated abroad). On the basis of the foregoing considerations, we find that our legal system attributes both to the national and to the alien the general capacity of suing and being sued in our courts. This can be deduced not only from the system as a whole, but also from express rules which presuppose such a capacity, such as Articles 2, 4, 37 and 800 of the Code of Civil Procedure; Article 14 of the Royal Decree No. 3282 of December 30, 1923, on free defence [legal aid]; Article 280 of the Law of War No. 1415 of July 8, 1938, under which aliens, even if nationals of enemy States, retain the right to sue and be sued in Italian courts; and, above all, Article 10, para. 2, of the Constitution, which provides that the legal status of aliens is regulated by law in conformity with international rules and treaties.

" As we shall explain later, international rules are, for the most part, formed by long continued usage, which has raised a custom to the status of law. In particular, as far as the derivation of the right of aliens to bring actions is concerned, we may assume that the relevant rule is contained in the provisions of Article 16 of the Rules of Application of the Civil Code and in Article 4 of the Code of Civil Procedure. In fact, the former recognises that an alien may enjoy the ownership of private rights, and the latter sets out the cases in which a foreigner can be summoned before an Italian court, without it making any difference whether the plaintiff is a national or an alien. From all this, and from the provision of the Constitution above cited, it follows that an alien has the right to bring actions in the Italian courts: the right is also accorded to foreign legal *personae*. Of course, the procedural capacity of the foreigner is regulated by a series of rules, most of which are contained in international treaties: therefore, in this matter there is a *jus peculiare* to which an alien litigant must conform. . . . It is a general principle of municipal law that the State exercises jurisdiction in respect of all persons who are subject to it, without discrimination. Therefore, in order to exclude jurisdiction in a given case, it is necessary to point to an explicit and specific rule of international law accepted by our legal system. Such a rule, which was customary in its nature and which was confirmed by formal acts and declarations of various States, was in existence until the last century. This rule was connected with the absolutist principle, which, again, was related to the idea of sovereignty, and also with the difficulty of making any distinction between the activities performed by the State as the supreme authority in its own legal system and those performed by the State as a subject of this system. It was also connected with the difficulty of enforcing judgments against foreign States and with the danger of impairing good relations with the States concerned. Nevertheless, modern study and research, which have caused both authoritative writers and courts themselves to ascertain with increasing accuracy the legal nature of the activities of the State, the development of the political conscience towards forms (which have become more and more rigid) of international cooperation, and the tendency, which is now in full development, towards federalistic and supra-national forms of association, have all contributed to the formation of an opposition to the doctrine [of the jurisdictional immunity of foreign States]. On the one hand, we may affirm that the rule relative to that immunity is no longer in force; on the other hand, we may assert that, besides decisions of the courts of many States, there are specific provisions of municipal and international law which affirm the principle that foreign States are subject to the jurisdiction of other States (see, for example, the Swiss Decree of July 12, 1928; the Italian Decree Law of August 30, 1925, which has become Law No. 1263 of July 15, 1926; and the Brussels Convention[1] of April 10, 1926, etc.).

" This principle has been accepted to such an extent that, on the one hand, Italy has deemed it expedient for constitutional reasons to subordinate some judicial acts to the authorization of the Ministry of Justice (Law No. 1263 of July 15, 1926, Article 1, paragraph 1), and, on the other hand, there are international instruments on the basis of which the Italian State assumed the obligation to grant jurisdictional immunities to some international organizations. (See, for example, the Convention on the Privileges and Immunities of Specialized Agencies, approved by the General Assembly of the United Nations on November 21, 1947, and brought into operation in Italy by Law No. 1740 of July 24, 1951; the Protocol on the Privileges and Immunities of the European Community of April 18, 1951, brought into operation by Law No. 766 of June 25, 1952, but only as regards the immunities from execution and convervatory measures of property belonging to the European Coal and Steel Community, etc.)

[[1] On the Immunities of State-owned Ships Engaged in Commerce.]

"On the basis of the foregoing considerations, therefore, it should be manifest that the Sovereign Military Order of Malta is subject to Italian jurisdiction, because in the present case it is clearly a subject of the Italian legal system. More specifically, by virtue of the rules of international civil procedural law generally accepted in practice, and reaffirmed in Italy by Article 4, paras. 1 and 2, of the Code of Civil Procedure, Italy has jurisdiction in respect of the Sovereign Military Order of Malta because the Order has accepted the Italian jurisdiction and because this action concerns goods situated on Italian territory. . . .

"Submission to the jurisdiction of this Court by the Sovereign Military Order of Malta has taken place both implicitly and explicitly: implicitly because no plea to the jurisdiction has been raised and explicitly because by the declaration in the Notice of appeal it is stated that 'The Sovereign Military Order of Malta spontaneously submits itself to the jurisdiction of the Italian judge'. . . ."

[Report: *Giurisprudenza Italiana*, 1955, 1, p. 737.]

IV.—Relation to Municipal Law

[*See also* PART VIII, TREATIES: IX, Operation and Enforcement of Treaties, Necessity for Municipal Legislation; *and* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.]

International Law and Municipal Law—Treaties—Absence of Municipal Legislation—General Armistice Agreement between Israel and Jordan—Interpretation of—Effect on Private Rights.

CUSTODIAN OF ABSENTEE PROPERTY *v.* SAMRA.

Israel, District Court of Tel-Aviv. January 6, 1955.

Supreme Court of Tel-Aviv (*sitting as the Court of Civil Appeals*).

(Cheshin, Deputy President; Sussman and Berinson JJ.)

December 12, 1956.

THE FACTS.—This was a consolidated appeal in three cases concerning the question of the domestic effect in Israel of an international treaty. By the General Armistice Agreement between Israel and Jordan signed at Rhodes on April 3, 1949 (*U.N.T.S.*, vol. 42, p. 303), certain territory was transferred from Jordan to Israel. Article VI (6) of that General Armistice Agreement provided that wherever villages might be affected by that transfer their inhabitants "shall be entitled to maintain, and shall be protected in their full rights of residence, property and freedom." The respondent in the present case was an Arab who lived in territory which was transferred by that Agreement. Before the outbreak of the hostilities between Israel and Jordan in May 1948, his lands had extended into what subsequently became Israel, and the front dividing the Israel and Jordan forces had severed his lines in two. In that period the Custodian for Absentee Property had assumed possession of the lands on the Israel side of the line, the respondent being an absentee. The respondent argued that after the entry into force of the General Armistice Agreement he was no longer an absentee, a question regulated exclusively by Israel law, and that in any event Article VI (6) of the General Armistice Agreement entitled him to the return of his property. In the District Court of Tel-Aviv (*sub nom. Samra* v. *Custodian for Absentee Property*) this plea was upheld in this and two other cases. On appeal,

Held (by the Supreme Court of Tel-Aviv): that international agreements are not part of the domestic law of Israel in the absence of legislation to that effect and, therefore, that the General Armistice Agreement did not operate to restore to the respondent property which had been appropriated by the Custodian during the time of hostilities. The General Armistice Agreement protected the respondent in the exercise of rights of property which he actually enjoyed in the transferred area when the Armistice Agreement entered into force.

The Court said (*per* Berinson J.): " The first legal question here is to what extent, if at all, the Rhodes Armistice Agreement influences the Absentee Property Regulations, 1948, or the Absentee Property Law, 1950, and consequently the status of the respondents and their lands which were in the State of Israel before the transfer of territory, from the point of view of their being absentee persons. The Rhodes Agreement is a bilateral undertaking between the Hashemite Kingdom of Jordan and the State of Israel. [After citing Article VI (6) of the Agreement the Court continued:] This Article raises two questions. The first is: Does this provision apply only to the property in the transferred area of the inhabitants of the villages transferred to Israel, or does it apply to all the property of those villagers, even property which before the transfer was in the State of Israel ? A clear answer to this question was given in *El-Yussef* v. *Kfar Ara District Military Governor and Others*,[1] where it is stated:

' That provision was intended to preserve the rights of the inhabitants of the area which was ceded to Israel by the Rhodes Agreement over property situated in that very area. It in no way applies to land—such as the land here being discussed—which was in Israel even before the entry into force of the Rhodes Agreement, nor does it relate to the rights of access to such lands of a person resident in the ceded area.'

" The Judges in the lower courts did not regard themselves as being bound by this rule. They saw in that quotation an expression of opinion *obiter dictum*, on the ground that it said more than was necessary to decide the issue then before the Court and, therefore, was not binding on them in other circumstances."

[[1] See below, p. 8, Note.]

After explaining the difference between the two cases, the Court pointed out that nevertheless the interpretation of Article VI (6) of the General Armistice Agreement was common to both, so that an earlier interpretation of that Article by the Supreme Court would be binding in a later case even though the precise subject-matter of the later case might be different. The Court concluded this part of its judgment by explaining that Article VI (6) had as its purpose to prevent the inhabitants of the transferred area being deprived of their existing rights and not to grant them rights which they did not have before the transfer.

The second question which was raised in argument, and which the Court called a fundamental question, was a preliminary issue of whether the respondents were entitled to rely in a court of law on the Rhodes Agreement, whether as citizens of the State or as potential beneficiaries under the Agreement, and to use it as a source for their own rights. Counsel for the appellant argued that even if the Agreement was subject to the jurisdiction of the Court the respondents could not use it as a basis for their own rights because the Agreement was not part of the law of the land and the courts were not responsible for its implementation and were not entitled to rely upon it even as a subsidiary means for the interpretation of the statute law.

On this the Court said: " This argument is in principle correct. The Rhodes Agreement is a Treaty between Israel and another State. Whatever its force and validity according to international law, it is not law which the Israel courts will or can enforce. The rights which it grants and the duties which it imposes are the rights and duties of the States which concluded the Treaty and its implementation is a matter for them alone to secure by those special means which are usual to ensure the implementation of international treaties. Such a Treaty is not given to the jurisdiction of the courts of this country except and to the extent that it, or the rights and duties which flow from it, have been embodied in the law of the land and have acquired the force of binding law. In such circumstances, it must be pointed out, the Court would then have reference not to the Treaty as such but to the law which alone gives it validity for domestic purposes. Furthermore, from this it follows that if it should happen that the law and the Treaty should not be identical, even though it is clear that the purpose of the law was to implement the Treaty and to carry it into effect, then the courts will give preference to the law, which alone binds them and by which alone justice can be done. What is more, even when an inter-State or international agreement provides that certain individuals should have defined rights, such an obligation remains an international obligation binding upon the State, and nothing more. The individuals concerned obtain no substantive right on the basis of the agreement and have nothing which they can secure in a court of law, whether on the ground that they are beneficiaries under the agreement or on some other basis. These rules in principle have been established in a long and consistent line of judicial precedents in England. [Here the Court quoted from the speech of Lord Dunedin in *Vajesingji Joravarsingji* v. *Secretary of State for India*, (1924) L.R. 51 I.A. 357, as cited in *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*, [1941] A.C. 308,[1] and continued:] " Similar opinions have been expressed in other countries and it is possible to say that these principles are in their fundamentals of universal application. [The Court here cited from the Canadian case of *Arrow River & Tributaries, Slide & Boom Co., Ltd.* v. *Pigeon Timber Co. Ltd.* (1932) Can.L.R. 495,[2] as well as from Italian, Greek and Australian decisions reported in various volumes of the *Annual Digest*, and continued:]

" At first sight it may be said that the United States—and other States having a similar Constitution—act differently, but this is not so in fact. The Constitution of the United States contains a specific provision which elevates to the status of the supreme law of the land all treaties properly made in the name of the United States. For this reason the Federal and the State Courts do have recourse to treaties and even give them preference over domestic law in the event that the provisions of the latter are not compatible with the provisions of the treaty. This is a direct consequence of the constitutional provision. More fundamentally, therefore, it may be said that the United States courts, too, act in accordance with those universal principles previously mentioned. They, too, enforce treaties for the benefit of individuals, to the extent that they give those individuals rights which can be substantiated in a court of law only in accordance with their own law, but here, owing to the overriding general provision of the Constitution of the United States, there is no need for a specific provision for each individual treaty. See *Edye* v. *Robertson* (1884) 112 U.S. 580. As to the Rhodes Agreement, there is in Israel no law incorporating it, or any part of it, in the domestic law of Israel and, therefore, it is impossible to rely upon it in the courts as a source of rights of the individual or the duties of the State or any of its organs."

[The remainder of the judgment deals with questions of municipal law.]

[Reports: *Pesakim Mehoziim*, 10 (1955) p. 335; *Piskei-Din*, 10 (1956) p. 1825; *Pesakim Elyonim*, 26 (1957), p. 209.]

NOTE.—The above decision of the Supreme Court thus settles authoritatively a matter upon which there has been some confusion of thought. In *El-Yussef* v. *Kfar Ara District Military Governor and Others* (*Piskei-Din*, 8 (1954), p. 342; *Pesakim Elyonim*, 15 (1954), p. 4) the Supreme Court, sitting as the High Court of Justice, in making the above-quoted interpretation of Article VI (6) (see *supra*, p. 6) of the General Armistice Agreement, had left the impression that the General Armistice Agreement could be relied upon as a source of rights and of obligations in the domestic courts. When the *Samra* and other cases consolidated in the above appeal were before the lower Courts, different opinions were expressed regarding this aspect, but they inclined to the view that the earlier remark was *obiter*. In *El-Raabi* v. *Custodian of Absentee Property*, decided by the Tel-Aviv District Court on May 12, 1955 (*Pezakim Mehoziim*, 10 (1955), p. 344), Judge B. Cohen agreed with the manner in which the *El-Yussef* case had been distinguished (in the *Samra* case), and also with the view that Article VI (6) was intended to give expression to the principle of respect for private rights. He went on to discuss the question of the effect of the Rhodes Agreement upon the relations between an individual and the Custodian of Absentee Property when that question falls to be decided by a municipal court. On that question the Judge said: " I appreciate that it is not desirable that in foreign affairs more than one voice should speak for the State. If the Government is empowered to assume obligations upon the State by a treaty with another State, it is not desirable that another authority should frustrate its aims. Frustration of a subsisting international treaty is liable, at least in law, to confront the State, in its foreign relations, with a difficult situation and possibly even with war. From this angle there is much to be said for the point of view according to which the provisions of a valid and subsisting international treaty are *ipso facto* the law of the land. But if I recognize the provisions of a treaty as law, then I recognize the authority of the Government to enact legislation, and thereby I would be infringing the sovereignty of Parliament as the legislative body. Several solutions to this problem can be envisaged. For instance, a Constitution may provide that the Government has no power to bind the State by a treaty with another State except with the sanction of Parliament, and then the provisions of the treaty will be law. In another instance, the Government may be empowered to accept binding obligations by international treaty, but these obligations will not be law and if the Government is unable, without legislation, to comply with that treaty, it will have to persuade the Parliament to enact the necessary legislation. Such a Constitution, in fact, imposes upon the two authorities the duty of harmonious co-operation while leaving intact the absolute liberty of action of each within its own sphere. In Israel the constitutional régime, as far as I am aware, permits the Government to undertake valid international obligations by treaty without the necessity for parliamentary sanction. But I know of no provision of law which accords to the terms of such a treaty the force of law merely because of their being incorporated in the treaty. For reasons already given, however, I accept the view expressed in the *Elmahmadi* case (*infra*), according to which it is to be assumed that the legislator did not intend to enact laws incompatible with a valid and subsisting international treaty."

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[1] See *Annual Digest*, 1938–1940, Case No. 184.

[2] *Ibid.*, 1931–1932, Case No. 2.

In *Elmahmadi* v. *Custodian of Absentee Property*, decided by the Tel-Aviv District Court on December 6, 1954 (*ibid.*, p. 335), the Court made the following comment on the status of the Armistice Agreement in the domestic law: " Although the Rhodes Agreement is, as an armistice agreement, a '*modus vivendi*', its juridical status is the same as that of any regular international agreement and it is subject to international law,

. . . The obvious intention of paragraph 6 was to state that the inhabitants of the area who chose to come over to Israel would be under no disability as regards their rights of property . . . Although international law as such is not an organic part of the law of Israel, the courts tend always to proceed on the assumption that, in interpreting obscure or ambiguous passages of a statute, the legislature intended to confirm and apply the provisions of international law and not contradict them."

The decision of the Supreme Court in the *Samra* case also confirms the general views held by the Government as to the general effect of a valid and subsisting international treaty. See the Note dated March 11, 1951, to the Secretary-General of the United Nations, published in *Laws and Practices concerning the Conclusion of Treaties* (U.N. Legislative Series, Doc. ST/LEG/SER. B/3, at page 71). This document was not cited to or by the Courts.

International Law—Relation to Municipal Law—Overriding Effect of Statute Inconsistent with Previous Treaty—The Law of the United States of America.

See p. 460 (*Ballester* v. *United States*).

International Law—Relation to Municipal Law—Application in Arbitration of International Law to Exclusion of Municipal Law of Either Party.

See p. 820 (*In the Matter of the Diverted Cargoes*).

International Law—Relation to Municipal Law—Effect of Treaties Which Have Not Been Made Part of Municipal Law—Jay Treaty, 1794—The Law of Canada.

See p. 591 (*Francis* v. *The Queen*).

International Law—Relation to Municipal Law—Treaties—Question of International Public Policy in Treaty—Interpretation by Executive—Whether Interpretation Retroactive—The Law of France.

See p. 623 (*C.* v. *Intendant Militaire de la 3e Région*).

International Law—Relation to Municipal Law—Extradition—Treaty Providing for Exercise of Discretion in respect of Time-Barred Offences—Municipal Law Prohibiting Extradition in respect of Time-Barred Offences—Whether Treaty or Municipal Law Takes Precedence—The Law of France.

See p. 514 (*Re Plevani*).

International Law—Relation to Municipal Law—European Convention for Protection of Human Rights—Rules of Procedure Contained in the Convention—Whether those Rules of Procedure Binding on Municipal Courts—The Law of Germany.

See p. 608 (*European Human Rights Convention Case*).

International Law—Relation to Municipal Law—Treaty Provisions—Effect on Municipal Law—The Law of Italy.

See p. 544 (*Società Arethusa Film* v. *Reist*).

International Law—Relation to Municipal Law—*Consensus gentium*—Effect on Municipal Law—The Law of Italy.

See p. 533 (*Lagos* v. *Baggianini*).

International Law—Relation to Municipal Law—Treaty Providing for Exemption of Aliens from " Extraordinary Contributions "—Question of Exemption a Matter of Public Policy—Whether Judiciary or Executive Competent to Determine Question of Exemption—The Law of France.

See p. 622 (*Enrégistrement* v. *Tetlow*).

International Law—Relation to Municipal Law—Requirement of Constitutional Approval of Treaties—The Law of Belgium.

See p. 614 (*Belgian State, Minister of National Defence and Minister of Finance* v. *Leroy*).

International Law—Relation to Municipal Law—Interpretation of Statute Apparently Conflicting with International Law.

See p. 64 (*Maharaja Bikram Kishore of Tripura* v. *Province of Assam*).

International Law—Relation to Municipal Law—Interpretation of Statute Apparently Conflicting with International Law.

See p. 73 (*Rani Amrit Kunwar* v. *Commissioner of Income Tax*).

International Law—Relation to Municipal Law—Customary International Law—Treatment of Enemy Property—The Law of Mexico.

See p. 913 (*In re Peters*).

PART II

STATES AS INTERNATIONAL PERSONS

A—IN GENERAL

II.—Sovereignty and Independence

i.—In Foreign Relations

[*See also below*, IV, Recognition of Acts of Foreign States and Governments; PART IV, JURISDICTION; *and* PART VIII, TREATIES: XII, Interpretation of Treaties, ii, Principles and Rules of Interpretation.]

States—Sovereignty and Independence—In Foreign Relations—Conclusiveness of Statements of Executive—Statement of Foreign Office as to Reciprocal Grant of Diplomatic Immunity.

See p. 544 (*Società Arethusa Film* v. *Reist*).

ii.—In Matters of Domestic Jurisdiction

Sovereignty—In General—Regulation of Currency and International Exchange—Limits of—Articles of Agreement of International Monetary Fund.

See p. 734 (*National Bank of Belgium* v. *Bank of the Belgian Congo and National Committee of the Kivu*).

Sovereignty—In General—Regulation of Currency and International Exchange—Limits of—Articles of Agreement of International Monetary Fund.

See p. 732 (*Simonaer* v. *Community of Jette-Saint-Pierre*).

iii.—Conduct of Foreign Relations. Conclusiveness of Statements of the Executive

Conclusiveness of Statements of Executive—Foreign Office Certificate—Supplementation by Evidence *ex aliunde*.

See p. 97 (*In the Estate of Pikelny*).

III.—Equality of States

States as International Persons—Equality of States—Treaties of Peace—Matters of Nationality.

See p. 443 (*Mergé Claim*).

IV.—Recognition of Acts of Foreign States and Governments

[*See also below*, D, Recognition of States, Governments, Belligerency; *and* PART IV, JURISDICTION: I, TERRITORIAL.]

Recognition of Acts of Foreign States—Foreign Confiscatory Legislation—Extraterritorial Effect of—The Law of France.

BAUER MARCHAL ET CIE *v.* PIOTON AND OTHERS.
France, Court of Cassation. March 2, 1955.

THE FACTS.—The Russian Bank for Foreign Trade (hereinafter referred to as " the Bank ") was nationalized by a Russian Decree of December 14, 1917. In 1934 a French court made an order for the winding up of the Bank's branch office in Paris, and at the same time a board of liquidators was appointed for the purpose of the winding-up. At that time the Bank had a large sum of money standing to its credit on current account with a French bank, and the board of liquidators brought an action against the latter for payment of part of that sum for the benefit of former shareholders of the Bank. The claim was upheld on the ground that the Russian Decree was confiscatory and therefore of no legal effect in France. The French bank now appealed and contended that the Russian Decree was valid and of full legal effect so far as concerned the rights of shareholders of Russian nationality, and that the rights of the latter accordingly accrued to the shareholders of other than Russian nationality, including the appellants themselves, whose shareholding was in excess of the sums of money alleged to be owing to shareholders of Russian nationality, with the result that the appellants were entitled to retain all the funds of the bank in their possession.

Held: that the appeal must be dismissed. The Russian Decree was confiscatory and therefore of no legal effect in France. It therefore followed that all the shareholders, regardless of their nationality, were entitled to share in the funds held by the appellants, in proportion to their shareholdings.

The Court said: " The judgment under appeal has found that the ' Russian Bank for Foreign Trade ', a Russian joint-stock company, was nationalized by a Soviet Decree of December 14, 1917, and that a Decree of February 6, 1918, ordered shareholders to hand their shares to the State. Certain members of the board of the Bank having undertaken to lodge at the Bank's branch office in France such shares as were not in Russia, 75 per cent. of the shares traced were deposited with the Bank of Messrs. Bauer & Marchal. The Commercial Court, by a judgment dated December 3, 1934, ordered the winding up of the Russian Bank and appointed a board of liquidators. The liquidators brought an action, with a view to obtaining a provisional judgment, against Messrs. Bauer & Marchal for payment of 1,000,000 francs on account of the sum owing to the

Russian Bank. It is contended that the Court of Appeal was wrong in rejecting the contention put forward by Messrs. Bauer & Marchal in their capacity of shareholders. This contention was to the following effect: That as the Soviet Union, whose sovereignty was recognized by France, had taken away the rights of shareholders owing allegiance to the Soviet Union, and as these rights were governed by their own national law, they must accrue to the other shareholders, who alone are entitled to share in the assets in accordance with the law of the *forum*, which is French law and which must be substituted for Soviet law, the latter being contrary to our conception of public policy in this respect. This Court is of opinion that the Court of Appeal was right in holding that if the legislative measures taken in Russia were designed to expropriate all shareholders, without exception, then no class of shareholders can be excluded, according to French law, from the distribution of the assets situate in France. The physical destruction of share certificates, if indeed it has occurred, only affects the question of proof, without affecting the right itself, and the moneys owing to shareholders as yet unknown must be reserved."

[Report: *Revue critique de droit international privé*, 44 (1955), p. 496.]

Recognition of Acts of Foreign States—Expropriation of Assets of Company—Effect of Expropriation on Property of Company in Country of Forum—Effect on Patents Registered in Country of Forum—Situs of Patents.

EXPROPRIATION OF EASTERN ZONE COMPANY (GERMANY) CASE.

German Federal Republic, Federal Supreme Court. May 10, 1955.

THE FACTS.—A company registered in Leipzig (in the Eastern Zone of Germany) was the owner of certain patents and trademarks registered in the German Federal Republic. The authorities of the Eastern Zone appointed a so-called Trustee to carry on the business of the Company, and one of the directors, a principal shareholder of the Company, thereupon took up residence in the Federal Republic, in order there to carry on the business of the Company. The Company carrying on business in the Federal Republic in the circumstances here set out, and represented by this director (one W.H.), was the plaintiff in the present action. The defendant was a person who imported into the territory of the Federal Republic goods manufactured by the Company in Leipzig under the patents referred to above, and he claimed the right to sell these goods in the Federal Republic. The plaintiff Company contended that the expropriation of the property of the Company in Leipzig had no legal effect in the Federal Republic, that the Company was accordingly a valid legal entity there, and that the defendant was not entitled to sell goods manufactured under patents owned by the Company in the Federal Republic without the permission of the Company as represented by W.H.

Held: that the Company was a valid legal entity in the Federal Republic and as such entitled to the patents which were situate in the Federal Republic where they were registered, and that the defendant was accordingly not entitled to sell the goods without the permission of the Company as represented by W.H.

The Court said: " According to the established practice of the courts of the Federal Republic, the effect of an expropriation extends only as far as the territorial sovereignty of the Power which has carried out the expropriation. The expropriation of companies in the Eastern Zone cannot comprise the property of such companies in the Western Zone. The Company continued to exist when W.H. had gone to Western Germany and after the appointment of a Trustee for the Leipzig Company which stipulated that the right of W.H. to act on behalf of that Company was henceforth to cease. This Company remained the owner of the business in Leipzig and, regardless of where the seat of the Company was or who its shareholders were, continued to be entitled to the incorporeal rights registered in its name. The view that there are in existence two distinct companies—one in Leipzig and one in Munich—is quite erroneous. It is therefore unnecessary to determine whether after the appointment of the Trustee the company had its seat in Leipzig, Hamburg or Munich, and whether the registration of its change of domicile in the commercial register is valid in law. Nor need we go into the question whether the shareholders of the Company who are domiciled in the Eastern Zone have given up their holdings. It is immaterial for the purposes of this case whether the Company consists of two or four shareholders. Whatever the position, we are concerned with one and the same Company. This Company is the owner of the patents and trade-marks, and the only person entitled to act on behalf of the Company is W.H. The position might have been different if W.H. had formed a new company, but there is nothing to suggest that he did.

" The appointment of a Trustee has at least the *de facto* effect of depriving W.H. of the right to act on behalf of the Company in the Soviet Zone. The trusteeship, however, is limited to property situate in that Zone. Neither the expropriation nor the revocation of the right of W.H. to act on behalf of the Company can have any effect outside the Soviet Zone. The trusteeship is only a preliminary step leading to expropriation. If we were to give extra-territorial effect to the trusteeship we would thereby enable the expropriating authority to achieve the object which it is unable to achieve by an expropriation. It would be enabled to deal with property of the Company which is situate outside its territory. This would result in the confiscation, without payment of compensation, of property outside the Soviet Zone of Occupation, which would be contrary to Article 14 of the Federal Constitution. It follows that after the appointment of the Trustee the Company, represented by its shareholder W.H., was alone entitled to deal with patents and trademarks registered in the Federal Republic. The rights of the Company remain unaffected by the expropriation which has taken place while these proceedings were in progress. The rights in the patents and trade-marks which have been kept in being in the Federal Republic are situate in the territory of the Federal Republic and therefore remain unaffected by measures of confiscation taken in another country. Even if the authorities of the Soviet Zone had the intention of depriving the plaintiff company of these rights—which is unlikely so far as concerns the trade-marks because the person in charge of the business in Leipzig no longer makes use of these trade-marks—such intention would have been doomed to failure as constituting a violation of the sovereign sphere of the Federal Republic.

[The Court then dealt with the question whether a patentee who is not actively engaged in the production of goods protected by a patented process is entitled to pursue an action restraining others from using such process. This question was answered in the affirmative, and the Court continued:] " The defendant contends that the Appeal Court was wrong in holding that the defendant had infringed the rights of the Company, and that he, the defendant, had legitimately acquired the goods in Leipzig. The appellant, however, overlooks the fact that he was not entitled to offer these goods for sale in the Federal Republic because the Trustee of the business in Leipzig had no right to deal with incorporeal rights protected in the Federal Republic, with the result that his consent cannot take the place of the consent of the Company. After the termination of the licensing agreement, the defendant no longer had the consent of the Company. This applies, to an ever greater extent, to the use of the Company's name by the defendant. The right to use a name is not limited in the territorial sense, and as a personal right it is incapable of expropriation. In this context it is immaterial whether the public is deceived as to the place of origin of the goods concerned. Even if the defendant offered genuine goods for sale, he was not entitled to make use of the incorporeal rights of the Company because these goods were circulating against the will of that Company."

[Report: NJW, 8 (1955), p. 1151.][1]

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[1] See also the judgment of the District Court of Cologne of July 6, 1955, in which the owners of the " Zeiss Optical Works ", which were established at Jena, in the Soviet Zone of Germany, transferred the seat of their business to the Federal Republic. The works in the Soviet Zone were expropriated by the Soviet authorities and re-named " National Enterprise Carl Zeiss, Jena ". The " National Enterprise " thereupon used in the Federal Republic the name of " Zeiss ", as well as various trade-marks registered in the name of the " Zeiss Optical Works ". The original owners were granted an injunction restraining the " National Enterprise " from using the name of " Zeiss " or the trade-marks in the Federal Republic. [NJW, 8 (1955), p. 1923, and MDR, 10 (1956), p. 658.]

Recognition of Acts of Foreign Governments—Foreign Confiscatory Legislation—Nationalization of Business Enterprise—Trade-Marks Owned by Business Enterprise—Trade-Marks Registered in Country of Forum—Situs of Trade-Marks—Whether Confiscation Affects Trade-Marks in Country of Forum.

CONFISCATION OF TRADE MARKS (GERMANY) CASE.

German Federal Republic, Federal Supreme Court. June 7, 1955.

THE FACTS.—The plaintiffs were the former owners of a firm in Czechoslovakia which had been nationalized by a Decree of the Czech Minister for Industry dated December 27, 1945, pursuant to a Presidential Decree of October 24, 1945. The firm, its property and certain trade-marks registered in its name were vested in a so-called national enterprise, the defendants herein. This enterprise was referred to in the Presidential Decree as an independent legal entity, and the Decree further provided that " the provisions governing business enterprises in their own right " were applicable to it. The defendants claimed to be entitled to use the trade-marks in the German Federal Republic where they had been registered as so-called international trade-marks by virtue of the Madrid Convention of April 14, 1891, for the Protection of Industrial Property, as subsequently amended. The plaintiffs thereupon brought an action against the defendants to restrain them from using the trade-marks in the German Federal Republic. On behalf of the defendants it was contended (i) that as a " national enterprise " they were immune from the jurisdiction of the German courts, and (ii) that the trade-marks, two of which had been registered first in Czechoslovakia and only subsequently in Germany, and one of which had first been registered in Czechoslovakia and subsequently at the International Bureau in Berne, were governed by Czech law and were accordingly now vested in them by virtue of the Decree of December 27, 1945.

Held: (i) that the defendants were an independent legal entity and therefore not entitled to immunity from the jurisdiction of the German courts; and that, having regard to their independent status by virtue of their own (Czech) law, there was no need to determine the controversial question as to whether a foreign sovereign State could ever be subject to the jurisdiction of the German courts in respect of its *acta jure gestionis;*

(ii) that all the trade-marks were governed by German law, and that as German law did not recognize a foreign Decree purporting to expropriate such trade-marks, the plaintiffs were still the owners thereof and as such entitled to restrain the defendants from using the same.

The Court said: " The appellants contend, in support of their plea to the jurisdiction, that the action is directed against a national enterprise of the Czechoslovak Republic and thus against a foreign

State. They rely more especially on the jurisprudence of the former Supreme Court of the German Reich (RGZ 103,275) according to which a foreign State is, as a general rule, immune from the jurisdiction of the German courts even in matters of private litigation. In determining the case now before us, we need not consider the question whether this rule (*cf.* also RGZ 62,165; 102,253) is applicable at the present time, when States increasingly take part in economic activities which are no longer related to their sovereign activities. No such right of immunity can be claimed by the defendants in the special circumstances of this case. According to section 13 of the Decree of the President of Czechoslovakia of October 24, 1945, the defendants are an independent legal entity ' to whom the provisions governing business enterprises in their own right ' are to be applied. Even though it is contrary to the principle of equality of States to subject States to the jurisdiction of foreign courts if such subjection were to result in a diminution of sovereignty, this argument cannot apply where a State has granted to an enterprise owned by it not only independent economic status, but also independent legal status for its economic activities. There is no rule of international law which ordains that a foreign State must be given immunity from local jurisdiction in cases of this kind. In fact, the defendants did not contend in the Courts below that they were immune from the jurisdiction of the German courts. On the contrary, in their appeal of June 23, 1952, they stated expressly that they were an independent legal entity to which all the provisions of private law were applicable. They stressed the fact that they were a business enterprise and ' in no way an organ of State ownership '. They cannot now go back on this factual plea.

" Thus, while for the reasons here stated there is no obstacle militating against the exercise of jurisdiction by the German courts, there is equally no reason why this Court should accept the contention of the appellants that they acquired a right to the protection of the trade-marks transferred to them, by virtue of the Paris Convention of March 20, 1883, and the Madrid Convention for the Protection of Industrial Property of April 14, 1891, as amended by the Hague Convention of November 6, 1925, and that by virtue of these Conventions their rights are better than those of the plaintiffs. The two trade-marks which were of Sudeten-German origin were registered in the German Register of Trade-Marks and are therefore entitled, by virtue of express legal provision, to the same protection in the Federal Republic as trade-marks registered in the former Reich. They are therefore entitled to protection exclusively by virtue of German law, and the provisions of the Convention must be disregarded in so far as concerns the legal position of these trade-marks."

The Court then considered the question whether trade-marks first registered in a foreign country and subsequently in Germany by virtue of the Conventions referred to above are independent German trade-marks in the sense that their status in Germany remains unaffected by a change in their status which may have occurred in their country of origin. This question was answered in the affirmative. With regard to one of the trade-marks concerned in the present case, the Court held that a trade-mark first registered outside Germany and subsequently as an " international trade-mark " at the International Bureau in Berne was in the same position as a trade-mark first registered in its country of origin and subsequently in Germany. The Court accordingly arrived at the conclusion that the plaintiffs were entitled to restrain the defendants from using in the German Federal Republic the trade-marks first registered in Czechoslovakia and subsequently in the German Federal Republic, as well as those first registered in Czechoslovakia and subsequently at the International Bureau in Berne.

[Report: BGHZ, 18 (1956), p. 1.]

Recognition of Acts of Foreign States and Governments—Nationalization Decrees—Property of Aliens—Duty of Compensation—Nationalization of Property of Anglo-Iranian Oil Company—Oil Brought to Italy—Attempted Sequestration of.

Anglo-Iranian Oil Company Ltd. *v.* S.U.P.O.R. Company (Unione Petrolifera per l'Oriente, S.p.A.) (*The Miriella*).
Italy, Court of Venice. March 11, 1953.
(Mastrubuono.)

The Facts.—The respondent Company had purchased in Persia certain oil which was shipped in the *Miriella* from Abadan and lay in store in Venice. The Anglo-Iranian Oil Company (A.I.O.C.) claimed the oil on the ground that the Persian Law of May 1, 1951, nationalizing the petroleum industry had not affected the ownership of A.I.O.C. in this particular cargo of oil and that in any event the Oil Nationalization Law could not properly be enforced by an Italian court as it violated the principles of Italian " public order ". The A.I.O.C. applied for " judicial sequestration " [an order for interim custody] of the oil pending the hearing of their claim. S.U.P.O.R. objected on the ground that for the Court to grant such an order would amount to prejudging the substantive claim and so to " annulling " the law of a foreign sovereign State, namely, the Persian Oil Nationalization Law.

Held: that the application must fail. Although the respondents were in error in contending that the Court had no power to examine, and if necessary to refuse to apply, the law of a foreign State, on the merits of the substantive claim the Court found that the Persian Oil Nationalization Law was not contrary to Italian " public order"; the applicant Company therefore had no claim to the ownership of the oil in question.

The Court said: "[The respondent's objection] can easily be refuted by the fact that in view of the provisions of the Italian Civil Code relating to private international law (Articles 16–31 of the Preliminary Rules), the Persian Oil Nationalization Law would in any case be subject to examination to ascertain whether or not it could be regarded as coming within the limits contemplated by Article 31 of the above-mentioned Rules, the intention of which is—as is well-known—to prevent foreign laws or acts from taking effect on Italian territory if such laws are contrary to public order; it is clear that, although such an examination might prevent the Persian Law from being applied, it could never cause the 'annulment', 'revocation' or 'destruction' of that Law, which would in any case remain effective within Persian territory.

"The error in S.U.P.O.R.'s argument becomes even clearer if it is seen as being contrary to the principles of international law by implying that the Italian Court cannot give judgment in an action by applying legislative provisions of a different legal system; indeed, the Court would *a priori* be denied the right to disregard a foreign Law if it is found to be in conflict with the principles of public order. The competence of the Court is determined only by the actual powers conferred upon it and not by the results obtained from the exercise of these powers: otherwise, the Court would be unable to investigate whether or not a foreign Law is contrary to public order, whereas by Article 31 such investigation is obligatory and is one of the bases for the application of other provisions.

"The objection raised by S.U.P.O.R. having thus been shown not to be justified, we proceed to examine the first of the conditions under which—according to Article 670 of the Code of Civil Procedure—judicial sequestration may be granted, namely, disputed ownership. There is no doubt as to the existence of a dispute between A.I.O.C. and S.U.P.O.R. in connection with the oil in question, the former having declared, as mentioned before, their intention to bring a claim for the ownership of the oil, and the latter maintaining that they are the owners of the oil having purchased it in Persia from the National Iranian Oil Company.

"However, the mere existence of a dispute as to ownership is not sufficient for a grant of judicial sequestration and the Court must enquire into the reasons adduced by both parties before granting or rejecting a request which might entail serious consequences in the nature of restriction of the right of ownership. For the purpose of carrying out such an enquiry it is necessary to have a clear picture of the situation as presented by the parties.

"It is maintained on behalf of A.I.O.C. that the Nationalization Law of May 1, 1951, never affected the Company's right of ownership over oil such as that in question, which was extracted from wells within the Concession area agreed upon on April 29, 1933. Although the Company does not question the validity of that Law within Persian jurisdiction, they nevertheless deny that such validity could be recognized by an Italian Court, inasmuch as, no compensation having been provided for, the said Law violates one of the principles comprised under the heading of ' public order ' in the above-mentioned Article 31 of the Preliminary Rules.

" On the other hand, it is maintained on behalf of S.U.P.O.R. that the Persian Oil Nationalization Law is not contrary to Italian ' public order ', and that even if it were, Article 31 of the Preliminary Rules would not be applicable since S.U.P.O.R. do not rely on the Persian Law as having effect in Italy, inasmuch as, by virtue of the principle laid down in Article 25 of the Preliminary Rules, the Persian Law is deemed to have taken effect in Persia where the contract for the sale and purchase of the oil was concluded, and not in Italy where the oil lies, which oil, by virtue of a contract concluded elsewhere has become the property of the Italian purchaser.

" Examination of this latter point, which logically precedes the other point raised by S.U.P.O.R. and that of A.I.O.C., shows the weakness of the proposed claim of ownership.

" According to the most authoritative writers and case-law, it would appear redundant to enquire whether the principles adopted by a foreign Legislature are contrary to those adopted by our Legislature if the acts contrary to public order have taken place in a foreign country, seeing that the proceedings before the Italian Court deal only with the juridical consequences of these acts, the acts themselves having—from a legal point of view—been finally concluded abroad.

" The oil which forms the subject of the present dispute was taken by the Persian Government in Persia by virtue of the Nationalization Law, and in Persia it was disposed of in favour of S.U.P.O.R by a contract of sale: all this was in conformity with the judicial system of the Persian Government, on whose territory these acts (expropriation and sale and purchase) took place, with the legal and material consequences flowing therefrom. The recognition in Italy of the validity of the effects which these acts had already had in Persia cannot be termed co-operation to make them become effective; it constitutes no more than an acknowledgment that the effects have indeed taken place, *i.e.*, accepting the effects produced, which in themselves—and considered separately from their cause—are in no way contrary to public order. The Nationalization Law should not, therefore, be examined from the point of view of public order.

" If, however, the question is tested by examining the Nationalization Law in regard to public order, which has been referred to at some length in the contentions put forward on behalf of A.I.O.C., the claim of ownership appears unjustified, which supports the rejection of the request for sequestration.

" Among the principles included under the generic name of ' public order ' is doubtless the one that no person should be deprived of his property without payment of compensation, this basic principle of our legal system having been solemnly proclaimed not only in the Civil Code (Article 834), but also in Articles 42 and 43 of the Constitution, where it is expressly declared that ' private property is recognized by the law ' and that ' it may, in cases provided for by the law, be expropriated for reasons of the common good, provided that compensation is paid '.

" It remains to be seen, therefore, whether or not the Persian Nationalization Law complies with this principle. Articles 2 and 3 of that Law provide:

' The Government is bound to dispossess at once the former Anglo-Iranian Oil Company under the supervision of the mixed board. If the Company refuses to hand over at once on the ground of existing claims on the Government, the Government can, by mutual agreement, deposit in the Bank Milli Iran or in any other bank up to 25 per cent. of current revenue from the oil after deduction of exploitation expenses in order to meet the probable claims of the Company.' (Article 2.)

' The Government is bound to examine the rightful claims of the Government as well as the rightful claims of the Company under the supervision of the mixed board and to submit its suggestions to the two Houses of Parliament in order that the same may be implemented after approval by the two Houses.' (Article 3.)

" It can be seen, therefore, that the Nationalization Law does not exclude the payment of compensation to A.I.O.C.; moreover, it unequivocally recognizes the right to claim such compensation. In fact, whilst Article 2 envisages a deposit to meet the claims of the Company, Article 3 contains the solemn undertaking on the part of the Persian Government to examine, in addition to its own claims, those of the Company; these claims, which are not specified in Article 2 but which are ' likely ' (' probable ' in the English text produced by A.I.O.C.), are in Article 3 defined as being ' rightful ', and the argument maintained by A.I.O.C. that among these legitimate claims the Law does not include the claim for compensation—which is the most likely and most legitimate, though not the only one—must be regarded as being an entirely arbitrary view.

" Little importance, from a legal point of view, can be attached to the argument of A.I.O.C. that the Law does not fix the measure of compensation nor require promptness in payment. Even considering the exceptional nature of the question, which—it must be recognized—as compared with the normal application of a foreign Law almost touches the limits contemplated by Article 31 of the Preliminary Rules, the Persian Law can be examined only with a view to establishing whether it fails to provide for the payment of any compensation, so as to be contrary to our Constitution, the provisions of which present the principle of public order and which admits expropriation 'provided that compensation is paid'. And other questions, such as the measure of compensation, its form, and promptness in payment, do not concern the public order: these are accessory elements which should be agreed upon on the basis of present historical, political, social and economic conditions, which should be proportionate to the nature and importance of the property in question, and which do not enter the sphere of public order provided that they do not in practice annul the compensation and make it illusory.

" This can, however, be disregarded in the dispute in question. There is a special procedure, legally laid down, the requirement of putting which into effect is binding upon governmental organs, and there are the statements of the Head of the Persian Government, Mr. Mossadeq. The latter, after having made an offer to A.I.O.C. to proceed to the payment of compensation to A.I.O.C. as early as September 1951—either on the basis of the value of the shares of the Company before the nationalization or, at the option of A.I.O.C., on the basis of the Laws of those countries which had already effected the nationalization of industries, or on any other basis that might be mutually agreed upon—again confirmed before the International Court of Justice the express obligation of compensation owing and to be borne, by virtue of the Law, by the Persian Government, and he again emphasized A.I.O.C.'s right—in case of failure to reach an agreement—to make use of the legal procedure provided for by Persian law. In view of this obvious evidence of the desire to meet A.I.O.C.'s rightful claims—the failure, as yet, to give effect to this desire has not, even by A.I.O.C., been attributed to any particular attitude of the Persian Government—it is impossible to speak of it as illusory compensation.

" As a result of the enquiry which we have made, the claim of A.I.O.C. to ownership of the oil in question is not regarded as being justified; it follows that the application for interim measures must be dismissed."

[Report: *Foro Italiano*, 78 (1953), i, p. 719.]

Recognition of Acts of Foreign States and Governments—Nationalization Decrees—Property of Aliens—Duty of Compensation—Nationalization of Property of Anglo-Iranian Oil Company—Oil Brought to Italy.

ANGLO-IRANIAN OIL COMPANY LTD. *v.* S.U.P.O.R. COMPANY
(UNIONE PETROLIFERA PER L'ORIENTE, S.P.A.).

Italy, Civil Court of Rome. September 13, 1954.

(Elia, Speziale, Mazzacane.)

THE FACTS.—The Anglo-Iranian Oil Company sued the Unione Petrolifera per l'Oriente (S.U.P.O.R.), claiming certain oil transported by S.U.P.O.R. from Persia to Italy in the vessels *Miriella Alba*, *Brezza* and *Salso*, on the ground that A.I.O.C. was its owner, the said oil having been extracted from territory comprised in the concession granted in 1933 by the Iranian Government to A.I.O.C. The plaintiffs contended that, by virtue of the Concession Agreement of April 29, 1933, duly ratified (by the Iranian Government on May 28 and by the Shah on May 29, 1933), the Iranian Government granted to A.I.O.C. " the exclusive right, within the territory of the Concession, to search for and extract oil, as well as to refine and to treat in any other manner and to render suitable for marketing the oil obtained by the said Company " (Article 1 of the Concession Agreement mentioned above).

In Articles 2 and 4 of the Concession Agreement, the manner of acquisition of the necessary territories, belonging to the Government or to third parties, was laid down; in Article 10 the rent was fixed, to be computed in proportion to the quantity of the minerals sold and to the profits of the Grantee of the Concession; in Article 11, an agreed tax payment was fixed in proportion to the quantity of oil sold; and in Article 20 it was stipulated that, on termination of the Concession " whether by expiration of the period or for any other reason ", the Government should become the owner of any property acquired by the Company in Iran and of any things and articles used for the purposes of the Concession.

In Article 21 of the Concession Agreement it was stated that " the Company undertakes to respect at any time the rights and privileges and the interests of the Government ". The same Article also provided:

" This Concession cannot be annulled by the Government and its terms cannot be modified in future either by any statutory regulations of a general or special nature or by any administrative measures or other acts of any description whatsoever of the executive authorities."

Article 26 provided:

> " Prior to the 31st December 1993, this Concession can only expire by the Company waiving the same or by the Arbitration Court (provided for in Article 22) declaring the Concession to be cancelled on the grounds of failure of the Company to comply with the conditions ",

and the cases of failure to comply which might give rise to such cancellation were specified.

By virtue of this Agreement, the plaintiffs claimed to be the owners of the oil extracted in the area of the Concession, from which they claimed to have been unlawfully evicted by the Iranian Government by application of the Oil Nationalization Laws of March 15/20, 1951 (ratified by the Shah on May 1, 1951), whereby it was decreed that " the oil-producing industry of Iran is declared to be nationalized . . . that is to say all operations of prospecting, extraction and utilization must be in the hands of the Government "; of April 28/30, 1951, ratified as from May 1, which ordered the " dispossession " of the plaintiffs; and of November 26, 1952, which established for the utilization of the mines previously granted to the plaintiffs the " National Iranian Oil Company (N.I.O.C.) ", the profits of which were intended for the Iranian Treasury " in order to maintain the welfare and prosperity of the country ".

The plaintiffs contended that such Nationalization Laws were not applicable in Italy as being (i) contrary to the Persian Constitution, (ii) contrary to Italian public policy, (iii) contrary to the generally accepted provisions of international law referred to in Article 10 of the Italian Constitution, (iv) of a political, discriminatory and confiscatory nature, and (v) because they decreed expropriation without compensation.

The plaintiffs claimed that the right of extraction, based on the Concession Agreement, implied ownership of the minerals extracted by anyone whomsoever in the area of the Concession, since, under Iranian law, to which " renvoi " was made under Article 22 of the Preliminary Rules of the Italian Civil Code, the principle that possession in good faith was equivalent to legal title, particularly in respect of grounds (ii) to (v) above, was not valid.

In reply, the defendants contended that the acquisition of the oil by N.I.O.C. took place in Iran, so that the Italian courts could only decide on the consequences of that fact; that the Iranian Oil Nationalization Laws resulted not in any expropriation but in a revocation of the Concession; that they implied, in any event, compensation; that the said Laws were applicable in Italy; and that the oil the recovery of which was claimed was not extracted by the plaintiffs, who were not the owners thereof.

Held: that the action must fail. The oil in question had been validly acquired in Persia by S.U.P.O.R. The Persian Oil Nationalization Laws were neither unconstitutional by Persian law nor—seeing that they provided for the payment of at least some compensation for dispossession—were they confiscatory in nature. They did not offend against either Italian public policy or international public policy, and the Court could not therefore refuse to apply those Laws or to recognize the validity of a purchase from a vendor who had derived title under them.

The Court said: " The plaintiffs, claiming to be the owners of the oil imported into Italy by the defendants, demand recognition of their right of ownership and the restitution of the property concerned. This action is to be classified, as regards its substance, as an action for the recovery of movable property within the meaning of Article 948 of the Civil Code.[1]

[[1] The Court referred here and *passim* to various decisions of the Italian Court of Cassation in support of its findings, which have been largely omitted from this report.]

"It is a general principle of our law that, whoever demands the restitution of property has to supply proof of his ownership and of that of his predecessors in title.

"The defendants, on the other hand, are not compelled under our law to bring any proof whatsoever, as they may invoke the principle '*Possideo quia possideo*' [I am in possession because I am in possession]; and the presumption of ownership operates, in accordance with the Italian legal system, in favour of anyone possessing without a legal title so long as the other party has not proved his own right of ownership.

"As regards, moreover, any movable property not inscribed in public registers, a person who acquires '*a non domino*' [from a non-owner] acquires the possession thereof if he was in good faith at the time of handing over and if an appropriate title existed at the time of transfer, in accordance with the provisions of Articles 1153 and 1156 of the Civil Code. Good faith consists of the lack of knowledge that the rights of any other party are injured, and it is excluded if it is based on an inexcusable error or on gross negligence. Good faith is presumed (Article 1147 of the Civil Code), so that gross negligence, as a fact barring the acquisition, must be proved by the party alleging it.

"In accordance with Article 27 of the Preliminary Rules of the Italian Civil Code, the jurisdiction and the form of the proceedings are governed by the law of the place where the proceedings are carried on.

"From the procedural and non-substantial nature of proof, the rule follows that the burden of proof and the distribution thereof must be governed by the *lex fori*, and that the *lex fori* also governs any reversals of the *onus probandi* prescribed by law and 'presumptions of law' (*juris tantum*) which are valid until the contrary has been proved and which constitute, in fact, a legal reversal of the burden of proof.

"On the other hand, legally binding presumptions (*juris et de jure*) not admitting any proof to the contrary, exceeding the limits of the system governing the proceedings (*ordinatorium litis*) and forming part of the legal system under which the proceedings are decided (*decisorium litis*), are governed, in so far as they lead to the legal appreciation of the individual facts, by the law governing the substance of the issue and not by the law of procedure.

"According to Article 22 of the Preliminary Rules of our Civil Code, possession, ownership and other rights relating to movable and immovable property are governed by the law of the place where the property is situated (*lex rei sitae*).

"In order to establish whether the acquisition of any movable property has been validly effected and whether the transfer of ownership rights has taken place by way of a valid transaction, the law applicable at the place where the property was situated at the time of the conclusion of the agreement of acquisition must be taken into consideration, whilst the transport of the movable property to another place subsequent to the transfer does not alter the legal relations once they are validly established by virtue of the *lex rei sitae*. This principle, laid down in respect of the law to be applied, obviously does not prevent the property—the acquisition thereof, which first occurred at its place of origin, remaining valid—from being subsequently acquired at another place by a new transfer in accordance with the law of that other place.

" The Court observes that the rule of Italian law to the effect that the claimant has to supply proof of ownership of the articles forming the subject of the claim for recovery of possession, is of an essentially procedural nature, irrespective of whether such principle is based on a presumption of ownership *juris tantum* (and not, therefore, of a nature relating to the main issue) which favours, by law, the possessor, or whether it is intended to base such principle on the general criteria of the burden of proof of facts constituting the basis of the law invoked (Article 2697 of the Civil Code).

" Similarly, the presumption *juris tantum* of good faith, laid down in Article 1147 of the Civil Code, is of a procedural nature. On the other hand, the provision of Article 1153 of the Civil Code according to which the ownership of movable property is acquired if an appropriate title exists on the transfer of ownership and if the acquirer possesses the property by virtue of such title and was in good faith at the time of handing over, is of a substantive nature and is governed by the *lex rei sitae*. The treatment of possession in good faith as being equal to ownership constitutes, in fact, not merely a displacement of the *onus probandi*, but a genuine and actual allocation of substantial rights.

" When applying such principles to the present case the Court observes that the plaintiffs, A.I.O.C., must supply proof of their ownership of the oil the recovery of which is claimed, that they have produced, for such purpose, the Agreement made with the Persian Government on April 29, 1933, and that they contend: (1) that the said Agreement is still valid and applicable, since the subsequent Persian Laws of March 15/20, 1951, November 26, 1952, and April 28/30, 1951, cannot be applicable in Italy as being contrary to the Persian Constitution, as being excluded, owing to their political nature, from the range of laws to which reference is made by the rules of private international law and also as being contrary to public policy and to international law for the reason that they comprise an expropriation without compensation and are, to that extent, discriminatory and confiscatory; (2) that, on the basis of the Agreement of April 29, 1933, which must be assumed to be still in force, the plaintiffs are still the owners of the oil the recovery of which is claimed.

" The Court observes that the defendants dispute the validity of the Agreement of April 29, 1933, and contend: (1) that the said Agreement has become inapplicable by reason of the Persian Nationalization Laws mentioned above; (2) that no right of ownership of the plaintiffs in respect of the oil could, in any event, be derived from the said Agreement, as there is no proof that the said oil was extracted by the plaintiffs; and (3) that the defendants acquired the ownership of the oil in Iran, it having been sold to them by N.I.O.C., a Persian public corporation, which was the owner thereof in accordance with the Iranian Nationalization Laws.

"The Court is of the opinion that it is necessary, first of all, to examine whether the defendants can base any rights in their own favour on the title of N.I.O.C. to the oil, independent of the examination of the other questions which have been raised, from two points of view: (1) that the acquisition which took place in Iran constitutes an accomplished fact and that the present action for recovery can raise only a discussion of the consequences of such fact; and (2) assuming the acquisition which took place in Iran to be not valid, that after the carriage of the property to Italy a new and different acquisition of the property, in favour of the defendants, had occurred, by virtue of Article 1153, so that the defendants, being presumed *juris tantum* to be in good faith and being in possession of the property in Italy, have acquired the ownership thereof.

"The investigations of both these points leads to negative results. In connection with the first, it is pointed out that, if any act has been completed abroad, it operates as a mere pre-condition of the legal relations disputed in Italy, so that the question of application of the foreign law does not arise, but only the question of assessing the legal consequences of the act which has been accomplished. In these circumstances, the Court does no more than state the existence of a fact; it does not create the fact by applying a provision of a foreign legal system.

"Thus, to cite an example commonly quoted by writers, where a wife and son bring in Italy an action for recovery of the estate of their deceased husband and father respectively, the Italian Court limits itself to establishing the existence of the marriage and of the parentage, but exclusively as pre-conditions of the question of devolution of the estate. It may thus happen that, in Italy, inheritance rights of the mother and son of a polygamous marriage are recognized, although such a marriage would not be recognized in Italy as being contrary to our public policy; it nevertheless has produced its effects abroad. In this connection, it must be remembered that a very widespread doctrine even asserts that incidental questions or questions preliminary to the proceedings may give rise to the direct and indirect application in Italy of provisions of foreign law which are contrary to our public policy. Actually, that doctrine confuses a fact (the situation created abroad) with a legal question which has not even arisen incidentally. In the present case the defendants contend that a similar position exists, in the sense that the ownership of the property appears to be a mere fact and not a legal question. The short answer is, however, that the entire action for recovery has been conceived by the lawgiver as a defence of ownership and therefore necessarily implies a dispute as to the ownership of the property.

" In order to decide whether the action for recovery of possession is to succeed, it is necessary to prove the ownership of the property claimed and, therefore, the question of ownership forms a substantive part of the present proceedings and is indeed the principal question submitted to the Court. It follows therefrom that the title of N.I.O.C. to the oil must be examined and discussed as the substantive matter of these proceedings, and cannot be considered an accomplished fact which is outside the matter to be decided on [*materia decidendi*].

" As regards, now, the second point, relating to the new acquisition which is stated to have occurred in Italy subsequent to the arrival of the oil and by virtue of Article 1153 of the Civil Code, the Court observes that such acquisition presupposes the possession of the property, which commenced in Iran at the time of the handing over of the oil and, in accordance with Article 22 of the Preliminary Rules of the Civil Code, is therefore governed by Iranian law.

" In accordance with Article 35 of the Iranian Civil Code,[1] possession based on a title suitable for the transfer of ownership is valid as ownership of the property, unless there is proof to the contrary. Under Article 323, the owner of any usurped property may claim the recovery thereof from any third party who acquires it. Under Article 36, the possessor must restore the property to the party claiming its recovery if it is established that the possession was not based on a lawful transfer, whilst the possessor is assisted by a presumption [of lawful transfer] until such time as the contrary has been proved; and to obtain restitution a claimant must establish his right, by proving that there was no legal transfer in favour of the possessor and so dislodging the presumption resulting from Article 35.

" By way of exception to the above rules, Article 37 provides that the burden of proof is shifted so as to rest with the possessor if the latter recognizes [*avoue*—admits, see Articles 1259 and 1275 of the Iranian Civil Code] that the property was once owned by the claimant.

" Such provisions of procedural and non-substantive law are not applicable to the present proceedings, which are governed by the *lex fori* as regards the burden of proof and the legal presumptions *juris tantum*, in respect of the principles already mentioned, of our legal system.

[[1] This and all the other provisions quoted are taken from the agreed French text as published by Aghababian, *Législation Iranienne* (Paris, 1951).]

" Iranian law, moreover, has no provision similar to Article 1153 of our Civil Code relating to the substance of the case, so that, under Iranian law, which is applicable in accordance with Article 122 of the Preliminary Rules, a possessor in good faith does not acquire the ownership of the movable property transferred to him on the basis of an appropriate title *a non domino* [by a non-owner], but has to restore the property to a lawful owner who proves that he is the owner, in accordance with the terms of Article 325 of the Iranian Civil Code, without prejudice to a claim against the vendor who was not the owner for refund of the price paid.

" In this particular case, therefore, the question of the validity in Italy of the acquisition of the oil in Iran by the defendants, boils down, for the purposes of the action, to the question whether the ownership of the oil was vested in the plaintiffs. The Court observes that, at the time of the Agreement of April 29, 1933, the principle laid down by Article 38 of the Iranian Civil Code—that the owner of the soil is also the owner of what is under the soil and is entitled to benefit thereby subject to the restrictions prescribed by law—was in force in Iran as the subsequent Law of February 6, 1939,[1] had not then come into force. The principle was repeated, in connection with mining, in Article 161 of the same Code, which prescribed that the mines belong to the owner of the soil and that only the utilization [*exploitation*] thereof shall be governed by special laws.

" At that time, therefore, the owner of the soil was fully entitled, there being no statutory restriction whatsoever, to prospect any mines below the soil of his own property and was also fully entitled to benefit by such mines after they had been discovered; the owner was entitled, moreover, to prevent any other parties, and even the Government itself (in the absence of any special law), from prospecting for mines in his subsoil and from benefiting by any mines which may have been discovered. There was, therefore, [in Iran] a system of absolute ownership of mines.

" By the Agreement of April 29, 1933, on the other hand, a virtual expropriation of the right of the owner of the soil to prevent any prospecting for mines on his land was effected, as well as the expropriation of the right of the owner to benefit by the deposits discovered on his land in so far as such land was contained within the boundaries of the Concession which the Government granted to A.I.O.C.

" In the event of any disagreement between the beneficiary of the Concession and the owner of the land relating to the sale price of the land, the Government had the right, under Article 4 of the Concession Agreement, to fix the sale price of the land forming the subject of the Concession and owned by private individuals in such manner that the said price was ' not to exceed ' the current price and with the implication that it might be less than the current value

[1] Reproduced in Aghababian, *op. cit.*, p. 116.

of the property, no minimum compensation and no appeal against the decision of the Government being provided for.

"The said Article 4, laying down the right of the beneficiary of the Concession to utilize the land necessary for the exercise of the Concession, even if it should not be owned by the Government, confirms the principle incorporated in the Agreement, which was ratified by law, that the owners of the land were not entitled to object to such utilization. In such circumstances, the owners, not being able to object to the utilization, had the option of either selling the land at the price fixed by the Government (if, that is, the owners are not, in view of the ambiguous nature of the text, to be regarded as actually compelled to sell at that price) or to tolerate the utilization, in respect of which Article 4 limited itself to prescribing general compensation, without providing for any procedure for determining its amount.

"Whether the expropriation is considered to have for its subject the right of ownership and to result in a reduction of such right, in accordance with the Roman Law theory of elasticity of ownership; or whether it is assumed, instead, that the subject of the expropriation consists of certain definite rights vested in the owner (accepting the German doctrine of ownership as 'a bundle of rights'), the conclusion which is reached is the same: the Agreement ratified by the Law of 1933 deprived the owners of the land of the use to which they were entitled, it deprived them of the rights to which they were entitled. And even if one assumes that, as no benefit was received from the mines prior to the discovery of the mineral deposit, no expropriation of the minerals took place, nevertheless the expropriation of the mineral prospecting rights by the Concession holder always constituted a partial expropriation of the rights of ownership, as the owner was deprived of the right to search for minerals on his own land and to oppose any such search by other parties. It must be pointed out, in this connection, that in the Concession area the right of prospecting and exploiting mines was granted exclusively to the holder of the Concession, who was therefore in a position, as a result of the Law ratifying the Agreement of 1933, to avail himself of such right even against the owner.

"The Court observes that, as the subject of this action is the right of ownership of the party claiming recovery, and as such right is based exclusively on the Iranian Law which ratified the Agreement of April 29, 1933, the first question to be examined is whether the said Law is applicable in Italy.

"If the contentions of the plaintiffs were to be accepted, the answer would be in the negative.

"Actually, although the Nationalization Laws of 1951 and 1952 came into force after the Law of February 6, 1939, had secured the exclusive right of utilization of oil wells to the Government (Article 3), the Law of April 29, 1933, by which the Concession

Agreement was ratified, came into force at a time when a full landownership system of mining prevailed, as has been shown above. That Law would, if the principles postulated by the plaintiffs were accepted, be contrary to the Persian Constitution and contrary to our public policy, as it would create an expropriation without prescribing the procedure and criteria of compensation in favour of the owners of the land covered by the Concession and not belonging to the Iranian Government granting the Concession (Article 4) and, therefore, the Law of 1933 could not be applicable in Italy, with the consequence that the present action would have to be dismissed.

" The validity of the acquisition by A.I.O.C. based on the said Law of 1933—which latter is the only ground from which the ownership of the oil can be inferred in the absence of any proof that the plaintiff is the owner of the land forming the subject of the Concession—cannot, moreover, be considered to be a fact outside the dispute and having occurred in Iran, since the question of the ownership of the oil is precisely the question of the applicability of the Law of 1933.

" In order for the plaintiffs to succeed, it is, in fact, necessary to find that A.I.O.C. is the owner of the oil, and this can only be done by applying in Italy the Iranian Law of 1933 by which the Concession Agreement was ratified, when even the Concession as such, regarded as an administrative or contractual act, would be contrary to public policy.

" It must therefore be pointed out that, whilst the Nationalization Law was directed against the right of utilization, based on the Concession of 1933, the latter appears to be contrary to the right of ownership recognized by Articles 38 and 161, quoted above, of the Iranian Code. Article XVI of the Iranian Constitution[1] imposes an obligation to grant compensation only in favour of parties who have been deprived of ownership, whilst Article 29 of the Iranian Civil Code distinguishes ownership from the real rights of utilization.

" Whilst Article XVI of the Constitution of 1907 requires compensation to be made for expropriation of ownership (and only of ownership), Articles XV and XVII relating to the confiscation of property and to the ' dispossession ' of property, do not repeat the obligation to grant compensation, but are limited to requiring that confiscation and ' dispossession ' shall take place only by virtue of a law (*i.e.*, an ordinary Law, which does not require the procedure of an amendment to the Constitution).

" Finally, whilst the Law of 1933 had for its object the expropriation of the Persian owners, protected as members of the Iranian people[2] (see ' On the rights of the Iranian people ', Article IX of the Constitutional Law), the Nationalization Laws of 1951 and 1952 had for their object the expropriation of foreigners, in respect of whom Article VI of the Constitution[1] lays down that the protection of their rights is subordinate to the (ordinary) laws of the Iranian State.

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[1] Constitutional Law of October 7, 1907: see Aghababian, *op. cit.*, p. 18.

[2] *Ibid.*

" The reservation based on Article 161 of the Iranian Civil Code, by which the exercise of mining rights is made subject to legal provisions, could not imply the annulment of such rights, which were vested in the owner in accordance with Article 38 of the said Code.

" The Court observes that, irrespective of whether or not all the above-mentioned laws are regarded as being applicable in Italy, the result is the same and leads to the dismissal of the plaintiffs' action, as the ownership of A.I.O.C. in respect of the oil cannot be recognized in either case.

" It is not possible, however, to accept the principles invoked by the plaintiffs and, consequently, the question of applicability in Italy both of the Law of 1933 and of the Laws of 1951 and 1952 must be answered in the affirmative.

" The Court observes that, in accordance with the rules of private international law laid down by the Italian law in force (Article 22 of the Preliminary Rules of the Civil Code) the Italian courts, in applying foreign law, must not only establish the existence of such law, but must also exercise the power, implied in accordance with our *lex fori* governing the proceedings, of examining its constitutional legitimacy, which examination is recognized by the Italian law of procedure. Modern doctrine has established the principle that the provisions of private international law form a part of municipal law and that, being governed by the sources of our own substantive law, they admit, for the particular subjects in question, the foreign legal system as a source of our law. In such a matter, the provisions of the foreign law governing the substance of the case are incorporated in our legal system: so that the Court, in respect of such provisions, as in respect of provisions of Italian law, has the right and the duty to examine their constitutional validity.

" The Italian court must apply the foreign law as if it were sitting abroad—to adopt the English formula—only, however, after verifying that the foreign law is in existence as a valid provision, it being its right and duty to verify '*incidenter tantum*' [purely incidentally]—with an effect limited to the case before it—the constitutional validity of the law, by virtue of the Transitional Provision No. VII of the Constitution, as the Constitutional Court provided for therein is not yet in operation.[2] And as, in accordance with the accepted doctrine, the legal provision of foreign law is incorporated in the Italian legal system, not only as regards its contents but in such form and with such significance and value as it possesses in its own legal system, the examination of its constitutionality must be made by the Italian court with reference to the Constitution of the foreign country.

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[1] Constitutional Law of October 7, 1907: see Aghababian, *op. cit.*, p.18.

[2] See decision of the Court of Cassation (United Divisions) of January 15, 1953, No. 107: *Foro Italiano*, 1953, I, p. 173.

" In this particular case, moreover, such examination leads to positive results if one considers that the Concession of 1933 was ratified by an ordinary Law (as were also the subsequent Laws of 1939, 1951 and 1952), so that it created a legal power recognized by the Legislator by virtue of Article XVI of the Constitution, while the expropriation of the owner of the land was balanced by the provision of fair compensation, into which the partially expropriated right of ownership was transformed. In fact, Article 4 of the Agreement made provision for such compensation, if only in a general form, and the expropriation took effect with legal validity, so that the principle of the constitutional provisions was duly observed.

" It is important, moreover, to point out that the Law [of 1933], which prescribed on the part of the Company due respect for the rights and privileges of the Government at any time and also for the interests of the Government, that is to say, the public interest (Article 21), which granted the Government ample powers of inspection (Articles 10 and 14) and even of intervention (Article 15) in the management of the Concession, and also power to exclude from the Concession any areas which it might require (Article 4) and which restricted the scope of the Concession to oil-containing minerals only (Article 12), recognized essentially (and thereby anticipated the Law of 1939) the right of the Government to utilize the mines.

" By the Law of 1939, while the principle that whoever is the owner of the land is the owner of the mine remained unchanged, the Government was given the exclusive rights of utilization [' *exploitation* '] of the oil wells. That is to say, a *jus in re*, a real property right of a direct nature, relating to the use of the property of another in accordance with No. 2 of Article 29 of the Iranian Code, was created in favour of the Government.

" It was laid down that such Law should be exclusive and therefore valid as against A.I.O.C. (Article 3 of the Law of February 6, 1939).[1]

" The Government was given power to authorize prospecting for deposits (Article 7) and to fix the compensation payable by the prospector to the owner (a provision similar to that in Article 4 of the Concession of 1933). The Government was given the right to grant concessions for the utilization of the mines, priority being established in favour of the owner and the discoverer (Article 8), subject to the obligation of the Concession holder to pay a ' fee ' to the owner, another ' fee ' to the Government and a further ' fee ' to the discoverer (Articles 11, 9 and 12), and subject to the right of the Government to reserve to itself the utilization of the mines for reasons of the public interest, the interests of the Concession holder being taken ' into consideration ' (Article 15).

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[1] See Aghababian, *op. cit.*, p. 116.

" The public interest had been safeguarded by the Concession Agreement of 1933 (Article 21) ' at any time ', its priority over the interests of the Concession holder being there declared. The Law of 1939 explicitly recognized the exclusive right of the Government to utilize the mines. Article 15 even describes the claims of the owner as ' rights ' and those of the Concession holder as ' interests '.

" However, the recognition, contained in the Law of 1933, of the rights, privileges and interests of the Government ' at any time whatsoever ' would in itself have permitted the Government to expropriate the Concession for reasons of public interest, subject to the due safeguarding of the right of the Concession holder to receive compensation.

" Moreover, in the Italian legal system, the power of expropriation is provided even in respect of real property which the Administration has undertaken not to expropriate.[1] Such a power cannot be described as being contrary to our public policy if our legal system recognizes it.

" In our legal system, in which the mines form part of the non-transferable property of the Government, a Mining Concession gives rise to an immovable real right of the holder[2] which, in the case of a permanent Concession in favour of the owner of the land, takes a form similar to the '*dominium utile*' (ownership of use only),[3] while, on the other hand, the agreements by which the Concession holder, the holder of the '*jus in re*' (real right) grants a sub-concession in respect of the economic utilization of the mine with the consent of the Administration, constitute personal and not real rights of utilization.[4] Our legal system provides that the real right of the Concession holder, subject to termination in accordance with Article 40 [of the Italian Constitution], must yield to the public interest, which is determined by the Government at its discretion and which has priority over the said right, so that the latter can only be protected as an interest coming within the jurisdiction of the Council of State.[5]

" In the case of personal rights of use which come to an end as a result of expropriation for reasons of public interest, no compensation whatsoever is due under our legal system.[6]

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[1] Decision of the Council of State (Section V), dated May 4, 1954, No. 20: *Giur. Compl. Cass.*, 1945, II, p. 676, No. 582.

[2] As decided by the Court of Cassation on May 2, 1934: *Foro Italiano*, 1934, I, p. 1143.

[3] *Ibid.*

[4] Decision of the Court of Cassation of July 24, 1945, No. 610: *Giur. Compl. Cass.*, 1945, II, p. 102, No. 27.

[5] Decision of the Court of Cassation (United Chambers), August 7, 1945, No. 711: *Giur. Compl. Cass.*, 1945, II, p. 187, No. 42.

[6] Decision of the Court of Cassation of July 24, 1945, No. 610: *supra*.

" Under Iranian law, unlike our law, the ownership of the mines is vested in the owner of the land (and not in the Government) and the Government possesses a real right of ' exclusive ' utilization of the mine, so that, as a rule, the right of the holder of a mining concession in Iran cannot be regarded as a real right, but is regarded as a personal right, for which no compensation is payable under our expropriation law,[1] as it is to be treated in the same way as rights of use granted in Italy by the holder of a mining concession to a third party, which rights are personal and not real rights.

" Nevertheless, the Court observes that the right to compensation is recognized by the Iranian Nationalization Law, which (Article 3 of the Persian Law of April 28/30, 1951) prescribes that the Government ' is bound ' to examine the ' rightful ' claims of the Company the holder of the Concession and to submit its suggestions to the two Houses of Parliament.

" As appears from the expression ' rightful ' in connection with the mandatory ' is bound ', this is a case of a genuine and proper right to compensation, recognized by law, subject to a preliminary procedure of an administrative nature but capable, eventually, of being safeguarded before the Persian Courts.

" In this connection, the accepted view of Article 43 of our Constitution, which renders the transfer of any business (undertaking) to any public body by way of expropriation subject to ' compensation ', is that the interest protected by such provision is sufficiently safeguarded in all cases where the ordinary law and the administrative action required thereby provide an actual and not an illusory compensation, capable of effecting the transformation of the expropriated right into a right to compensation. On the other hand, it is not required either by our law or by the generally accepted provisions of international law that the *quantum* of the compensation must appear actually equivalent to the value of the property forming the subject of the expropriation, that is to say, it is enough that there is *some* compensation for the expropriation to be lawful.

" Dissentient opinions among writers who endeavour to maintain the necessity of payment of compensation equivalent to the value of the property, have not found much support, so that only in cases where the compensation is purely fictitious, illusory and non-existent can the expropriation be deemed to be unlawful.

" In conclusion of this part of its enquiry the Court observes:

" (1) The Iranian Nationalization Laws of 1951 and 1952 cannot be said to be contrary to the Persian Constitution, which authorizes, in Article XVII,[2] both the ' dispossession ' of property from holders of rights of user without requiring any compensation, provided that the ' dispossession ' occurs by virtue of an ordinary law, and the expropriation of ownership rights, provided that it takes place under an ordinary law and against the payment of 'equitable' compensation.

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[1] Decision of the Court of Cassation of July 24, 1945, No. 610: *supra.*

[2] See Aghababian, *op. cit.*, p. 18.

"The use of the expression 'equitable', which must connote taking into account the circumstances of each individual case and, therefore, taking into consideration also the public interest (which has been given priority by the law), rules out the possibility of any intention to make the expropriation dependent on the payment of compensation equivalent to the value of the property. In any event, since the expropriation took place by law and since compensation was prescribed (Article 3 of the Oil Nationalization Law), with reference not only to equity, but directly to legitimacy ('legitimate' or 'rightful' claims of the Company), the Iranian constitutional provision appears to have been fully observed by the Nationalization Law.

"Moreover, it has not been proved that compensation was refused by the Iranian Government, which, on the contrary, in proceedings before the International Court of Justice at the hearing of June 9, 1952, not only recognized the right of A.I.O.C. to compensation, but also the fact that such right could be protected by proceedings in the ordinary Iranian Courts. Under Iranian law, such recognition is, in accordance with Articles 1259, 1275 and 1277 of the Iranian Code,[1] binding on the Persian Government in relation to A.I.O.C., by way of interpretation, if this should be necessary, of the text of the said Article 3.

"It cannot, moreover, be maintained that the Nationalization Laws, because they are not of a general and abstract nature, are not laws in the true sense of the word, but administrative acts, with the result that the expropriation would be unconstitutional under Iranian law because it was not effected by a statute.

"Apart from remarking that such an argument would result in the inapplicability for unconstitutionality of the Concession Law of 1933, which also was not abstract in its nature, it is a fact that the Court cannot regard laws which are properly formal statutes, endowed with all the sanctions and attributes of legislation, as being administrative acts, that is, administrative in substance, without thereby arriving at the conclusion that there has been an excess of legislative power. This would entail an examination of the motives of the law, and such an examination is one which the Court is not permitted to undertake as it is not of a legal nature but relates to political expediency.

"The Court, not being permitted to enquire into the real intentions of the law giver, an enquiry which is based on political considerations and which exceeds the limits of legal enquiry permitted to the judicial authority (which in fact belongs to the legislative power), cannot convert a formal legislative act into an administrative act, . . .

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[1] See Aghababian, *op. cit.*, p. 101.

" Having verified the formal correctness, as legislative acts, of the Nationalization Laws of 1951 and 1952 and their constitutional propriety, the Court must permit the application of the said Laws.

" (2) The above-mentioned Iranian Nationalization Laws are not contrary to our public policy within the meaning of Article 31 of the Preliminary Rules of the Italian Civil Code. The prohibition mentioned in Article 31 quoted above does not relate to so-called ' domestic ' public policy, that is to say, to the protection of any public interest whatsoever which is sufficient to prevent the rule from being modified by private individuals; it relates to the protection of such fundamental interests of a moral or social nature as are identical with the community of civilized States to which the Italian State belongs and which is a characteristic not of that State alone, but of all civilized peoples.

" It is well known that the foundation of such protection, which writers who follow the ' law of nature ' doctrine relate to international morality or to the community of justice, while writers who accept the positivist doctrine derive it from the idea of sovereignty (referring, for example, to the principles of territoriality in respect of statutes affecting real property), has been connected in the most recent writings of authority with the interest protected and with the fundamental nature of such interest, so that the conception of international public policy is distinguished from that of domestic public policy.

" The international public policy to which Article 31 relates is more limited than domestic public policy; it considers and protects only that part of the State's public policy which relates to the fundamental principles of civil life (to which reference is made by the statutory provision in a general manner). It is not possible, however, on the basis of such principles, to deny effect in Italy to the Persian Nationalization Laws if it is considered that the latter apply principles (expropriation by law and against compensation) which are accepted by our own Constitution (*i.e.*, in Articles 42 and 43). In this connection, the Court remarks that the nature of the Nationalization Law as expropriation cannot be disputed by reducing it to a mere revocation of a concession, which does not result in any expropriation of rights, either because the right of use of the mine (whether it be a real or a personal right) had been recognized by law or because reciprocal obligations and subjective rights (although subordinate to the public interest) which are capable of being protected before the ordinary courts were thereby created,[1] the most important of such rights being the right to stability of the concession (Article 21). A final reason for so holding is that the word ' dispossess ' used by the Oil Nationalization Law, and also in Article XVII of the Persian Constitution, is regarded as connoting expropriation and, indeed, that is the legal effect produced by the word, so much so that it was decided in the said Law to recognize the right to compensation.

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[1] Decision of the Court of Cassation (United Chambers), April 1, 1946, No. 355: *Giur. Compl. Cass.*, 1946, II, p. 454, No. 69.

" Compensation is therefore due under Iranian law, this being a case of expropriation of subjective rights, both in view of the stability clause contained in the Concession Agreement (Article 21) and because of the plan and the extracted material [taken over], and also in view of the mutual obligations created by the Concession, which was ratified by law. However, a right to compensation has in fact been recognized, with a further right to protection before the ordinary courts, and therefore the Oil Nationalization Laws (like the Law of 1933, which also resulted in an expropriation of the owners of the land) may, for that reason, be applied in Italy.

" It cannot be said, moreover, that as the expropriation is subject to the condition of public interest, no such condition applies in this particular case.

" Without enlarging upon the impossibility of examining in this Court the reason for the legislative act,[1] it is sufficient, in order to recognize the existence of a public interest, of an economic nature, in the expropriation, to mention that the Iranian Law of November 26, 1952, established, for the purpose of utilizing the oil wells, a public body, the National Iranian Oil Company, which is subject to Government supervision and whose profits are intended to ' increase the welfare and prosperity of the country '.

" (3) The existence of an economic public interest in the expropriation prevents the Court from regarding the Oil Nationalization Law as being of a political nature so as to exclude its application in Italy, or from regarding the Law as being discriminatory in the sense of incompatibility with international law, referred to in Article 10 of our Constitution; nor, in view of the subjective element of the Law (which is intended to protect the Iranian public interest, not to injure any other party) and of the established fact that a right to compensation has been recognized, can the nationalization be looked upon as discriminatory and so incompatible with that international public policy to which our legal system makes reference.

" The Court recalls that the rules of foreign private international law and foreign political laws cannot be applied in Italy independently of the effects produced by them and independently of any consideration regarding their relation to international public policy.

" Whether or not provisions of foreign laws are applicable in Italy depends on the nature of those provisions. If the laws have been enacted for reasons of political racial hatred, then the principle of ' non-intervention ' in the domestic policy of a foreign country, the consideration of the nature of such laws, and especially whether they are contrary to international public policy, and the sovereignty of the national State in the territory of which it is sought to apply them, prevent, according to the accepted doctrine, such laws from having extra-territorial effect. Thus, discriminatory laws enacted out of hatred, against aliens or against persons of any particular race or category or against persons belonging to specified social or political groups, cannot be applied in Italy because they run counter to the internationally accepted principle of the equality of individuals before the law.

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[1] Decision of the Court of Cassation of January 15, 1953, No. 107: *Foro Italiano*, 1953, I, p. 173.

" Such principles, developed by international doctrine, are generally accepted by the jurisdprudence of the various countries.[1] However, as has been noted, no such predominantly political and persecutory purpose as characterizes the political, racial, expulsory laws which have been met with elsewhere is found in the Persian nationalizing legislation. By the Oil Nationalization Law it is intended to protect the interests of Iran, not to attack the interests of foreign nationals as such. The economic content which appears from the text of the Law of November 26, 1953, shows the true purpose of the nationalization to be the safeguarding of national prosperity and not the persecution of aliens.

" The search for any concealed and subjective motives on the part of the law-giver, which are not revealed by the text of the Law and are contrary to its declared objects, would, in any event, not be open to this Court to make, by reason of the limits of its powers of examination of the Law, as mentioned above. However, such investigation, if it were permitted, would in any case not reveal any persecuting, political or confiscatory nature of the Law which is in fact based on purposes of national welfare.

" The rule that laws of a political nature will not be applied in Italy may be based on our legal system, from the point of view of compatibility of such laws with international public policy, or else on the natural incompatibility of such political laws with the principles of international law, referred to in Article 10 of our Constitution, that is to say, on the principles of law of all civilized nations which are recognized by all civilized States and which are applied by them by reason of international custom, or on such international treaties as are capable of producing international legal rules.[2]

" Enquiry into this point is strengthened by a fact which is given added importance by the nature of its origin. The General Assembly of the United Nations, at its meeting of December 21, 1952—less than one month after the date of the Iranian Law of November 26, 1952—passed a Resolution recommending that individual States should not be prevented from exploiting their natural resources. It is evident that the decision of the United Nations at that meeting, taking into consideration the date when it was taken and the international situation to which it related, constitutes a clear recognition of the international lawfulness of the Persian Nationalization Laws.

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[1] See, for example, the following decisions: Court of Paris, January 16, 1936, in the case of the *Duke of Brunswick*; Tribunal of Buenos Aires, December 23, 1905, in the case of the *Cistercensian Monks*; Tribunal of Rome, August 30, 1933, in the case of the *ex-King of Spain*; and Commercial Court of Brussels, June 9, 1938, in connection with German racial legislation.

[2] Court of Cassation (United Penal Chambers), March 5, 1949; *Giurisprudenza Italiana*, vol. 49, Part II, p. 281.

" (4) The above-mentioned considerations lead to the rejection of the contention that the Oil Nationalization Law was contrary to the generally accepted rules of international law. Apart from the consideration that the British Government itself, on August 3, 1951, through its Ambassador in Iran, recognized, for itself and also in the name of A.I.O.C. (of which, as is not disputed, it is the largest shareholder), the lawfulness of the nationalization, it is a fact that that lawfulness was not denied by the International Court of Justice in its decision of July 22, 1952, wherein it is said that the Concession Agreement of April 29, 1933, ' is nothing more than a concessionary contract between a Government and a foreign corporation '.[1] The legality of the nationalization was explicitly confirmed, not only by the President of the Tribunal of Venice in his Order of March 11, 1953, but also by the Court of Tokyo in its judgment of September 21, 1953,[2] and, implicitly, by the said General Assembly of the United Nations at its meeting of December 21, 1952, already mentioned. The principle of nationalization and the power of Governments to expropriate any real or personal right, and even the right of ownership, belonging to their own or foreign citizens, for reasons of public interest and against compensation which does not appear to be merely illusory, is, moreover, recognized by the case-law of every country. It is in accordance with Section III of the Convention of Geneva of May 15, 1922, and with Articles 1, 13, 55, 62, 68, 76 and, in particular, 17, of the Charter of the United Nations—indeed, the General Assembly made itself the interpreter of that principle by its Resolution of December 21, 1952, quoted above.

" The principle that Governments must, when dealing with foreign nationals, comply with the fundamental rules by which the more civilized Governments abide in relation to private individuals and which constitute the ' minimum standard ' of the idea of justice of civilized countries—the international ' ethical minimum '—need not be invoked if there is the right of compensation, as has been confirmed, moreover, by, *inter alia*, the judgment of the Tribunal of Le Havre of July 22, 1939, in connection with the expropriation of oil concessions by the Mexican Government, prescribed by its Decree of March 18, 1938.

" The judgment of the Civil Court of Antwerp of February 21,

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[1] *Anglo-Iranian Oil Company Case* (Preliminary Objection): *I.C.J. Reports*, 1952, p. 93; *International Law Reports*, 1952, Case No. 114 (at p. 518).

[2] *Anglo-Iranian Oil Company* v. *Idemitsu Kosan Kabushiki Kaisha*: *International Law Reports*, 1953, p. 305.

1939,[1] relating to the same question, that of the Court of Appeal of Arnhem of June 12, 1939,[2] and that of the District Court of New York (Southern District) of April 13, 1939,[3] definitely deny that any foreign court is entitled to decide on the lawfulness of an expropriation carried out by a foreign Government; the same conclusion was reached by the Court of Tokyo in its judgment of September 21, 1953,[4] relating to the Persian oil nationalization.

" As has been stated above, however, this Court holds that the Italian courts have the right and the duty to examine a foreign Law, from the point of view of its legality, so as to establish whether it is contrary to the Constitution of the foreign country concerned or to international public policy or to any generally accepted principles of international law, and this on the basis of Article 31 of the Preliminary Rules to the Italian Civil Code and Article 10 of our Constitution. In consequence, the Italian courts must refuse to apply in Italy any foreign Law which decrees an expropriation, not for reasons of public interest but for purely political, persecutory, discriminatory, racial and confiscatory motives. Furthermore, the Italian courts must refuse to apply in Italy such foreign Laws as may, even for non-political and non-persecutory motives, decree expropriation of the property of any foreign national without compensation.

" The Court holds that in this particular case the Iranian Oil Nationalization Laws of 1951-1952 may, in accordance with the principles which have been mentioned, be applied in Italy as they are not contrary either to the Iranian Constitution or to international public policy or to any generally accepted principles of international law, since they decree by statute expropriation for reasons of the public interest of Iran and not for motives of persecution or confiscation or for political or discriminatory motives, and since they recognize the right of the expropriated foreign nationals to compensation. Such considerations result in the rejection of the claim of the plaintiffs.

" The Court thinks fit, moreover, in view of the seriousness of the questions raised, to point out that even if there were no explicit recognition of the right to compensation and if, consequently, the Nationalization Laws were considered to be inapplicable in Italy, the claim of the plaintiffs would nevertheless have to be rejected since in any case, in accordance with the Concession Agreement of 1933, the ownership of the plaintiffs in the oil recovery of which is claimed cannot be maintained. The plaintiffs have neither alleged nor proved that the oil was extracted by them—the burden of proof being on them in accordance with the *lex fori* (Article 2697 of the Civil Code) as it would have been also under Articles 35, 36 and 37 of the Iranian Civil Code, as there was no admission by the defendants of the plaintiffs' ownership of the goods in question—whereas the defendants dispute such fact.

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[1] *" Propetrol ", " Petroservice " and " Petrolest "* v. *Compania Mexicano de Petroleo and Tankage and Transport*: *Belgique Judiciaire* (1939), Nos. 11, 12, col. 371; *Annual Digest*, 1938–1940, Case No. 11.

[2] *Petroservice of Paris* v. *El Aguila*: *W. and N.J.*, 1940, No. 20; *Annual Digest*, 1919–1942 (Supplementary Volume), p. 19.

[3] *Eastern States Petroleum Co.* v. *Asiatic Petroleum Corporation et al*: 28 F. Supp. 279; *Annual Digest*, 1938–1940, Case No. 35.

[4] See *supra*, n. 2.

" In this connection, the Court observes that under Article 1 of the Concession Agreement of April 29, 1933, it was established that the Company should become the owner of any oil obtained by the Company. That is to say, in order to obviate any doubt which might arise in the event of acquisition of the oil by any third parties under the legal situation prevailing prior to the new principle laid down in Article 1 of the Concession Agreement, it was intended to stipulate literally in the text, which was ratified by law, by the words ' obtained by the said Company ' used therein, the principle that A.I.O.C. should become the owner only of such oil as was extracted by it.

" This is justified in view of the ' *intuitu personae* ' (' taking into consideration the person concerned ') nature of the Agreement, which was entered into for reasons of public interest; it is justified by the assumption of the special capabilities of the Concession holder and by consideration of the expediency of stimulating, by such a clause, the interest of A.I.O.C. in attending directly to the operations in the Concession area. Moreover, the very fact that the rent (Article 10) was fixed in proportion to the amount of material actually extracted, confirms from the teleological point of view the ' *ratio legis* ' of the provision the object of which was to ensure that A.I.O.C., which was considered to be more expert and capable, and no other party, should carry out the extraction, and this, at the same time, with a view to ensuring that the operation of the oil wells should be effected in a proper and technically expert manner.

" Moreover, as also in accordance with the legal position prior to the provision of Article 1, it cannot be contended that the Persian legal system recognizes the ownership of the holder of a mining concession in respect of any mineral extracted by third parties (and much less that of the holder of a personal right of utilization, under a system allotting to the State the ' *jus in re* ' of utilization, reserving to the same the ownership of ' owner of the land ').

" Under the Persian legal system, minerals are not treated in the same way as natural fruits of land, as they are in Article 820 of the Italian Civil Code: consequently, neither the Persian Law relating to the acquisition of natural fruits laid down for the holder of a personal right of utilization under Article 466 of the Persian Code, nor the rule laid down by Article 531 of the same Code in respect of the acquisition of natural fruits on the part of a share-cropper, nor the rule of Article 29 laid down in respect of the owner, can be applied to minerals. Under the Persian system, where any fruits which have not been detached are immovable property (Article 15) and where, nevertheless, the farm tenant (Articles 466 and 531) acquires the ownership of the fruits when the same become recognizable on the plant, independently of the separation thereof, no equal treatment between minerals and fruits may, by definition, be asserted, since minerals do not, in actual fact, 'become apparent' (Article 531 of the Iranian Code) and cannot be identified until after separation.

"Under our law, on the other hand, minerals are treated in the same way as natural fruits (Article 820), which belong to the owner unless their ownership is transferred to any other party, in which case they are acquired on separation. The fruit while still on the plant belongs, under our law, to the owner of the land, not to the beneficiary of a usufruct.[1] Such a distinction follows from the difference in the definitions of 'fruit' in the two legal systems. In the Italian legal system, as previously under Roman Law, any fruit which has not been separated is '*pars rei*' (part of the thing) and can be dealt with as a future movable article (Article 820 of the Italian Civil Code); the separated fruit 'comes into existence' as a new article on separation (Articles 1472 and 821 of the Italian Civil Code). Under Iranian law, on the other hand, the fruit, as soon as it has appeared (Article 531 of the Iranian Code), acquires an independent legal existence, while still being regarded as immovable property (Article 15 of the Iranian Code).

"Under Roman Law, the owner, the possessor in good faith and the permanent lessee (holder of the '*jus dominio proximum*'—the right nearest to ownership) used to acquire the fruits immediately on separation by original title, on the basis of their relation to the thing bearing the fruit, whilst the beneficiaries of a usufruct and any other holders of real or personal rights of utilization used to acquire the fruit only when it was 'obtained', that is to say, only by way of appropriation (para. 35–38 L.D. r.d. II 1) and by way of a derivative title.

"The Italian Civil Code provides in Article 821 that the holder of the right of utilization may acquire the fruit on simple separation; and, as has been seen, under our law, the holder of a mining concession is considered to be the holder of a real right of utilization which, in the event of a permanent concession according to Article 54 of the Mining Law, is regarded as being similar to a permanent lease (emphyteusis). The acquisition of the mineral, which is treated in the same way as fruits, in Italy takes place in favour of the holder of the concession, on separation only. The Persian Code, on the other hand, prescribes in respect of fruit the acquisition of the same by the holder of the right of utilization, without any separation being necessary, as soon as it has appeared on the plant.

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[1] Decision of the Court of Cassation of March 6, 1950: *Giur. Compl. Cass.*, 1950, II, p. 496, No. 470.

"The Persian legislator, following, moreover, the trend shown in French law, which was previously followed in Italy,[1] brings into relief, therefore, the distinguishing elements of the lack of appearance of the mineral which has not been separated and of its purely hypothetical (and not physical) nature; and it distinguishes between the mineral and the fruit, so that it is not possible to apply the rule laid down in respect of fruit to the acquisition of minerals.

"In these circumstances, it becomes clear why the Concession Agreement of 1933 intended to clarify doubts which might, under the prevailing legal system, still arise in respect of the acquisition of the mineral by the holder of the Concession, by stipulating that such acquisition might only take place in respect of any oil extracted 'by the said Company'.

"It appears, in fact, that under Iranian law the sale of future goods is not provided for, whereas it is provided for under our law by Article 1472 of the Civil Code. Consequently, in accordance with the Persian legal system, in view of the non-autonomous nature of the minerals before extraction and of the impossibility of comparing mineral products with fruits, it is clear that the holder of the Concession cannot acquire the ownership of such mineral products prior to their extraction. Prior to extraction, the ownership of the mineral (a future commodity, not yet in existence, and not a fruit) was vested in the owner of the mine, in respect of which the holder of the Concession had a mere *jus adquirendi*, which could be converted into a right of ownership only by the exercise of the right of extraction and acquisition granted to the said Company.

"It is not surprising, therefore, that the Concession Agreement endeavoured to confirm the legal position by the unambiguous expression '*obtenue par elle*' (obtained by it). And for that reason also, the application is rejected."

[Reports: *Foro Italiano*, 1955, I, p. 256; *Rivista di diritto internazionale*, 39 (1955), p. 97.]

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[1] Decision of the Court of Cassation of Turin of December 14, 1903; *Foro Italiano*, 1904, p. 334.

Recognition of Acts of Foreign Governments—Revenue Laws of Another State—Whether Enforceable—Indirect Enforcement—Liquidation of Scots Company—Removal of Assets to Eire—Fraud on Scots Revenue Laws—Attempt of Scots Liquidator to Recover in Courts of Eire.

BUCHANAN AND MACHARG *v.* MCVEY.[1]

Eire, High Court of Justice. July 21, 1950.

(Kingsmill Moore J.)

Supreme Court. June 19, 1951.

(Maguire C.J., Murnaghan and O'Bryne JJ.)

THE FACTS.—Peter Buchanan Ltd., wine and spirit merchants, was a company incorporated in 1930 under the British Companies Act, having its registered office in Scotland. In 1937 the defendant had acquired control of it, holding eventually ninety-nine of the 100 shares, the remaining one being held by Miss Farquharson, a confidential cashier, who held this one share as trustee for the defendant. The defendant had also acquired control of two other wine merchanting companies, Henry Simpson & Co. Ltd., and James McVey Ltd. The Company became in a position to make very large profits from the sale of its whisky stocks.

When the price of whisky was soaring, the defendant disposed of his interests in the two other companies on very advantageous terms, having first been advised by the Inland Revenue authorities that the transaction would not attract excess profits tax. But subsequently the Finance Act, 1943, operating retroactively, made the transactions taxable and the defendant, in 1944, was assessed in sums amounting to £155,188. The defendant devised a simple plan to evade this tax by disposing of his valuable whisky stocks to safe hands in Eire and in due time following his money to that jurisdiction where, he was advised, he might safely defy the Scottish Revenue. This operation was successfully accomplished.

The Scottish Revenue, having been apprised of what was going on, made an assessment on the company of £370,000 for excess profits tax and £15,000 for income tax, and then moved the Scottish courts to order the winding up of the Company. Andrew (later Sir Andrew) Macharg was made liquidator "to chase the tax". In a suit in the Scots Court the defendant, in default of appearance, was required to pay £303,179 6s. 11d. Finally, in 1947, a summons was issued in the Irish courts for an account.

For the defence it was said, first, that the defendant was not liable to account as a shareholder, and that what he did was, *quoad* the Company, unexceptionable. It was true that the questions concerning the internal organization or validity of the Company's acts would ordinarily fall to be determined by Scots law. And since the object of the present transaction was to defraud Scots revenue, by Scots law the agreement between the corporators was fraudulent. But it was not all Scots law that was applicable; "the court could not recognize or even inform itself of the revenue provisions of another country; therefore it must blind its eyes to the existence of excess profits tax and, so doing, find that the distribution now called in question was made out of net profits."

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[1] Though decided in 1951, this case was first fully reported as a Note in L.R. [1955] A.C. 516. It is now also reported in [1954] I.R. 89, which appeared in 1956.

Secondly, it was argued for the defence that the Court would not in any case give its aid to collect the taxes of a foreign country.

Held (by Kingsmill Moore J., and affirmed by the Supreme Court): that the suit must be dismissed.

Kingsmill Moore J., after describing the facts, turned to the defence's first argument, and said: "In *Holman* v. *Johnson* (1775) 1 Cowp. 341, 343, decided in 1775, Lord Mansfield C.J. is reported as saying:

> 'There are a great many cases which every country says shall be determined by the laws of foreign countries where they arise. But I do not see how the principles on which that doctrine obtains are applicable to the present case. For no country ever takes notice of the revenue laws of another.'

Four years later, in *Planché* v. *Fletcher*, (1779) 1 Doug. 251, 253, the Chief Justice repeated his view as to the non-recognition of revenue laws of a foreign country. In *James* v. *Catherwood* (1823) 3 Dow. & Ry. K.B. 190, 191, Abbott C.J., with whom Holroyd and Best JJ. concurred, said:

> 'It has been settled, ever since the time of Lord Hardwicke, that in a British court we cannot take notice of the revenue laws of a foreign State.'

"Despite the embracing terminology of those pronouncements, the courts, from early times, have not followed them to the full extent of their meaning. In *Alves* v. *Hodgson*, (1797) 7 Term Rep. 241, *Clegg* v. *Levy* (1812) 3 Camp. 166, and *Bristow* v. *Sequeville* (1850) 5 Ex. 275, it was recognized that a contract which was avoided in the foreign country where it was made by reason of the absence of a requirement of a stamp was a foreign revenue provision. The effect of these decisions has been summarized by Tomlin J. in *In re Visser; Queen of Holland* v. *Drukker* [1928] Ch. 877, 883[1]:

> 'All that those cases do is to indicate that however willing the courts may be to recognize foreign law, there are certain cases in which, although they do not enforce the foreign law, they are bound to recognize some of the consequences of that law—namely, those cases when, as one of the terms of the law, contracts are rendered invalid by the foreign law.'

"Lord Mansfield's pronouncement has also been the subject of criticism by judges and the writers of textbooks. Anson's *Law*

[[1] *Annual Digest*, 1927–1928, Case No. 18.]

of Contracts, 19th ed., p. 218, says that there is no trustworthy authority for it. Dicey questions it in the 5th edition of his *Conflict of Laws* (pp. 657–8, n. (q)), and it is disapproved by the editors of the 6th edition (p. 607). Sankey L.J., in *Foster* v. *Driscoll*, [1929] 1 K.B. 470, 516 *et seq.*, clearly considers the statement too wide, and Scrutton L.J. reserved liberty to consider it in *Ralli Brothers* v. *Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287, 300.

" I doubt whether Lord Mansfield intended his remarks to preclude a court from informing itself as to the provisions of a foreign revenue law in order to determine the question whether a foreign transaction was or was not fraudulent and void according to the law of that country. But, if he so intended, having regard to the cases and opinions I have cited, I must refuse to follow his view. The agreement between the defendant and Miss Farquharson was one to commit a fraud on the Scottish Revenue. It was not ' honest ' and so by Scots law, which I hold to be applicable, it was neither a valid act of the company nor effective to bind the company. The company is entitled to question its validity when in a position to do so.

" Mr. Leonard's second submission leads into a region where the law cannot be considered free from doubt. He adopted, as a summary of his argument, two passages from Dicey's *Conflict of Laws*, 6th ed., General Principle No. 2 (p. lxv) and Rule 22 (p. 152). The passages are as follows:—

' General Principle No. 2: " English courts will not enforce a right otherwise acquired under the law of a foreign country *which is ordinarily applicable in virtue of English rules of the conflict of laws;* (A) where the enforcement of such right *involves the enforcement of foreign penal or confiscatory legislation or a foreign revenue law* . . ."

' Rule 22: " The court has no jurisdiction at common law to entertain an action (1) for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State . . ." '

" The principle that ' the courts of no country execute the penal laws of another ' has long-standing authority both in England and in the United States. In England it was recognized in *Folliott* v. *Ogden* (1789) 1 H.Bl. 123, 131, decided in 1792, and in *Wolff* v. *Oxholm* (1817) 6 M. & S. 92, decided in 1817. The words quoted come from the famous judgment of Marshall C.J. in *The Antelope* (1825) 10 Wheat. 66, 123, decided in the United States in 1825, and were cited and adopted in *Huntington* v. *Attrill* [1893] A.C. 150, 156.

" The application of the principle to revenue laws may be as old, though there is no reported case which lays it down before the present century. In *In re Visser, Queen of Holland* v. *Drukker* [1928] Ch. 877, 881–2, Tomlin J. said:

'It seems to be plain that at any rate for somewhere about 200 years, since the time of Lord Hardwicke, the judges have had present to their minds the motion, and have repeatedly said that the courts of this country do not take notice of the revenue laws of foreign States.'

While admitting that there was no actual reported English decision on the point till 1909, he went on to say:

> 'My own opinion is that there is a well-recognized rule, which has been enforced for at least 200 years or thereabouts, under which these courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States; and this is one of those actions which these courts will not entertain.'

"The principle as applied to revenue laws had been clearly recognized in the United States as far back as 1843 by Parker C.J. when giving judgment in *Henry* v. *Sargeant*, (1843) 13 N.H. 321, but the uncertain state of English authority may be gathered from the absence of any statement as to non-enforcement of revenue laws from the first two editions of Dicey. It appeared for the first time in the 3rd edition, published in 1922 [p. 230].

"The first specific decision seems to have been given by Lord Stormonth Darling in *Attorney-General for Canada* v. *William Schulze & Co.* (1901) 9 S.L.T. 4. The defendants had imported into Canada tweeds which had been seized by the customs for alleged infringements of revenue laws. On an appeal to the Canadian courts against the validity of the seizure the court awarded costs against the defendants (appellants). The Attorney-General for Canada sued subsequently in the Scottish Courts on foot of the Canadian judgment for costs. Lord Darling dismissed the action saying:

> 'It is a well-established rule of international law that the courts of one country will not execute or enforce the penal law of another; and this rule applies "not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of its statutes for the protection of its revenue or other municipal laws and to all judgments for such penalties". I quote these words from the opinion of an American judge, because they were adopted with approval by their Lordships of the Privy Council in the case of *Huntington* v. *Attrill*. . . . The question between the parties was truly whether the forfeiture was lawful, and if the defenders had succeeded the forfeiture would have been annulled. Accordingly, the suit was truly a revenue suit; that is to say, in the sense of the international rule, it was a penal suit. The only question, therefore, is whether the costs of this penal suit can be so dissociated from the suit itself as to fall outside the rule of international law.'

The learned Judge held that the costs could not be so dissociated. This case may perhaps be regarded more properly as an illustration of that branch of the principle which lays down that this court will not enforce penalties for the infringement of foreign laws than as an example of the branch which prohibits the court from enforcing the provisions of foreign laws of a revenue nature. The next case, however, suggests that there is no real reason for distinguishing between those two branches. In *Sydney Municipal Council* v. *Bull* [1909] 1 K.B. 7, the Council sued the defendant in England for municipal improvement rate in respect of land in Australia. Grantham J. dismissed the action and said:

> 'Some limit must be placed upon the available means of enforcing the sumptuary laws enacted by foreign States for their own municipal purposes . . . The action is in the nature of an action for a penalty to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has always been held that an action will not lie outside the confines of the last-mentioned State.'

"In *In re Visser, Queen of Holland* v. *Drukker* [1928] Ch. 877, Her Majesty sued in England the administrator of the estate of a Dutch subject who died domiciled in Holland, to recover Dutch death duties. Tomlin J. dismissed the suit on the authority of the last-mentioned case, indicating in the passages already quoted his own opinion of the antiquity of the rule.

"Three modern dicta may be mentioned, occurring in cases which are not themselves direct authorities. In *Indian and General Investment Trust Ltd.* v. *Borax Consolidated Ltd.* [1920] 1 K.B. 539, 550, Sankey J. said:

> 'Whilst it is the duty of an English court to enforce an English taxing Act, it is no part of its duty to enforce the taxing Act of another country.'

Lord Moulton delivering the judgment of the Privy Council in *Cotton* v. *Rex*, [1914] A.C. 176, 195, said:

> 'There is no accepted principle in international law to the effect that nations should recognize or enforce the fiscal laws of foreign countries.

And in *In re Cohen (a Bankrupt)* [1950] 2 All E.R. 36, 39, Evershed M.R. said:

> 'As is well known, it is not the practice of civilized countries, such as France and England, to enforce the revenue laws of the other of them.'

"These decisions establish that the courts of our country will not enforce the revenue claims of a foreign country in a suit brought for the purpose by a foreign public authority or the representative of such an authority, and that, even if a judgment for a foreign penalty or debt be obtained in the country in which it is incurred, it is not possible successfully to sue in this country on such judgment. They do not expressly go further, though some of the dicta suggest that there may be a principle that our courts will not lend themselves indirectly to the collection of a foreign tax and not entertain a suit which is brought for that object. Such a wide extension is also suggested by the authorities which establish that our courts will not entertain an action for the enforcement of a penalty imposed by the laws of a foreign State, a principle which seems to have been the parent of the rule as to not enforcing foreign revenue claims. I will refer only to three of the cases on penalties.

"*Huntington* v. *Attrill* [1893] A.C. 150 was a decision by the Privy Council in which the judgment was delivered by Lord Watson. The appellant had subscribed to a New York company on the faith of a certificate signed by the respondent and other to the effect that the whole capital of the company had been paid up in cash. The statement was false. A statute of New York provided that if any certificate given by the officers of a corporation should be false in any material representation, all the officers who should have signed it should be jointly and severally liable for the debts of the corporation contracted while they were in office. The appellant, having failed to recover his money, sued in Ontario the respondent, who had been a director of the company and had signed the certificate. The defence was that the statute imposed a penalty and so had no extra-territorial effect. The Privy Council held that, viewing the essence of the matter, the statute was not penal because it was enacted not for the benefit of the State, nor primarily as a punishment, but as a means of redress for an injured individual. Lord Watson said:

> 'The court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State.'

He continued:

> 'The rule has its foundation in the well-recognized principle that . . . all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of someone representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the courts of any other country.'

"In *Raulin* v. *Fischer* [1911] 2 K.B. 93, the defendant had been prosecuted in the French courts for negligent riding whereby she injured the plaintiff and, under the provisions of French law, in the same proceedings and by the same court she was condemned to pay 15,000 francs to the plaintiff in respect of his injuries. For this sum she was subsequently sued in England, and Hamilton J. held that he must determine for himself 'whether the enforcement of the plaintiff's rights would either directly or indirectly involve the execution of the penal law of another State.' He held that the penal element in the proceedings could be separated from the remedial and gave judgment for the plaintiff.

"Finally there is *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria* [1935] 1 K.B. 140.[1] The ex-King of Spain had deposited with the Westminster Bank certain securities with instructions that they were to be held to the order of the Banco de Vizcaya as his agents. After the revolution the ex-King claimed the deposits

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[1 *Annual Digest*, 1933–1934, Case No. 56.]

and they were at the same time claimed by the Spanish bank, on the ground that by decree of the Spanish Government all the property of the King had been confiscated to the State and all Spanish bankers having such property or deposit had been ordered to deliver it to the Spanish Treasury. In an interpleader issue Lawrence J. rejected the claim of the bank, holding that the substance of the right sought to be enforced by the bank was the delivery to it of the security, and that the enforcement of such right would directly or indirectly involve the execution of what were undoubtedly and admittedly penal laws of the Spanish Republic. He rejected the argument that the bank was only enforcing its own contractual rights against the Westminster Bank. In substance it was not enforcing its own contractual rights but the rights of the Spanish Republic.

" Those cases on penalties would seem to establish that it is not the form of the action or the nature of the plaintiff that must be considered, but the substance of the right sought to be enforced; and that if the enforcement of such right would even indirectly involve the execution of the penal law of another State, then the claim must be refused. I cannot see why the same rule should not prevail where it appears that the enforcement of the right claimed would indirectly involve the execution of the revenue law of another State, and serve a revenue demand. There seems to me to be a reasonably close parallel between the position of the Banco de Vizcaya and the present plaintiff. In each case it is sought to enforce a personal right, but as that right is being enforced at the instigation of a foreign authority, and would indirectly serve claims of that foreign authority of such a nature as are not enforceable in the courts of this country, relief cannot be given.

" I do not consider it necessary to comment on the decision of the House of Lords in *Kahler* v. *Midland Bank Ltd.* [1950] A.C. 27, or the criticism which has been passed on the judgment of the majority in that case, for it appears that the decision turned on questions of fact and the form of the pleadings, and that the learned Lords who formed the majority of the court did not purport or intend to lay down any new law on the question of the non-enforceability of the penal legislation of a foreign country.

" In the absence of any express authority defining the limits of the principle that the revenue legislation of a foreign State will not be given effect, directly or indirectly, in our domestic tribunal, it is natural to seek for guidance in the reasons which were assigned for establishing this principle when it was first enunciated. Here again the decisions on this side of the Atlantic afford no assistance. The principle is stated as if it were of long standing and so well established, so self evident, as to require no justification. An attempt at analysis of the underlying considerations was, however, made in 1929 by an eminent United States jurist, Judge Learned

Hand. In the case of *Moore* v. *Mitchell* (1929) 30 F. (2d) 600, 604, he delivered a special concurring judgment as follows:

> ' While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign State, if they run counter to the " settled public policy " of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic State. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens or even those who may be temporarily within its borders. To pass judgment upon the provisions for the public order of another State is, or at any rate should be, beyond the powers of a court; it involves the relations between the State themselves, with which courts are incompetent to deal, and which are entrusted to other authorities. It may commit the domestic State to a position which would seriously embarrass its neighbour. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.'

" Judge Learned Hand is well known as an authority on the conflict of laws in a country where the existence of so many co-ordinate State jurisdictions has given to this branch of law a special importance and has caused it to be studied extensively. Whatever be the origin of the rule, the Judge's statement of the practical basis which led to its adoption in the courts of common law and his reasons for its observance seem to me convincing and illuminating. Moreover, they suggest the importance of guarding any attempt to evade the rule or to whittle away the scope of its application.

" In deciding cases between private persons in which there is present such a foreign element as would ordinarily induce the application of the principles of a foreign law, courts have always exercised the right to reject such law on the ground that it conflicted with public policy or affronted the accepted morality of the domestic forum. Contracts valid according to what would normally be considered ' the proper law ' of the contract will not be enforced if in the view of the court they are tainted with immorality of one kind and another. Delicts committed abroad are not actionable here unless they are torts by our law. Slavery, or any other status involving penal or private disabilities, is not recognized, If, then, in disputes between private citizens, it has been considered necessary to reserve an option to reject foreign law as incompatible with the views of the community, it must have been equally, if not more, necessary to reserve a similar option where an attempt was made to enforce the governmental claims (including revenue claims) of a foreign State. But if the courts had contented themselves with an option to refuse such claims, instead of imposing a general rule of exclusion, the task of formulating and applying the principles of selection would have been one not only of difficulty but danger, involving inevitably an incursion into political fields with grave risks of embarrassing the executive in its foreign relations and even of provoking international complications. Neither common morality nor ‘ settled public policy ’ would have sufficed to cover the area of necessary rejection; for the nature and incidence of governmental and revenue claims are not dictated by any moral principles but are the offspring of political considerations and political necessity. Taxation originally expressed only the will of the despot, enforceable by torture, slavery and death. Though it may be conceded that in modern times it is more often designed to further a benevolent social policy, and that the civil servant has usurped the position of the executioner as the agent of enforcement, yet in essence taxation is still arbitrary and depends for its effectiveness only on the executive power of the State. Nor is modern history without examples of revenue laws used for purposes which would not only affront the strongest feelings of neighbouring communities but would run counter to their political aims and vital interests. Such laws have been used for religious and racial discrimination; for the furtherance of social policies and ideals dangerous to the security of adjacent countries; and for the direct furtherance of economic warfare. So long as these possibilities exist it would be equally unwise for the courts to permit the enforcement of the revenue claims of foreign States or to attempt to discriminate between those claims which they would and those which they would not enforce. Safety lies only in universal rejection. Such a principle appears to me to be fundamental and of supreme importance.

“ If I am right in attributing such importance to the principle, then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its revenue authority. In every case the substance of the claim must be scrutinized, and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected. Mr. Wilson has pressed upon me the difficulty of deciding such a question of fact and has relied on ‘ *ratio ruentis acervi* ’. For the purpose of this case it is sufficient to say that when it appears to the court that the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction.

“ If the strict application of the principle were in any way relaxed evasion would be easy and the court would be faced with all the difficulties which the adoption of the rule was designed to avoid.

One example will suffice to demonstrate this. Apart from any statutory provisions (such as govern the enforcement of English bankruptcies in this country) the accepted rule is that: ' An assignment of a bankrupt's property to the representative of his creditors under the bankruptcy laws of any foreign country, to whose jurisdiction he is properly subject . . . operates as an assignment of the movables of the bankrupt situate in England,' (Dicey's *Conflict of Laws*, 6th ed., Rule 99, p. 440). A national of a foreign country after incurring a debt to its revenue, comes to Ireland bringing with him a quantity of movables. The foreign revenue instead of courting certain defeat by suing him here in its own capacity resorts to bankruptcy proceedings in its own country (as in the case of *In re Cohen* [1950] 2 All E.R. 36), and the creditors' assignee seeks to enforce his claim here. In the course of the hearing it appears that the tax was incurred as the result of discriminatory legislation of a type repugnant to the political views of the enormous majority of the citizens of this country and that the bankrupt has sought asylum herein as a political refugee, bringing with him the remnants of his fortune. The court may admit the claim, may refuse because of the nature of this legislation, or may reject it on the broad principle that it is an attempt to collect the tax on a foreign revenue. To do the first would be to bring the courts into contempt in the eyes of the people and to offend against their own highest principles; to do the second would be publicly to censure the behaviour of a foreign State, a procedure dangerous and possibly arrogant; in the third course alone safety, propriety and a recognition of the feeling of the community are combined.

" I hold as a fact—and, indeed, I understand it to be admitted—that the sole object of the liquidation proceedings in Scotland was to collect a revenue debt. There is no evidence that any ordinary creditor would not have been paid in full out of the assets left in Scotland, and as far as ordinary creditors are concerned the result of the liquidation proceedings in Scotland would be to deprive them of payment by reason of the priority in Scotland of a revenue debt. I hold that the sole object of the present proceedings before me is also to collect a Scottish revenue debt, and that if I were to decide for the plaintiff the only result of those proceedings would be that every penny recovered after paying certain costs and liquidators' remuneration could be claimed by the Scottish Revenue. That, in my opinion, is the substance of the suit—to collect the revenue claim of a foreign State. Being of this opinion, I reject the claim."

The judgment of the Supreme Court was given by Maguire J. who, after describing the issue and discussing some authorities, said: " It is submitted by counsel for the appellant that the trial Judge considering whether the rule was applicable here should have concerned himself solely with what was the legal effect of the proceedings and not with the indirect result of them. The well-known dictum of

Lord Tomlin in *Inland Revenue Commissioners* v. *Duke of Westminster* [1936] A.C. 1 was cited. In that case the Duke had so arranged that an annuity took the place of what had formerly been wages. Lord Tomlin said:

> 'Apart, however, from the question of contract, with which I have dealt, it is said that in revenue cases there is a doctrine that the court may ignore the legal position and regard what is called "the substance of the matter," and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages, and that therefore, while he is so serving, the annuity must be treated as salary or wages.'

Rejecting this supposed doctrine Lord Tomlin said:

> 'This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable.'

" It is argued that while a company is in liquidation it is still a company and operates in Scotland by its liquidator. A foreign State, it is said, recognizes the title given to a liquidator by the laws of his country. I agree that if the payment of a revenue claim was only incidental and there had been other claims to be met, it would be difficult for our courts to refuse to lend assistance to bring assets of the company under the control of the liquidator. But there is no question of that here. The position seems clearly to be as found by the trial Judge, that these proceedings were started in Scotland with the purpose of collecting a tax—and that apart from costs and the expenses of the liquidator any moneys recovered will inevitably pass to the Revenue.

" The first step in the proceedings against the defendant was taken following the assessment on January 18, 1945, on the company of £370,000 in respect of excess profits and £15,000 in respect of income tax. These assessments were confirmed on appeal on March 1. A petition was then issued at the suit of the Lord Advocate suing on behalf of the Inland Revenue to wind up the company compulsorily. On May 2, the Scottish courts made an order for winding up and appointed Sir Andrew Macharg as liquidator on the application of the petitioners. No other creditor is shown to have any claim. In these circumstances the conclusion of fact at which the judge arrived, that the sole object of the liquidation proceedings in Scotland was to collect a revenue debt—and that, apart from the costs and expenses of the liquidator, any moneys received would inevitably pass to the Revenue—was amply justified.

" The point raised by the notice of the respondents of an application to vary the order of the High Court only affects the question of costs. The defendant claimed that what he did quoad the company was unexceptionable. It is admitted that there was no formal meeting of the company to authorize the disposal of its property to the defendant and no formal resolution to that effect. It is, however, settled law that no meeting and no formal resolution is necessary. It is necessary, however, that an agreement of this kind to be valid must both be intra vires the company and must be honest. The trial Judge held that neither of these requisite conditions were fulfilled. As pointed out by the Judge, a company may not, save in exceptional circumstances, reduce its capital to its members. What happened here could not properly be described as a reduction of capital. It was, however, the return of capital by the company to its members. This was done at a time when there was no outstanding liability save the threatened claim for tax. This did not materialize in the form of an assessment until after the disposal by the company of its assets. Accordingly, there was no immediate liability to tax: *In re Winget Ltd.*, [1924] 1 Ch. 550. I consider, however, that the Judge was right in holding that the company was bound to have regard to the fact that such an assessment was pending and that it was not then in a position to estimate the amount of profits or assets which could properly be distributed amongst its members. I am, furthermore, in agreement with the trial Judge that, from the viewpoint of Scottish law, to do so was not honest. In applying both these tests it is necessary to take notice of the claim of the Scottish Revenue. Again, however, I am in agreement with the trial Judge that to take notice of the revenue law of a foreign country in order to apply these tests is not to conflict with the proposition of law which I have already accepted, that no country will enforce the revenue law of a foreign country. In his judgment in *In re Visser, Queen of Holland* v. *Drukker* [1928] Ch. 877, Tomlin J. has shown that in certain cases it is necessary to recognize foreign law. Explaining *Alves* v. *Hodgson*, 7 Term Rep. 241, *Clegg* v. *Levy*, 3 Camp 166, and *Bristow* v. *Sequeville* 5 Ex 275, he said:

> ' All that those cases do is to indicate that however unwilling the courts may be to recognize foreign law, there are certain cases in which, although they do not enforce foreign revenue law, they are bound to recognize some of the consequences of that law—namely, those cases where, as one of the terms of that law, contracts are rendered invalid by the foreign law.'

" It seems impossible, in considering whether the acts of the members of the company were intra vires and honest, to avoid giving the same limited recognition to the revenue laws of Scotland.

" Accordingly, I am of opinion that the Judge was right on both of the points argued in this case. The appeal should be dismissed. The application of the respondent should also be refused."

[Report: [1954] I.R. 89.]

Recognition of Acts of Foreign Governments—Recognition of Law Enacted by Unrecognized Government.

See p. 97 (*In the Estate of Pikelny*).

V. Continuity of States.

[*See also below*, E, State Succession.]

States—Continuity of—Incorporation of Austria into German Reich—Subsequent Re-establishment of Independent Austrian State—Operation of Treaties Concluded by Austria prior to Incorporation into Reich—Whether such Treaties Operative after Re-establishment of Austrian State.

SECURITY FOR COSTS (AUSTRIA) CASE.

Austria, Supreme Court. August 3, 1955.

THE FACTS.—The respondent, a French national, was plaintiff in an action before an Austrian court. The defendant applied for security for costs. His application was refused on the ground that a Treaty concluded between Austria and France on March 4, 1925, provided that the nationals of each of the Contracting Parties were exempt from the requirement of providing security for costs in legal proceedings in the courts of the other. The defendant appealed against the refusal of his application and contended that as the Franco-Austrian Treaty of March 4, 1925, had lapsed as the result of the incorporation of Austria into the German Reich, the respondent was not entitled to rely on it, notwithstanding the re-establishment of an independent Austrian State in 1945.

Held: that as the State of Austria had continued to exist as a legal entity throughout the period of incorporation into the German Reich, and as the French courts accorded the benefits of the Treaty of March 4, 1925, to Austrian nationals, the Treaty remained applicable, and the plaintiff was accordingly entitled to exemption from the requirement of security for costs.

The Court said: " The Court of first instance ordered the plaintiff to provide security for costs, alternatively to swear to his inability to do so. The Appeal Court refused the application of the defendant. It took the view that the plaintiff, a French national, need not provide security, on the ground that the Treaty of Judicial Assistance and Legal Aid between Austria and France, dated March 4, 1925, is still in force. It said that Article 2 of this Treaty provides for the exemption of nationals of the other Contracting Party from the requirement of providing security for costs. The defendant's appeal is not well-founded. It is quite true that section 53 of the Decree on Judicial Assistance, of October 29, 1951, does not mention the Treaty of March 4, 1925, among the treaties which are at present applicable. According to information received from the Federal Ministry of Justice, the continued application of this Treaty could not be provided for (in this Decree) because the French Government had intimated some time before that the determination of the question whether this Treaty continues to apply must be left to the courts. Contrary to the contention of the appellant, it does not follow from the failure to mention the Treaty in the Decree of 1951 that the Treaty is no longer applicable. Neither the Austrian nor the French Government denies the continued operation of the Treaty. The French Government has left the determination of this question to the courts, while the Austrian Government, though regarding the continued operation of the Treaty as doubtful, does not in any way wish to prevail upon the courts. At present, however, there is no reason to enquire into the continued operation of the Treaty. The French courts (*Tribunal de Commerce de la Seine* and *Tribunal de première instance de la Seine*) have affirmed—by reference to the Moscow Declaration of October 1943—the legal continuity of the Austrian State from 1918 until the present day and have therefore decided, also having regard to the fact that there was no state of war between France and Austria from 1939 until 1945, that the Treaty continues in operation. Reciprocity thus appears guaranteed, in the absence, as far as our knowledge goes, of decisions to the contrary. The decision of the Appeal Court is therefore justified."

[Report: *ÖJZ*, 1955, Ev. Bl. 346/1955.]

States—Continuity of—German Federal Republic and German Reich.

See p. 943 (*The German Civil Service Case*).

States—Continuity of—Status of Saar Territory—Whether Part of Germany—Request by Saar Authorities for Rendition of Suspected Criminal—Whether Request concerns Rendition within Same Country or Extradition between Different Countries—The Law of Germany.

See p. 512 (*Rendition of Suspected Criminal* (*Saar Territory*) *Case*).

States—Continuity of—Incorporation of Austria into German Reich—Subsequent Severance of Austria from Reich—Reconstitution of Austrian State—Effect on Nationality—Relevance of Intention of Persons Affected.

See p. 430 (*Austrian Nationality Case*).

B—COMPOSITE AND DEPENDENT STATES AND TERRITORIES

I.—Unions of States

ii.—Other Unions (Including Customs Unions)

Unions of States—French Union—Whether Morocco Part of French Union—Privileges of Nationals of French Union in Metropolitan France—Whether Moroccan Nationals Entitled to Privileges—Expulsion Order against Moroccan Nationals—The Law of France.

Re HAMOU BEN BRAHIM BEN MOHAMED, OTHERWISE PACI.

France, Conseil d'État. March 18, 1955.

THE FACTS.—A French Ordinance of November 3, 1945, provides —as far as here material—that any alien may be expelled from France. Aliens within the meaning of the Ordinance are "all persons who do not possess French nationality, either because they possess a foreign nationality or because they have no nationality". The appellant was a Moroccan national whose expulsion from France had been ordered by the Minister of the Interior. He appealed against the Minister's order and contended that Moroccan subjects were "nationals of the French Union" (*ressortissants de l'Union française*) who, by virtue of the French Constitution, were entitled to the rights and freedoms therein provided, including the right of residence, and that accordingly the Minister was not entitled to order his expulsion.

Held: that Moroccan subjects were not nationals of the French Union, and that the Minister of the Interior was therefore entitled to order the appellant's expulsion from France, in accordance with the Ordinance of November 3, 1945.

The Court said: "According to Articles 23 *et seq.* of the Ordinance of November 3, 1945, 'any alien may be the subject of an expulsion order, under the conditions laid down in the said provisions'. According to Article 1 of the Ordinance, 'aliens within the meaning of this Ordinance are all persons who do not possess French nationality, either because they possess a foreign nationality, or because they have no nationality'. It follows clearly from the French Nationality Law of October 19, 1945, that Moroccan subjects do not possess French nationality. There is no law or treaty which has the effect of exempting Moroccan subjects, *qua* subjects of a French State or Protectorate, from the application of the aforementioned provisions of the Ordinance of November 2 [*sic*], 1945. Even though Article 81 of the French Constitution confers upon nationals of the French Union the status of citizens of the French

Union, which assures them of the enjoyment of the rights and liberties guaranteed by the preamble thereof, and even though these nationals are thus entitled to the right of residence and unrestricted movement within the territory of France and cannot legally be expelled from that territory, the fact remains that Moroccan nationals are not, as the law stands at present, nationals of the French Union who can rely on the provisions of Article 81 of the Constitution. It follows that the appellant, a Moroccan national, cannot validly contend that his status as the subject of a protected State precluded the Minister of the Interior from ordering his expulsion from French territory."

The Court then dealt with certain allegations to the effect that the Minister of the Interior had failed to observe the formal requirements of serving the expulsion order on the appellant, and in the result rejected the appeal.

[Report: *Revue juridique et politique de l'Union française*, 1955, p. 405.]

II.—British Commonwealth of Nations

British Commonwealth of Nations—Nationality and Citizenship—British Nationality and Status of Aliens Act, 1914, Sec. 26 (1)—British Nationality Act, 1948, Sec. 2 (2) (d)—Immigration—Powers of Colonial Legislatures to Restrict Entry of British Subjects into the Colonies—" Citizens of the United Kingdom and Colonies "—Meaning of.

MUSSON AND MUSSON *v.* RODRIGUEZ.

Trinidad, Supreme Court of Trinidad and Tobago. April 16, 1952.

(Furness-Smith C.J., Vincent Brown and Duke JJ.)

THE FACTS.—This was an appeal from a removal order made by a Magistrate under section 23 of the Immigration Ordinance (Ch. 20, No. 2). The material circumstances were as follows: On January 16, 1952, the appellants, citizens of the United Kingdom and Colonies, received notice signed by the Deputy Chief Immigration Officer informing them that they had been deemed by the Governor in Council under paragraph (h) of section 4 (1) of the Immigration (Restriction) Ordinance to be undesirable visitors to the Colony and therefore prohibited immigrants. The notice required them to leave the Colony on or before February 14, 1952. That date was by subsequent notices extended to February 25, 1952. The appellants did not comply with this notice, and the Immigration Officer obtained a warrant for their arrest. The appellants pleaded " not guilty " and submitted that no case had been made out against them. The complainant subsequently applied for leave to amend the complaint by addition of an application for the removal of the appellants in accordance with section 23 (1) of the Ordinance. A removal order was made.

The Court had to construe the meaning of the term " citizen of the United Kingdom and Colonies ", as used in the British Nationality Act, 1948. First it disposed of certain preliminary objections to jurisdiction, ruling that a removal order made by a Magistrate under section 23 (2) of the Immigration (Restriction) Ordinance was subject to appeal to the Full Court; that there was satisfactory evidence that the appellants had been deemed undesirable visitors to the Colony by the Governor in Council; and that the proceedings were not vitiated by amendment of the complaint at the conclusion of the case for the prosecution.

Held: (a) that the repeal of section 26 (1) of the British Nationality and Status of Aliens Act, 1914, by the British Nationality Act, 1948, did not by implication or necessary intendment withdraw from Colonial Legislatures the power of restricting the entry of British subjects into the Colonies; and (b) that the British Nationality Act, 1948, did not, by the creation of the status of citizenship of the United Kingdom and Colonies, confer on persons enjoying such status any rights other than those of British nationality as opposed to alien nationality. The word " citizen " in the Act must be construed as denoting membership of a particular geographical area for the limited purpose of determining nationality, and no meaning could properly be assigned to it beyond that limited purpose. The appellants, though citizens of the United Kingdom and Colonies, were not citizens of Trinidad and Tobago in the sense that they were entitled to enjoy any special rights or privileges therein, which were reserved to those who belong to the Colony by virtue of the qualifications specified in section 2 (2) of the Immigration (Restriction) Ordinance.

The Court said (*per* Furness-Smith C.J.): " The principal and most important submission which has been made in this appeal concerns the interpretation of the British Nationality Act, 1948 . . . It is said that, prior to the enactment of section 26 (1) of the British Nationality and Status of Aliens Act, 1914, the common law rule was that every British subject is free to enter and remain in British Territory without restriction (save in breach of the criminal law), and that it was only by virtue of that section that Colonial legislatures derived power to abrogate that principle. I would first observe that, assuming that this is a correct statement of the common law on the subject, I am aware of no such restriction on the powers of Colonial legislatures . . ."

The Chief Justice then referred to the Act of 1914, section 26 (1) of which provides:

> " Nothing in this Act shall take away or abridge any power vested in, or exercisable by, the Legislature or Government of any British

> Possession, or affect the operation of any law at present in force which has been passed in exercise of such a power, or prevent any such Legislature or Government from treating differently different classes of British subjects."

The Chief Justice continued: " When therefore the Act of 1948 expressly repeals that section of the 1914 Act, it is argued that the intention must necessarily be to withdraw the power from Colonial legislatures adversely to affect British subjects in that way. The fallacy in that argument is, first that the power residing in Colonial legislatures to over-ride the common law is derived from the Colonial Laws Validity Act, 1865, which remains unaffected by the 1948 Act, and next that it is manifest from section 31 of the 1948 Act, that the classes of British subjects which are referred to in section 26 (1) of the 1914 Act, are not those comprising the members of different States within the British Commonwealth, but classes determined by the place of birth or naturalization.

" The second phase of the argument . . . is as follows: Since the 1948 Act confers upon British subjects the status of citizenship within a single area or unit which is described in the Act as ' the United Kingdom and Colonies ' it follows that such persons are citizens also of every individual Colony within that area or unit. Since the description as a ' citizen ' of a country, it is said, necessarily implies the right of unrestricted entry and residence within that country, the provisions of the Immigration Ordinance which restrict such entry and residence in the case of persons who do not ' belong to ' Trinidad within the meaning of the Ordinance are in conflict with the 1948 Act and therefore void for repugnancy. A number of passages from the work of Mr. Clive Parry entitled *British Nationality* were cited which, taken out of their context, might be thought to confirm this interpretation of the effect of the 1948 Act, but it is significant that nowhere in that work is it stated that the effect and intention of the Act is to confer upon citizens of the United Kingdom and Colonies citizenship rights in every individual territory which is included in that geographical area . . .

" The design of the Act . . . is to provide a common code whereby the status of British subjects (as opposed to that of aliens) throughout the Commonwealth is defined. With that object in view the Commonwealth is divided into nine territorial areas, one of which is that comprised by the United Kingdom and Colonies. The division is merely one of convenience for the purpose of defining the qualifications for British nationality within that area. I can find no indication in the terms of the Act itself, or in the commentaries upon it, that the use of the word ' citizen ' was intended to confer any rights other than those of nationality. The rights, privileges and benefits conferred by British nationality are substantial, and so also are its duties and obligations, but they are very different in many respects both as to character and scope from the rights, privileges, benefits, duties and obligations arising from citizenship of a single Colony or country having its own independent government which forms part of the association of states known as the British Commonwealth. The word ' citizen ' as used in the 1948 Act, must, in conformity with its context, be interpreted as denoting membership of a particular geographical area for the limited purpose of determining nationality, and no meaning can properly be assigned to it which would extend the operation and effect of the Act beyond that limited purpose . . ."

[Report: 12 Trin. L.R. 85.]

NOTE.—The decision in this case was reversed by the Judicial Committee of the Privy Council in *Musson* v. *Rodriguez*, [1953] A.C. 530; but the Privy Council found it unnecessary for their decision to discuss the construction put on the British Nationality Act, 1948, by the Supreme Court of Trinidad and Tobago.

British Commonwealth of Nations—Whether Revenue Laws of One Member Enforceable in Courts of Another—Indian Tax Claim against Liquidator of English Company—Action by Government of India in English Courts.

See p. 286 (*Government of India* v. *Taylor*).

III.—Protected States and Protectorates. Dependent States

Vassal States—Immunity of Indian Rulers from Taxation—International Law and Municipal Law—Law of Nations as Part of Law of the Land—The Law of India.

MAHARAJA BIKRAM KISHORE OF TRIPURA *v.* PROVINCE OF ASSAM.

India, High Court of Calcutta. July 30, 1948.[1]

(Harries C.J. and Mukherjea J.)

THE FACTS.—The Maharaja of Tripura was assessed for agricultural tax for the years 1939/40, 1940/41 and 1941/42 in respect of land (*zemindary*) held by him in the Province of Assam. The Maharaja appealed against the assessments and the Assam Agricultural Income Tax Board stated a case by which it referred in 1945 a number of questions for the determination of the High Court. The Court instructed its Registrar to write to the Crown Representative for an answer to the following questions:

(1) Is the State of Tripura an independent State? If not, what is its status with regard to the Crown? and

(2) Is His Highness the Maharaja of Tripura the sovereign ruler of the State of Tripura?

The Court directed the Board of Agricultural Income Tax to re-state the case after answers had been obtained from the Crown Representative to the questions propounded by the Court.

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[1] See n. 1 on p. 73 *infra*.

The reply received from the Secretary to the Crown Representative was in the following terms:

"Lieutenant Colonel His Highness Maharaja Manikya Sir Bir Bikram Kishore Deb . . ., Maharaja of Tripura, has been recognized by His Majesty as the Ruler of the Indian State of Tripura since the 13th August 1923. His Majesty's Government do not regard or treat His Highness or His subjects as subjects of His Majesty and they do not regard or treat Tripura as being part of British India or of His Majesty's Dominions. Tripura is an Indian State and the Maharaja is a Ruler as defined in sub-section (1) of Section 311 of the Government of India Act, 1935.

"But though His Highness is thus not independent, His Majesty's Government accord to him the status of a Sovereign Ruler under the suzerainty of His Majesty exercised through His Majesty's representative for the exercise of the functions of the Crown in its relations with Indian States. As such he possesses various attributes of sovereignty, including internal sovereignty, which is not derived from British law, but is inherent in the Ruler, subject, however, to the suzerainty of His Majesty and to the exercise by His Majesty's Representative of such rights, authority and jurisdiction as have by treaty, grant, usage, sufferance, or otherwise passed to and are exercisable by His Majesty. These include the conduct of international relations, the exercise of jurisdiction over Europeans and Americans, interference to settle disputes as to succession to the State, the suppression of gross misrule in the State, and the regulation of armaments and the strength of Military Forces.—The Maharaja is, in regard to proceedings in the Civil Courts in India, covered by the provisions of Sections 85 and 86 of the Indian Code of Civil Procedure."

After re-statement by the Income Tax Board, the case came again before the High Court. It was contended on behalf of the Assam Government that the Assam Agricultural Income Tax Act made no exception in favour of an independent Ruler. This being so, it was urged that even if international law exempted a ruling Prince from liability to taxation, that immunity had been taken away by the Provincial Act.

Held: that the plaintiff was entitled to immunity. "It is true that there is nothing in the Provincial Act exempting a ruling Prince, but it is a well established rule of construction that a statute will not be construed as overriding international law unless the words of the statute compel the Court to put such a construction upon it."

The Court first considered the question whether the land held by the Maharaja in the Province of Assam was his personal property or State property and said (*per* Harries C.J.): "The Board of Agricultural Income Tax was of opinion that [the land] formed part of the personal property of the assessee, the Maharaja of Tripura. But in my view the early history of this *zemindary* shows that it is the property of the Maharaja in his capacity as Ruler. [The Court then referred to the following cases in which the legal position of the particular *zemindary* had been considered: *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* ((1869) 12 Moo I.A. 523), *Beer Chunder Manikya* v. *Raj Coomer Nabodeep Chunder Deb Burmono* ((1883) I.L.R. 9 Cal. 535) and *Shamarendra Chandra Deb Barman* v. *Birendra Kishore Deb Barman* ((1908) 12 C.W.N. 777). The Court (Harries C.J.) further observed:] " In my view it is also clear that the Maharaja is an independent Ruler and, therefore, not amenable to the ordinary jurisdiction of the Courts in India. International law always gives to the Ruler of an independent State certain privileges. [The Court then quoted from Hall's *International Law* (8th ed., p. 220), Oppenheim's *International Law* (vol. 1, 5th ed., p. 590) and Holland's lectures on *International Law* (p. 201) and referred to the case of *The Parlement Belge* ((1880) 5 P.D. 197) and observed:] State property of a particular State is not subject to the jurisdiction of another State although the property lies in the latter State."

As to the contention that the principles of international law applicable to independent sovereigns had no application to Rulers of Indian States because the latter were not, in the true sense of the word, independent, the Court (Harries C.J.) said: " In my view however, though the Maharaja of Tripura cannot be said to be independent in the full sense of the word he must be regarded in international law as an independent sovereign. Indian Rulers and Rulers of States with similar powers have always been regarded by the Courts in England as beyond their jurisdiction." The Court referred here to the following cases: *Statham* v. *Statham and His Highness the Gaekwar of Baroda* ([1912] Pro. Div. 92), *Mighell* v. *Sultan of Johore* ([1894] 1 Q.B. 149) and *Gaekwar of Baroda State Railways* v. *Hafiz Habib Ul Huq* ((1938) 42 C.W.N. 705).

As to the contention of the Assam Government that the Maharaja of Tripura was liable to income tax because the Assam Agricultural Income Tax Act made no exception in favour of an independent Ruler, the Court relied on the " well established rule of construction that a Statute will not be construed as overriding international law unless the words of the Statute compel the Court to put such a construction upon it ". In this respect the Court referred to Maxwell's *Interpretation of Statutes*, 7th ed., p. 127.

In conclusion, the Court (Harries C.J.) said: " It appears to me that in construing the provisions of the Assam Income Tax Act, we must give effect to this principle enunciated in Maxwell's *Interpretation of Statutes*. There is nothing in the Act to show that the Provincial Legislature intended to take away the privileges of a foreign sovereign, and, that being so, we must so construe the Act as to preserve such privileges."

[Report: (1949), 17 Income Tax Reports 220.]

NOTE.—It would appear from this case, as well as from other cases, that following English law India has made international law part of the law of the land. For a discussion of the problem see "International Law in India" in *International and Comparative Law Quarterly*, July 1952.

Vassal and Other Semi-Independent States—Rulers of—Immunity from Jurisdiction—Classification of Ex-Rulers of Indian States —Ex-Rulers Enjoying and Ex-Rulers Not Enjoying Immunity from Jurisdiction in Indian Courts—Reasonableness of Classification and Equality Clause in Constitution of India.

BHIMAJI NARASU MANE *v.* VIJAYASINVRAO RAMRAO DALE.

India, High Court of Bombay. July 26, 1954.[1]
(Chagla C.J.; Dixit J.)

THE FACTS.—The plaintiff filed a suit in the Court of the Civil Judge, Jath, against the Rajasaheb of Jath, claiming certain reliefs. A preliminary objection was taken to the maintainability of the suit in view of the provisions of section 87 (B) of the Code of Civil Procedure, which guarantees immunity from jurisdiction to certain of the Rulers of former Indian States. The Judge held that these provisions violated Article 14 of the Constitution (equality clause), and referred the case to the High Court for an opinion. It was argued on behalf of the Attorney-General of India that Article 362 of the Constitution, which imposes on Parliament the obligation to safeguard the privileges of the Rulers of former Indian States, overrides Article 14 of the Constitution.

Held: that the fundamental right of equality must prevail over the provisions of Article 362 of the Constitution but that, on the other hand, the equality clause admits of reasonable classification. The fact that immunity from jurisdiction had been granted to some only of the Rulers of former Indian States, *i.e.*, those who had been recognized by the President, did not offend against "reasonableness of classification". This class of Indian Rulers therefore enjoyed immunity from jurisdiction in the same way as foreign Rulers were generally immune from jurisdiction according to international law.

The Court said: "Section 87 (B), which was incorporated in the Code of Civil Procedure after the Constitution was passed by Act II of 1951, applies the provisions of s. 85 and sub-ss. (1) and (3) of s. 86 to Rulers of any former Indian States; 'former Indian State' is defined as 'any such Indian State as the Central Government may, by notification in the *Official Gazette*, specify for the purposes of this section', and 'Ruler' in relation to a former Indian State means the person who for the time being is recognized by the President as the Ruler of that State for the purposes of the Constitution. When we turn to ss. 85 and 86, s. 86 deals with persons to be appointed by the Government to prosecute or defend on behalf of foreign Rulers; s. 86, sub-cl. (1) provides that no Ruler of a foreign

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[1] See n. 1 on p. 73 *infra*.

State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government, certified in writing by a Secretary to that Government, and sub-cl. (3) exempts a Ruler from being arrested except with the consent of the Central Government and also provides that no decree shall be executed against the property of any such Ruler. In this case, the plaintiff filed the suit without obtaining the necessary consent of the Central Government, and it was on that ground that the maintainability of the suit was questioned . . .

"Now, the view taken by the learned Judge—and there is considerable force in that view—is that under Article 14 of the Constitution there is equality before the law and it seems rather strange that in a democratic State the former Rulers of Indian States should not be as much liable to the process of the court as any other citizen. One would expect that the rule of law applies to all citizens; every one in India is subject to that rule of law and if the courts exist in order to enforce that rule of law, everyone in India should be equally subject to the process of the courts. But when one considers and interprets the Constitution of a country, one cannot ignore the historical context in which that Constitution came into existence. The democratic State in India was born as a result of a unique and unprecedented revolution. However non-violent that revolution might have been and however much the Constitution has attempted to turn away from the past and to write a new chapter for the future of India, the slate on which the past history was written has not been completely erased. Therefore, in considering the position of former Rulers of Indian States, one must have regard to their rights and privileges as they existed before the Constitution came into existence and how the Indian States ceased to have any independent existence and ultimately became merged with India to form part of the Union of India.

"Turning first to Article 366, sub-cl. (22) defines 'Ruler' in relation to an Indian State as meaning:

> '. . . the Prince, Chief or other person by whom any such covenant or agreement as is refered to in clause (1) of Article 291 was entered into and who for the time being is recognized by the President as the Ruler of the State, and includes any person who for the time being is recognized by the President as the successor of such Ruler; . . .'

Turning to Article 291, sub-cl. (1) provides that where, under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of the Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as privy purse, such sums shall be charged on, and paid out of, the Consolidated Fund of India, and the sums so paid to any Ruler shall be exempt from all taxes on income. Therefore, the Ruler must satisfy two conditions: (1) he must have signed an agreement as provided by Article 291 (1); and (2) he must be recognized by the President as the Ruler of the State. Now, when we turn to the agreement which was signed by the Ruler of Jath—the defendant in this case, whose privy purse is guaranteed under Article 291 (1)—we find from the White Paper on Indian States that with regard to this Ruler the Government of India guaranteed his personal rights, privileges, dignities and titles. Article 362 of the Constitution imposes an obligation upon Parliament and the Legislature of a State, in the exercise of the power to make laws or in the exercise of the executive power of the Union or of a State, to give due regard to the guarantee or assurance given under any such covenant or agreement as is referred to in cl. (1) of Article 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State. Therefore, the personal rights of the Rulers, which were guaranteed under the merger agreements, are now embodied in the Constitution and form part of the Constitution, and a constant reminder of these agreements is set out in Article 362. Before the Constitution, the position of the Indian Rulers was governed by s. 86 of the Code of Civil Procedure; that section provided that a Prince or Chief may, with the consent of the Governor-General in Council certified by the signature of the Political Secretary, and in any other case with the consent of the Central Government certified by the signature of a Secretary to that Government, be sued in any competent court. The Prince or Chief was to be in the same position as an ambassador or envoy of a foreign State. The amendment retains in ss. 85 and 86 the provisions with regard to ambassadors or envoys of a foreign State and also Rulers of a foreign State. By s. 87 (B) these provisions are made applicable to the Rulers of former Indian States who are recognized by the President as Rulers of the States for the purposes of the Constitution. Therefore, there can be no doubt that, before the Merger Agreement and before the Indian States merged with the Union of India, a Ruler of an Indian State had this privilege, namely, that he was exempt from being sued in courts in British India without the consent of the Governor-General. That personal privilege, along with other personal privileges that he might have enjoyed, was guaranteed by the Merger Agreement, and it is with regard to that personal privilege along with the other personal privileges that Article 362 imposes an obligation upon Parliament and the Legislature of a State to give due regard in passing any legislation.

[The Court disagreed with the allegation made on behalf of the Attorney-General that Article 362 of the Constitution overrides Article 14 (equality clause). The Court then turned to the question whether Article 14 had actually been violated in the present case. The subordinate Judge had come to the conclusion that the classification applied to Rulers was bad 'because all the Rulers of Indian States are not exempted from being sued in a civil court without the consent of the Central Government '. As to this the Court said:] " With due respect to the learned Judge, the error into which he has fallen is that the classification is not of all the Rulers of former Indian States; the classification is of the Rulers recognized by the President; and the President can only recognize those Rulers who have signed an agreement under Article 291. Not all the Rulers have signed an agreement as referred to in Article 291 (1), nor has a privy purse been given to every Ruler, nor has a privy purse been guaranteed under Article 291. Therefore, there is a special class of Rulers recognized by the Constitution, namely, those who have signed an agreement under Article 291 (1), to whom the privy purse has been guaranteed, and who have been recognized by the President. It is to this narrow and special class of Rulers that the exemption under s. 87 (B) applies; and it may also be mentioned that it is only to this special class that, by the Merger Agreements, their personal privileges have been guaranteed. We must remember that these Rulers at one time exercised absolute power over their States and they had great prestige, dignity and personal privileges. They gave up their States, they gave up their rule, they joined the Union of India and for all practical purposes became political pensioners. It is in consideration of their patriotic gesture that the Government of India have guaranteed to them the personal privileges which they enjoyed before the merger, apart from the substantial privilege of a privy purse. Can it be said that against this background and in this context it would be unreasonable for the Legislature to classify these Rulers so that a special privilege with regard to being sued should be conferred upon them? In this connection, it is open to the Court to look at Article 362 also because that Article requires the Legislature to have due regard to the guarantee or assurance given under the Merger Agreement with respect to the personal rights, privileges and dignities of the Ruler of an Indian State. Therefore, the draftsmen of the Constitution themselves felt that it was right and proper, even in a democratic setting, for Rulers to have certain privileges; and Parliament, in enacting Act II of 1951, has done nothing more than to give effect to the provisions of Article 362. Thus, taking into consideration the past history, the antecedents of these Rulers, the Merger Agreement, and the directions to the Legislature contained in Article 362, it is impossible to say that there is no reasonable basis for the classification made under Act II of 1951."

[Report: 57 Bom. L.R. 60.]

Vassal and Semi-Independent States—Ex-Rulers of Indian States—Immunity from Jurisdiction—Privilege of Not Appearing in Court.

DARBAR SAHEB SURANGWALA OF JETPUR *v.* THE NEW INDIA ASSURANCE CO. LTD.

India, High Court of Bombay. February 2, 1955.

(Chagla C.J.; Dixit J.)

THE FACTS.—The plaintiff, the ex-Ruler of the State of Jetpur in Saurashtra State, filed a suit against the defendants, claiming a sum paid in respect of a policy effected by the defendants, on the ground that the policy had been effected by misrepresentation and that the plaintiff was entitled to avoid the policy. After the suit was filed he took out a chamber summons for examination on commission of himself and his wife. On that summons the Judge made no order and the plaintiff appealed. He (the appellant) contended that, being the ex-Ruler of an Indian State, he and his wife enjoyed the privilege of not appearing personally in court and that this privilege had been guaranteed by the Covenant entered into with him by the Government of India when his State merged with India. This contention was denied by the respondents.

Held: that as the appellant had filed a suit in a municipal court, the ordinary procedure regulating the proceedings in that court must be applied. According to international law the privilege of immunity ceased on submission to the jurisdiction and this applied equally to the privilege of not appearing personally in court.

The Court said: ". . . [This] is not a case where the plaintiff seeks to have himself and his wife examined on commission on any ground which is usually urged when an application for commission is made. It is not the case of the plaintiff that he or his wife are incapacitated from being present in court and giving evidence in the suit. Commission is sought on the grounds that, the plaintiff being an ex-Ruler of an Indian State, he and his wife enjoy the privilege of not appearing in court and that that privilege has been guaranteed by the Covenant entered into by the Government of India with the plaintiff when his State merged with India. Now, what is relied upon is cl. 12 of the Covenant, which is in the following terms:

> 'The Rulers of each Covenanting State, as also the members of his family, shall be entitled to all the personal privileges, dignities and titles enjoyed by them, whether within or outside the territories of the State, immediately before the 15th day of August 1947.'

Now, before the plaintiff can rely on this clause he must satisfy us that his personal privilege was enjoyed by him prior to August 15, 1947. Perhaps [Counsel for the Attorney-General] is right when he contends that it is not necessary that the privilege must have been actually enjoyed by the plaintiff so long as he had the right to enjoy that privilege. As far as the Code of Civil Procedure is concerned, the only privilege of exemption that has been conferred upon a person is to be found in s. 133, which enables the State Government to exempt from personal appearance in court any person whose rank in the opinion of such Government entitles him to the privilege of exemption. No notification has been issued exempting the plaintiff or his wife, and therefore obviously they cannot claim exemption under s. 133. Indeed, [counsel] contends that s. 133 has no application and that the privilege claimed by the plaintiff is independent of this section and by virtue of cl. 12 of the Covenant. Now, [counsel] has failed to satisfy us that a privilege such as is claimed by the plaintiff was ever enjoyed by him or that he had any right to enjoy such a privilege. [Counsel] says that before August 15, 1947, Rulers in India did not file suits and therefore the question of claiming such a privilege did not arise. In our opinion, the matter is really very simple. Under s. 87-B of the Code of Civil Procedure Rulers of former Indian States have been given an exemption against being sued except on the satisfaction of certain conditions, but the Code makes no provision with regard to any rights of privilege of an ex-Ruler who files a suit in a court in any State in India, and no such provision is made for very obvious reasons. If the Ruler files a suit in a municipal court, he submits to the jurisdiction of that court and he must be governed by the ordinary procedure regulating the proceedings in that court. When a Ruler is sued, he has not sought the jurisdiction of the court; he is dragged to that court by the plaintiff; clearly, therefore, some protection may be afforded to him. But no protection can be afforded to a Ruler who voluntarily invokes the jurisdiction of a municipal court, files a suit in that court, and then contends that he will not be bound by the procedure regulating that court but will claim certain personal privileges. As soon as the plaintiff filed a suit in the High Court, he permitted himself to be governed in all respects by the Code of Civil Procedure which regulates the procedure of the Court, and the only exemption he can claim under the Code is the exemption which is to be found in s. 133. It would be open to the Government, if they can legally do so, to issue a notification exempting the plaintiff by reason of his rank from appearing in court; but so long as such a notification is not issued, the plaintiff cannot in law claim exemption. [Counsel] submitted, with some hesitation, that the ex-Rulers in India understood that they would never have to appear in the courts of this country and that was an understanding which should be respected . . . We find it difficult to appreciate that argument. It is an argument of prestige, a type of argument that, we should have thought, should no longer have any force in our country which is governed by a Constitution which sets up a democratic and egalitarian State. But even if prestige were to be respected, we do not understand why there is no loss of prestige in filing a suit in this court whilst there is said to be loss of prestige in appearing in this court as a witness. In our opinion the learned Judge was right in refusing commission to examine the plaintiff and his wife on the grounds set out by them."

[Report: 57 Bom. L.R. 286.]

Vassal States—Immunity from Taxation of Ruler of Vassal State in Territory of Suzerain—Immunity of Wife of Ruler—International Law and Municipal Law—British India.

RANI AMRIT KUNWAR *v.* COMMISSIONER OF INCOME TAX.[1]

India, High Court of Allahabad. December 21, 1945.

(Iqbal Ahmad C.J.; Braund and Malik JJ.)

THE FACTS.—Rani Amrit Kunwar, the wife of the Ruler of Kalsia State, resided at Dehra Dun in British India for some years with her sons and daughters. She received allowances from her husband for the purpose of meeting her household and living expenses and the education of her children. She received also from her brother, the Maharaja of Nabha State, an annual " wardrobe allowance ". Although the payments appeared in the State budgets as State expenditure, there was no dividing line between that part of the income of the State which the Ruler spent for public purposes and that part which he spent for his private purposes. Rani Amrit Kunwar was assessed by the tax authorities in British India for income tax. This assessment came on appeal before a full Bench of the Income Tax Appellate Tribunal (which upheld it) and then before the High Court. The assessee contended, *inter alia*, that she was the wife of the Ruler of Kalsia and, though resident in British India, she " is exempt under the canons of international law from taxation under the Income Tax Act in respect of her personal income accruing, arising or received in British India ".

Held: that the assessee was not exempt under principles of international law from taxation under the Indian Income Tax Act. Rulers of Indian States did not enjoy " sovereignty in the full sense in which that word is used in public international law so as to extend the privilege of personal immunity from proceedings in the courts of British India to the Ruler's wife." Thus she could not enjoy immunity from taxation in British India. The Court first considered the status of Indian Rulers and expressed the generally accepted view that though they were under the suzerainty (paramountcy) of the Crown, they were entitled to certain privileges, including immunity from taxation in British India.

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[1] This case, decided in 1945, has been included in the present volume in pursuance of the policy of including in any particular volume cases which, on account of inaccessibility, oversight or any other reason, have been omitted from the volume in which they would otherwise have appeared.

The Court said (*per* Braund J.): " I cannot help thinking that the test of whether the Ruler of an Indian State can be made the subject of taxation in British India . . . must ultimately rest on whether he is capable of being sued in British Indian Courts . . . [The Court, in answering this question, said that Indian Rulers are entitled to immunity from proceedings and from taxation. But as to the application of these privileges to the wife of a Ruler, the Court said:] " No case, with one possible exception, has been brought to our notice in which there has ever been put forward successfully a claim on behalf of the Ruler of an Indian State to recognition of sovereignty in the full sense in which the word is used in public international law so as to extend the privilege of personal immunity from proceedings in the courts of British India to the Ruler's wife. The only possible exception is the case relating to Kapurthala State, which is reported in *Movstak Rae* v. *Lady Randheer Singh of Kapurthala State* ((1870) 54 P.R. p. 139). But, in my opinion, that case when examined is no authority for so general a proposition that the personal immunity founded on his domestic Sovereignty of a Ruler of an Indian State from suits in the courts in British India extends by international usage to his wife. What the Court in British India said in that case was that it would not assume jurisdiction in British India in a suit which arose between the Maharaja and his subjects within his own State. It was held that a British Indian court would not adjudicate in British India on rights in issue within his own State between the wife of a politically independent Raja and a subject of that State . . . That is a very different thing from saying that every British Indian court will extend to the wife of every Ruler of an Indian State recognition of her husband's sovereignty in the full sense of international personality as recognized by public international law, in relation to a proceeding in which the rights in issue do not arise within the State itself but within British India ". The Court concluded from the above that immunity from taxation does not extend to the Rani in the present case.

Malik J., in a separate judgment, referred to the position of the Ruler of an Indian State and said that " a foreign Sovereign is not 'entitled' to be taxed by the Government of another country " (Oppenheim, *International Law*, vol. I, 5th ed., pp. 590–1). He further observed: " It is not denied that the Legislature of an independent State has the power to override by appropriate legislation a rule of international law: see the observations in *Rochefoucauld* v. *Boustead* ((1897) 66 L.J.Ch. 74). It is argued that unless the rules of international law have been expressly abrogated by statute, the Courts would interpret the Act, as far as its language admits, so as not to be inconsistent with the established rules of international law or with the principles of comity of nations: see Maxwell on *Interpretation of Statutes*, 7th ed., p. 127. There can be no doubt that these are sound principles of law, and in interpreting the Income Tax Act it must be conceded that there is nothing in the language of the Act which would entitle us to hold that the Legislature intended to override any settled principles of international law." Thus the judge came to the conclusion that " the Courts have so far disclaimed all jurisdiction against a (foreign) Ruling Chief."

As to the immunity of the wife of a foreign Ruler, Malik J. said: " The argument that the wife of a sovereign is exempt from taxation is based on certain observations in Oppenheim's *International Law*, vol. I, pp. 590–1, where it is said:

> 'The wife of a sovereign must likewise be granted ex-territoriality but not other members of a sovereign's family.'

Oppenheim based [this statement] on the authority of Rivier, while according to Bluntschli exterritoriality need not in strict law be granted to the wife of a sovereign. A reference to Sections 85 and 86 of the Code of Civil Procedure (V of 1908) would, however, show that there is no such protection given to the wives of Indian Princes against their liability to be sued in British India. The only case in which the question of the wife of an Indian Chief being sued arose was the case of *Movstak Rae* v. *Lady Randheer Singh of Kapurthala State* " (*supra*). [As to this case the learned Judge made the same critical observations as Braund J. He then observed:] Learned counsel for the assessee has argued that in case of doubt the benefit of the doubt must go to the assessee, and his client must therefore, according to the opinion of Rivier, be given the exemption. I am, however, inclined to follow the opinion of Bluntschli, whose opinion seems to have been tacitly accepted in the Code of Civil Procedure and in the Government of India Act. If the wife of a Ruling Chief is not exempt and can be sued in British Courts, there seems to be no principle under which we can say that she is exempt from taxation."

(Iqbal Ahmad C.J. agreed with the other two Judges.)

[Report: (1946) 14 Income Tax Reports 561.]

NOTE.—This case seems to provide authority for the proposition that though the Ruler of a Vassal State is entitled to immunity from proceedings and taxation in the territory of the suzerain, this immunity would not extend to his wife in relation to proceedings in which the rights in issue do not arise within the vassal State but within the suzerain State. Neither would she be entitled to immunity from taxation within the suzerain State in respect of any income accruing, arising or received in the territory of that State. The silence of the municipal law of the Suzerain on the subject is construed in favour of immunity, in the case of the Ruler, but not so in the case of his wife.

Dependent Territories—Protectorate *sui generis*—Protectorate of Bohemia-Moravia—Status *vis-à-vis* German Reich—Whether Territory "Occupied" by Reich.

See p. 152 (*Re Larwin's Claim*).

Dependent Territories—Colonies—Status of Belgian Congo.

See p. 226 (*Montefiore* v. *Belgian Congo*).

Vassal and Other Semi-Independent States—Rulers of—Immunity from Jurisdiction—Rulers of Indian States After Merger with India.

See p. 253 (*Thakore Saheb Khanji Kashari Khanji* v. *Gulam Rasul Chandbhal*).

IV.—Mandated and Trust Territories

i.—Sovereignty over Mandated and Trust Territories. Status of Mandated and Trust Territories

Trust Territories—Status of—Somaliland.

See below (*Società A.B.C.* v. *Fontana and Della Rocca*).

ii.—Rights and Duties of the Administering Authority

Trust Territories—Rights and Duties of Administering Authority—Powers of Administrator—Power to Regulate Judicial System of Trust Territory—Whether Legal System of Trust Territory Foreign in relation to That of Administering Authority—Somaliland.

Società A.B.C. *v.* Fontana and Della Rocca.

Italy, Court of Cassation (*United Chambers*). *August* 10, 1954.

The Facts.—The plaintiff Company sued the defendants in a Court in Somaliland and subsequently appealed against the decision of that Court to the Court of Appeal of Addis Ababa, Ethiopia. While that appeal was pending, a Decree (known as Decision No. 7 of April 12, 1950) of the Trusteeship Administrator of Somaliland transferred all outstanding appeals from the Court of Addis Ababa to the Court of Appeal of Rome. The latter Court, on June 3, 1953, heard and dismissed the appeal, and the plaintiffs now appealed from that decision to the Court of Cassation on the following grounds: (a) that Italian courts were not bound by an order of the Trusteeship Administrator; (b) that the Decree of the Administrator was in any event not lawful because he had no power to give Italian courts jurisdiction over appeals from decisions of courts in Somaliland, jurisdiction in respect of which lay with the Ethiopian courts.

Held: that the claim must be dismissed on both grounds. (a) The Trusteeship Administrator was an organ of the Italian State, and orders made by him were binding on the Italian Courts; and (b) Somaliland was within the Italian legal system and the Trusteeship Administrator had the power to designate Italian courts for the performing of functions within that system.

The Court said: " One of the grounds of appeal concerns the Decree of the Trusteeship Administrator of Somaliland dated April 12, 1950. This Decree provided that outstanding actions should be brought before a competent court according to the legal system in force in Somaliland, which had been approved by Royal Decree No. 638 of June 20, 1935, and that under that legal system appeals lay to the Court of Appeal of Rome.

" From the foregoing it is contended that the above-mentioned Decree [of 1950] should be regarded as a foreign law, and that therefore its existence and its content should have been proved by one of the parties.

" Judicial practice is to regard foreign law as a *quid facti*, which must be proved by the ordinary rules of evidence in the same way as other facts laid before the court. This appreciation of the question of foreign law does not appear, however, to be an exact statement of general application, and it has in fact been criticized by writers of authority. In any case, the problem is connected with the function performed by a rule of a foreign legal system when it is made applicable by a rule of private international law.

" The problem in our case is new and different. We must see whether the rules enacted by an organ of the Trusteeship Administration of Somaliland must be regarded as foreign in relation to the Italian legal system.

" This Court is not unaware of the historical evolution of the old colonial systems and the new conception of colonial affairs as expressed in the Covenant of the League of Nations and now in the Charter of the United Nations. Nor is it unaware that by virtue of Article 1 of the Annex to the Trusteeship Agreement, which was brought into operation so far as Italy is concerned by Law No. 1301 of November 4, 1951, sovereignty over the territory of Somaliland is vested in its population, although under Article 2 of the Agreement, the Administration of the territory, for the period specified in the Agreement, has been entrusted to Italy. Moreover, we know—and it was mentioned in the report by Ambrosini to Parliament on the draft Bill for the ratification and bringing into operation of the Trusteeship Agreement—that the régime of Trusteeship Administration is connected, like that under the former Mandate system, with the Anglo-Saxon legal institution of trusteeship, which consists in entrusting the full administration of property to a person for the benefit of a third person.

" From these preliminary remarks it is clearly wrong to say that acts performed by the State which has the power of administration over a Trust Territory can be regarded as foreign in relation to its own legal system, even though they concern another subject of international law.

" If we may refer to private law—from which, as we have said, the conception of trust is derived—the acts which are performed by the trustee, although they concern the beneficiary, are always within the sphere of will and action of the trustee. We should come to a similar conclusion in respect of the administration of a territory which was a colonial territory. The limits of the Italian legal system have become wider and more comprehensive. In addition to exercising sovereignty over its own territory, the Italian State, by virtue of Article 1 of the Annex to the Agreement exercises it also—although in the name of the population of Somaliland and under the conditions set forth in the Agreement—over Somaliland. The Trusteeship Administration which has been entrusted to Italy comes within the limits and the scope of the Italian legal system. It constitutes not a mere right but a power, and at the same time an obligation, of the administering State, which must be fulfilled by all the organs of the State itself within the limits of their respective competences.

" It may be worth while recalling that, according to Article 5 of Law No. 1301 of November 4, 1951, the necessary expenses of the administration are to be paid by Italy, and that they are determined for each financial year by a law which is a part of the law by which the budget of the Italian State is approved.

" Therefore, the rules which have been laid down for the execution of the task of administration cannot be considered as a *res facti*, the implementation of which cannot be left to the initiative of private persons. On the contrary, those rules are applied *ex officio* by the Italian courts, not only because of the relationship which links Somaliland with Italy but also because they are rules laid down by Italian legislative organs.

" The second ground of appeal concerns the power of the Trusteeship Administrator to designate the Court of Appeal of Rome as a court of second instance for actions begun in Somaliland. It has been said that the Trusteeship Administrator constitutes an organ outside the Italian legal system and that therefore he could not interfere in the functions of an organ of the Italian Republic.

" The idea, already examined, of the absolute separation between the Italian legal system and the Trusteeship Administration of Somaliland is repeated in this ground of appeal. The Court, however, is constrained by a number of considerations to reject the complaint. In the first place, the competencies of the Administration of Somaliland are not foreign to the Italian legal system. Article 2 of the Agreement confers on the administration authority all powers of legislation, administration and jurisdiction. The Trusteeship Administrator is designated by the President of the Italian Republic. According to paragraph 7 of Article 87 of the Constitution, this fact alone provides sufficient grounds for inferring that the Trusteeship Administrator constitutes an organ of the Italian State. It is irrelevant that Italy and Somaliland are two separate sovereign entities in their respective spheres and that therefore there cannot be interference by one in the legal system of the other. As a statement of fact, it is correct, but, on the one hand, the sovereignty of the Somali people is limited and confined within the limits of the power of the Trusteeship Administration of Italy, and, on the other hand, the Administrator derives his powers from the Italian State: therefore, he is in a position to designate Italian organs for the performing of functions which, as we have already said, belong to the sphere of the Italian legal system.

" It is not in point to say that the powers of the Administrator are limited to the territory of Somaliland. It is true that those powers are adherent to the territory of Somaliland, but the Administrator did not [in making his Decree of 1950] overstep the limits of his powers, seeing that the Decree concerns the exercise of jurisdiction with respect to that territory. It is of no importance whatsoever whether or not the seat of the organ which exercises judicial power is outside the territory concerned. This ground of appeal, therefore, must be rejected.

" Similarly with the third ground of appeal, that the Court of Appeal did not take into consideration the fact that the Administrator's decision was made before the ratification of the Agreement and the delimitation of the Administrator's powers. It is worth recalling that the British Military Administration of Somaliland handed over the territory to Italy on April 1, 1950, before ratification and execution of the Agreement. The Trusteeship Administration, therefore, was taken up provisionally by Italy. As stated in the report by Ambrosini, the Italian Government explicitly requested Parliament, in laying before it the Bill which became Law No. 12 of February 8, 1950, to give authorization of the assumption of power. This Law authorized expenditure for the implementation of ' acts connected with the taking up and functioning of the Trusteeship Administration in Somaliland in accordance with the recommendation approved by the General Assembly of the United Nations on November 21, 1949, and with the Agreement signed at Geneva with the Trusteeship Council on January 27, 1950 '. The provisional enforcement of the Agreement had thus already been foreseen and regulated by the Italian legal system. It is also stated in the report by Ambrosini that ratification was necessary only for the definitive coming into force of the Agreement.

" If the foregoing considerations are correct, the Court of Appeal was not wrong when it decided that Decision No. 7 of April 12, 1950, was lawfully taken, and that in any case it was confirmed by the successive ratification of the Trusteeship Agreement which was retroactive. It may be added that if one does not recognize such retroactive force in the Agreement, one would be obliged to accept the notion that from the time when power passed to the provisional Administrator until the ratification of the Agreement, Somaliland would have been a State without administration, which is absurd.

" It is worth recalling that the Administrator's Decision No. 7 of April 12, 1950, which incorporated—with the exception of a few modifications that are not relevant in our case—the judicial system for Somaliland approved by the Royal Decree of June 20, 1935, was borne in mind by the Legislature when it was decided to ratify the Agreement. On this point, it is necessary to refer once more to the report by Ambrosini, which actually quotes Decision No. 7 of the Provisional Administrator. It is of some importance to remember that—as stated in the report by Ambrosini—the outlines of the judicial system which was set up by that decision, were reported by the Administrator to the Trusteeship Council.

" In conclusion, it seems that there can be no doubt of the lawfulness of the decree which gave the Court of Appeal of Rome jurisdiction to hear appeals in proceedings commenced in Somaliland and it cannot be said that the decree would have withdrawn the present proceedings from the judicial system of Ethiopia solely because they were pending before the Court of Appeal at Addis Ababa.

" The principle that a change in the exercise of powers relative to sovereignty does not alter the constitution of a State, and other principles, such as *perpetuatio jurisdictionis*, etc., may be applied when there is no manifestation of the legislative will. They cannot serve any purpose when such a manifestation exists, as in the present case, and is explicit. In fact, appeals in pending litigation had—in accordance with the existing judicial system—been brought before the Court of Appeal of Addis Ababa. On the other hand, the arguments which are put forward on behalf of the plaintiff company would not in any event lead to the conclusions which they seek to establish. They contend that territorial modifications do not modify the constitution of a State; but the plaintiffs seem to forget that the Court of Appeal of Addis Ababa was an organ not of the Ethiopian State but of Italian Africa, of which Somaliland was a part. Therefore, in the final analysis, the attainment of independence by Ethiopia had no influence on the connection of these proceedings with the judicial system of Somaliland . . .

" It appears therefore, in conclusion, that all the grounds on which it has been attempted to show that the Court of Appeal had no jurisdiction over the case before us, are unfounded.

" For these reasons, the appeal is dismissed."

[Report: *Foro Italiano*, 1954, I, p. 1231.]

Trust Territories—Obligations of Administering Authority—Duty to Recognize Customary Religious Laws in Respect of Marriage—Former Mandated Territory—The Law of Tanganyika.

MALEKSULTAN *v.* JERAJ.

East Africa, Court of Appeal of Nairobi. January 22, 1955.

(Sir Barclay Nihill, President; Sir Herbert Cox C.J. (Tanganyika) and Briggs J.A.)

THE FACTS (*per* Sir Barclay Nihill).—" This is an appeal from a judgment of the High Court of Tanganyika. The appellant is an Asiatic woman who by religion is a Khoja Mohammedan follower of His Highness the Aga Khan. On the 3rd of August, 1945, she married the respondent in Dar es Salaam according to the rites and ceremonies, and rules and regulations, of the Khoja Ismaili sect. The respondent at the time of the marriage resided and carried on business in Uganda, to which territory he took his bride. The marriage turned out unhappily and, in 1946, the appellant lodged a complaint before the Ismailia Provincial Council in Dar es Salaam. She appears to have obtained an order equivalent to an order for restitution of conjugal rights, but this order the respondent, who was still in Uganda, ignored. In 1950 the appellant came to know that the respondent had married a Shia Itnashry girl, and in 1951 she again complained to the Provincial Council asking for a divorce, arrears of maintenance, and the delivery to her of certain clothes and ornaments. The Council dissolved her marriage and ordered the respondent to pay her Sh. 18,000. The respondent has never complied with this order.

" It is this non-compliance with the decision of the Provincial Council that caused the appellant to seek a remedy in the High Court of Tanganyika. In her amended plaint she asked for divorce, certain arrears of maintenance and delivery back to her of a gold necklace. Before the amended plaint was filed, the original plaint came before Mr. Justice Mahon of the High Court of Tanganyika on a preliminary issue of jurisdiction. Mr. Justice Mahon held that the High Court had jurisdiction to hear and determine a matrimonial suit arising out of the marriage of non-Christian spouses either of whom is an Asiatic, if at the time of the institution of the suit the petitioner was domiciled in Tanganyika (see section 3 (1) of Cap. 112 of the Laws of Tanganyika, as amended by section 2 of the Marriage, Divorce and Succession (Non-Christian Asiatics) (Amendment) Ordinance, 1947, 1949). He ordered, however, that the facts establishing jurisdiction must be pleaded and proved. When the suit on the amended plaint again came on for hearing, the husband's counsel took the preliminary point that the Court had no jurisdiction to entertain the action. The husband gave evidence, and his evidence established that he did not possess a Tanganyikan domicil. On this evidence the Court was asked to hold that the English legal rules with regard to a wife's domicil applied and that the wife therefore in this case did not possess a Tanganyikan domicil. The learned Judge found as a fact that the husband was domiciled in Uganda and that the domicil of the plaintiff was that of her husband. Accordingly, he further held that he had no jurisdiction to entertain the suit, which he dismissed with costs. . . ."

On appeal to the East African Court of Appeal, counsel for the respondent raised certain questions regarding the interpretation of the statute law of Tanganyika, which appear more fully in the various judgments reported below. In essence he argued that the High Court of Tanganyika had no jurisdiction under the statute law of the Territory to entertain the case, and that jurisdiction would, therefore, have to be based on the common law of England as applied to Tanganyika under the Tanganyika Order-in-Council, 1920. However, in the instant case jurisdiction could not be founded on the common law, as, in the submission of the respondent's counsel, that law did not recognize polygamous marriages for any purpose at all.

Held: that the appeal must be allowed. From the inception of British rule in Tanganyika, it had been recognized that, quite apart from statute, the marriage and divorce of persons belonging to a recognized religious community are matters to be governed by the religious and personal law of the community concerned, subject only to the proviso that the customs of any such community are not repugnant to good order and natural justice. The obligations of the United Kingdom, under the Mandate and the Trusteeship Agreement, were such as to render inapplicable any alleged rule of English common law against recognition of polygamous marriages in a territory where such marriages were contracted by a large proportion of the inhabitants. While the High Court of Tanganyika had correctly refused to grant a statutory divorce, as both the parties were domiciled in Uganda if the marriage still subsisted, there was nothing to prevent the Court from recognizing a divorce effected by local customary law, such as the wife alleged that she had obtained in the present case. The case should, therefore, be remitted to the High Court of Tanganyika so that it might receive evidence of the dissolution of the wife's marriage by local customary law. If the Court found that the marriage had in fact been dissolved, it should then hear and determine the issues raised by the appellant in her suit and grant her relief in some form other than dissolution of her marriage as this would have been already obtained in accordance with the personal law of her community.

Briggs J.A. said: "This case raises questions of law of great importance and considerable difficulty. I see no reason to doubt the correctness of the learned trial Judge's decision that a Muslim wife, like an English one, acquires the domicil of her husband and, since the husband's domicil was and is undoubtedly in Uganda, the statutory jurisdiction to grant a divorce under section 3 of the Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance (Cap. 112) could not be exercised in this case. It was therefore necessary to refuse the prayer for a divorce. I think, however, that counsel who appeared for the plaintiff in the Court below entirely failed to put to the Court the real substance of his case, which was that the divorce had taken place for all purposes on July 18, 1951, before the suit was filed. This was clearly pleaded, and it was also clearly pleaded that the plaintiff's domicil is in Tanganyika. If she was divorced in 1951, it is at least possible that before the plaint was filed she had resumed by choice her domicil of origin in Tanganyika. In that case she could invoke the jurisdiction under section 3 of Cap. 112, if necessary. It is also possible that, if the claim for judicial divorce is ignored, and if a divorce took place in 1951, the suit may fall within the general jurisdiction of the Court and it may not be necessary to invoke section 3 at all. In that case the plaintiff's action might succeed, even if she could not prove a Tanganyika domicil.

" Mr. O'Donovan has argued for the husband that, even if the allegation of a divorce in 1951 in accordance with the religious law of the parties be accepted, there is still no jurisdiction to try this suit. He bases this on the very peculiar history of the Ordinance. As it stood before amendment in 1948, section 2 extended statutory recognition to marriages of non-Christian Asiatics, if contracted in accordance with their religious law, and section 3 similarly gave statutory recognition to divorces effected in accordance with their religious law. The amending Ordinance introduced in 1948 . . . a new statutory jurisdiction to ' hear and determine all matrimonial causes and suits arising out of ' marriages of the type recognized by section 2, and at the same time repealed the old section 3. Mr. O'Donovan submits that the repeal of the section which gave statutory recognition to extra-judicial divorces indicates that the courts of this territory cannot now recognize any such divorce at all, and that a judicial divorce under the new section 3 is the only means of effecting a lawful divorce under any marriage recognized under section 2. This argument is certainly attractive and I think it can only be met by considering the state of the law before the original Ordinance was passed in 1923. If the courts of this country would then have refused to recognize a marriage or a divorce of the type described in section 2 or the old section 3, I think the argument would be sound. Mr. O'Donovan says that it would not have been necessary to enact those sections, if recognition could have been granted without them. It is, however, not unusual to enact, either for the removal of actual or possible doubts, or from sheer legislative *joie-de-vivre*, provisions which declare, but do not alter, the existing law. If the old section 3 was a provision of that nature, its repeal does not preclude the courts from recognizing a divorce within its provisions which they would have recognized before its enactment.

"Mr. O'Donovan reinforces his argument on what I may call its procedural side by saying that jurisdiction in this case must either be under section 3 of the Ordinance or under common law, and that the common law of England does not recognize a polygamous marriage as being a marriage at all for any purpose and, therefore, will not grant a divorce, or a declaration of divorce, or any relief consequential on marriage or divorce in such a case . . . I doubt if the English rules are now so strict as he suggests. . . . But, however, that may be, it is essential to remember that Article 17 of the Tanganyika Order-in-Council, 1920, in defining the law applicable to the territory contains the proviso which is usual in colonial or dependent territories, namely—

> " ' Provided always that the said common law doctrines of equity and statutes of general application shall be in force in the territory so far only as the circumstances of the territory and its inhabitants and the limits of His Majesty's jurisdiction permit, and subject to such qualifications as local circumstances may render necessary.' "

"I cannot think that it would be a reasonable application of the common law to the circumstances of this territory and its numerous Asian inhabitants to refuse recognition of those marriages which alone would accord with the requirements of their personal law and religious beliefs, or to refuse recognition of divorces which in accordance with such personal law and religious beliefs would validly determine such marriages. If recognition was ever refused, I should expect the early law reports of the territory to be full of cases where the legitimacy of children was questioned in connection with succession to the estates of deceased persons or similar issues; but I am unable to find such cases. I think that from the inception of British rule in Tanganyika, marriages and divorces of this kind must have been recognized as valid *de jure* in the territory. The enactment in 1923 of the Ordinance did no more, I think, than put on record in clear terms the effect of the law as it then was, or should have been, understood to be.

"The Trusteeship Agreement, 1946, imposes on the Crown as Administering Authority certain specific duties to all nationals of other Members of the United Nations. They are to have protection for life and property and equal treatment in the administration of justice (Article 9). Freedom of conscience, freedom of religious teaching and the free exercise of all forms of worship are guaranteed (Article 13). The Mandate imposed on the Crown as Mandatory similar obligations. These provisions are of direct importance in considering the proviso relating to recognition of polygamous marriages of the type described in section 2. . . .

" Tanganyika is not a Christian country . . . The common law of England might refuse to recognize as a ' marriage ' a polygamous union between spouses of a different religion, whether quasi-Christian or non-Christian. . . . But in my opinion the law of Tanganyika could not from the date of the Mandate refuse such recognition; and such a marriage would be recognized before, no less than after, the enactment of section 2 of the Ordinance. It follows that a divorce in due accordance with the incidents of such a marriage would be similarly recognized. . . ."

Sir Barclay Nihill, in his concurring judgment, supported the arguments of Briggs J.A. He stated, *inter alia*, that: " I have had the advantage of reading the judgment delivered by my brother, the learned Justice of Appeal, and I am in entire agreement with the view he has expressed on the nature of the obligations imposed on the mandatory power in Tanganyika by the Trusteeship Agreement of 1946. The regulation of the marriage state between members of the same religious community is so intertwined with the practice of religion that I am fully persuaded that the obligations imposed upon the administering authority under Article 13 of the Trusteeship Agreement must be taken to include recognition of the customary religious law of the community in respect of marriage so far as the same is not inconsistent with the requirements of public order and morality. I am also fully persuaded that the same principle was recognized under the old mandatory system which preceded the Trusteeship Agreement of 1946, in fact I consider that the right view to take of the Ordinance of 1923 (Cap. 112) is that it was nothing more than declaratory of the obligation resting on the then mandatory power to recognize the personal law of non-Christian Asiatic communities so far as this law was not inconsistent with the principles of good order and natural justice. I agree, therefore, with the conclusion reached by my learned brother that from the inception of British rule in Tanganyika it has been recognized quite apart from statute that the marriage and divorce of persons belonging to a recognized religious community were matters proper to be governed by the religious and personal law of the community concerned subject only to the proviso that the customs of any such community were not repugnant to good order and natural justice. . . ."

Sir Herbert Cox C.J., in his concurring judgment, also referred to obligations of an Administering Authority under a Mandate or Trusteeship Agreement. On this point he said: " The first Order in Council establishing the Government of this territory was the Tanganyika Order in Council, 1920, dated 22nd June, 1920, and which will be found at page 12 of Volume V of the current Laws of Tanganyika. In the recital to that Order it is stated:—

> " ' Whereas by the Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles on the twenty-eighth day of June, 1919, Germany renounced in favour of the Principal

> Allied and Associated Powers all her rights and titles over her oversea possessions;
>
> 'And whereas the said Treaty having been duly ratified as therein provided came into force on the tenth day of January, 1920;
>
> 'And whereas it has been agreed between the Principal Allied and Associated Powers that the territories of Africa situate within the limits of this Order (being part of the territories formerly known as German East Africa) shall be administered by His Majesty the King, subject to and in accordance with the provisions of the said Treaty;
>
> 'And whereas accordingly by treaty, capitulation, grant, usage, sufferance and other lawful means His Majesty has power and jurisdiction within the said territories (hereinafter called the Tanganyika Territory);
>
> 'Now, therefore, His Majesty, by virtue and in exercise of the powers on this behalf by the Foreign Jurisdiction Act, 1890, or otherwise, in His Majesty vested, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows: . . .' "

"The Tanganyika Order in Council, 1920, follows the general pattern of Orders in Council (under the Foreign Jurisdiction Act, 1890) but in its enactment a most important provision referred to in the recital had to be kept in mind, namely, that the territory was being administered by His Majesty the King, subject to and in accordance with the provisions of the Treaty of Peace signed at Versailles on June 28, 1919. It must also be borne in mind that Tanganyika was then being administered in accordance with Article 22 of the Covenant of the League of Nations under a Mandate conferred on the King of England, that the Mandate has been superseded by the present Trusteeship Agreement by means of which territories originally held under Mandate from the League of Nations can be placed under the international trusteeship of the General Assembly of the United Nations in accordance with Articles 75 and 77 of the United Nations Charter. The text of the present Trusteeship Agreement follows the pattern of the old Mandate and will be found at p. 1 of Vol. V of the current Laws of Tanganyika and one of the principal objects of the Mandate is the government of the territory in the interest of the inhabitants of the territory . . . ."

[Report: 22 E.A.C.A. (1955), p. 142.]

iii.—Rights and Duties of the Supervisory Authority

Mandates—Supervision by United Nations—Territory of South-West Africa—Voting Procedure of General Assembly—Voting Procedure under United Nations.

See p. 651 (*Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*).

v.—Nationality in Mandated and Trust Territories

Mandates—Nationality in Mandated Territory—Effect of Birth in Class "C" Mandate—Persons Born in Western Somoa—The Law of New Zealand.

ANNANDALE *v.* COLLECTOR OF CUSTOMS.

New Zealand, Supreme Court of Wellington. November 8, 1954.

(Hutchison J.)

THE FACTS.—The appellant was born in Western Samoa on June 28, 1924, his father being a natural-born British subject (a Scotsman) and his mother a Samoan. At the time of the appellant's birth, Western Samoa was a Class "C" Mandate administered by New Zealand.[1] The appellant entered New Zealand in 1951, obtaining for that purpose a permit under s. 5 of the Immigration Restriction Amendment Act, 1920.[2] The permit finally expired on September 7, 1953. The appellant had thereafter remained in New Zealand, and was convicted for remaining in New Zealand after his permit had expired. He appealed against this conviction. It was common ground that he was, under the terms of the British Nationality and Status of Aliens (in New Zealand) Act, 1928 (now repealed), a natural-born British subject, and, by virtue of s. 16 (3) of the British Nationality and New Zealand Citizenship Act, 1948, was at the time of this action a New Zealand citizen.

Held: that the conviction must be quashed. The appellant's father being a British subject born in Scotland, the appellant was consequently "a person of British birth and parentage" within the meaning of that expression in s. 5 (1) of the Immigration Restriction Amendment Act, 1920, irrespective of the status of Western Samoa at the time of his birth.

Hutchison J. said: "The question is whether the appellant is subject to s. 5 or whether he is outside its provisions as being 'a person of British birth and parentage'. The learned Magistrate in the Court below, in a reserved judgment, concluded that the words

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[1] A Trusteeship Agreement in respect of the territory was approved by the General Assembly on December 13, 1946: U.N.T.S., vol. 8, p. 71.

[2] Section 5 of the Immigration Restriction Amendment Act, 1920, reads:

"(1) In addition to the restrictions imposed upon immigration into New Zealand of the several classes of persons specified in the principal Act as amended by this Act, it is hereby enacted that no person other than a person of British birth and parentage shall (except as by this Act is specially provided) enter into New Zealand unless he is in possession of a permit to enter in the form and to the effect provided by regulations under this Act.

"(2) A person shall not be deemed to be of British birth and parentage by reason that he or his parents or either of them is a naturalized British subject, or by reason that he is an aboriginal Native or the descendant of an aboriginal Native of any dominion other than the Dominion of New Zealand or of any colony or other possession or of any protectorate of His Majesty."

'British birth' are to be given a meaning based on locality, a person not born within Her Majesty's Dominions and allegiance therefore, in that view, not being 'of British birth', and that Western Samoa, being a 'trust territory', is not British or New Zealand territory; and he accordingly convicted the appellant. [Hutchinson J. then examined the provisions of section 5 (1) of the Immigration Restriction Amendment Act, 1920, and formed the opinion that the words 'of British birth' in that section did not refer to the place of birth but to national status at birth. The learned Judge concluded by saying:] In my opinion, the appellant is of British birth and parentage within the meaning of that expression in s. 5 (1), whatever the status of Western Samoa was at the time of his birth. That being my view, it is unnecessary for me to consider the latter question. . . ."

[Report: [1955] N.Z.L.R. 168.]

vi.—Other Matters

Mandated Territory—Damage Suffered by Alien in French Cameroons—Damage Alleged to be Due to Act Committed by Local Administration—Whether French Government or Local Administration Liable—Whether French or Local Courts Competent to Determine Claim—The Law of France.

In re Bernard.

France, Conseil d'État. June 17, 1955.

The Facts.—The plaintiff, a Swiss citizen, alleged that he had suffered damage as the result of certain measures of restraint taken against him during the Second World War by the Governor of the territory of the French Cameroons, then a "B" Mandate under French administration. He contended that the French Government was liable for what he alleged to be illegal acts committed by a French official in a territory under French administration, and that the French courts were competent to determine the matter. On behalf of the French Government, it was contended that the action must be brought against the local administration and that only the local courts were competent to determine the matter.

Held: that the French Government could not be held liable for acts committed by an official of the French Cameroons, that only the local administration could be sued, and that the local courts and not the *Conseil d'État* were competent to determine the matter.

The Court said: "Bernard contends, first, that the Governor of the Cameroons, by expelling him from the territory of the Cameroons by an order dated August 28, 1940, which he considers to be illegal, committed an illegal act which entails the liability of the (French)

State, and secondly, that the conditions under which he, the plaintiff, and his family were compelled, on their return to the territory of the Cameroons in 1941, to reside in places assigned to them by the local administration, were such as to entail the responsibility of the French State. Measures of general security taken in overseas territories fall within the competence of the police of those territories. The measures taken by the Governor of the Cameroons in respect of which Bernard claims damages were measures taken by a public authority acting on behalf of the territory of the Cameroons. It follows that if the plaintiff considers the responsibility of the local administration to be involved by reason of the circumstances in which the said measures were taken, he must bring his action for damages against the territory of the Cameroons in the local administrative court. The plaintiff's contention that the State is liable is therefore ill-founded and directed to the wrong court and must accordingly be rejected."

[Report: *Recueils Dalloz et Sirey*, 1956, *Jurisprudence*, p. 352.]

D—RECOGNITION

[*See also above*, A, IV, Recognition of Acts of Foreign States and Governments; *and* PART IV, JURISDICTION: A, I, Territorial.]

I.—Of States

Recognition—Of States—Annexation of Austria by Germany—Non-recognition by United States—Status of Austria Pending Conclusion of Treaty of Peace—Whether Occupied or Liberated Territory—Requisition of Property.

See p. 398 (*Seery* v. *United States*).

Recognition—Of States—Recognition by Treaty—France and Vietnam.

See p. 224 (*Gugenheim* v. *State of Vietnam*).

II.—Of Governments

Recognition—Of Governments —Non-Recognition — Effect of — Rights Created by Treaty— Reciprocal Right of Inheritance— Applicability to Persons Resident in Territory Controlled by Unrecognized Government— Effect of Civil War on Treaties— Denunciation by Unrecognized Government—Effect of Foreign Assets Control on Right of Alien to Inherit Property — The Law of the United States of America.

In re NEPOGODIN'S ESTATE.

United States, District Court of Appeal, First District, California. June 27, 1955.

THE FACTS.—Nepogodin died intestate in San Francisco, California, and his estate was distributed to the State of California, pursuant to the law of that State. Six first cousins of the decedent petitioned for the payment of the estate to them. The Attorney-General of California opposed the petition on the ground, among others, that the petitioners were non-resident aliens residing in Manchuria, China, under the dominion of the Communist Government of China and that there did not exist on the date of Nepogodin's death reciprocal rights of inheritance between citizens of the United States and of China as required by the Probate Code of California. He also contended that it could not be shown that the petitioners would receive the money, as required by Section 1354, California Code of Civil Procedure. The petitioners based their case on Article VIII, para. 4, of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China, signed at Nanking on November 4, 1946, 63 Stat. 1299, 1308, *T.I.A.S.* No. 1871, which provides in part:

> "The nationals, corporations and associations of either High Contracting Party shall be permitted to succeed, as heirs, legatees and donees, to personal property of every kind within the territories of the other High Contracting Party, left or given to them by nationals of such other High Contracting Party or by nationals of any third country, and shall be permitted to take possession thereof, either by themselves or by others acting for them, and to retain or dispose of it at their pleasure, exempt from any restrictions, taxes or charges other or higher than those to which the nationals, corporations and associations of such other High Contracting Party are or may hereafter be subject in like cases."

They asked the Court to take judicial notice of the fact that Manchuria is within the geographical boundaries of the Republic of China. The Court ordered the payment of the estate to the petitioners. The Attorney-General appealed on the grounds, *inter alia*, that (a) the treaty referred to did not extend to residents of Manchuria and that even if it did, it would not prove that a citizen of the United

States actually had an enforceable right to receive Manchurian property by succession, and (b) the blocking provisions of the Foreign Assets Control Regulations of the United States prevented the petitioners from actually receiving their distributive shares and the licensing provisions of the regulations could not provide such actual possession.

On appeal,

Held: that the judgment of the Court below must be affirmed. Manchuria was a part of China and was recognized to be such by the Government of the United States. The Treaty of Friendship, Commerce and Navigation between the United States and China had application to all of the territory of China, notwithstanding the fact that certain of that territory was not subject to the effective control of the Nationalist Chinese Government recognized by the United States. The statement of the Chinese Communist Government denouncing the Treaty was without effect. A reciprocal right of inheritance was established by the Treaty, and no proof had been adduced that the Government of China had violated in any respect its obligations under the Treaty. The fact that a state of civil war might have impeded in many parts of China the effective enjoyment of the reciprocal rights conferred by the agreement was not to be considered decisive. The requirement of California law that the petitioners actually be in a position to receive the property would be satisfied, even though the funds should be deposited in a blocked account.

The Court said: " It must be noted from the outset that the provision of the Treaty on which the claimants rely, relates only to *nationals* of the contracting parties. There is no evidence or contention that claimants were at any time nationals of China, only that they were *residents*. Therefore the claimants can derive no rights from the Treaty and the rule that such Treaty, as the supreme law of the land, supersedes the provisions of Section 259 of the Probate Code which are inconsistent with it, *Clark* v. *Allen*, 331 U.S. 503, 508, 67 S.Ct. 1431, 91 L.Ed. 1633;[1] *In re Estate of Meyer*, 107 Cal.App.2d 799, 804, 238 P.2d 597,[2] is not applicable to this case. The only function of the Treaty in this case is that of evidence of the existence of the reciprocity required by Section 259, *supra*, for the right of succession of the claimants.

" As to the existence of the right of succession the date of the death of decedent is controlling. On the ground that under our law, the property of a decedent on his death vests at once by inheritance in his heirs it was held in *Re Estate of Giordano*, 85 Cal. App.2d 588, 594, 193 P.2d 771, that changes in the substantive law of succession to which Sections 259 and 259.1, Probate Code, belong, enacted after the date of death cannot devest it. The same reasoning supports the decisiveness of that date as to the existence of reciprocity and accordingly the reciprocity was decided as of that date in the California cases. See for instance *In re Estate of Arbulich*, 41 Cal.2d 86, 88, 257 P.2d 433.[1] Although there is no finding to that effect it is undisputed that on the date of death of decedent respondents were residents of Harbin, Manchuria. The first point to be decided is therefore whether the provisions of the Treaty at that time (January 13, 1949) extended to Manchuria, as part of the territory of China. The facts regarding the geographical division and the political history of the world, of which our courts take judicial notice, Section 1875, subd. 8, Code of Civil Procedure; *Ocean Industries, Inc.* v. *Superior Court*, 200 Cal. 235, 241, 252 P. 722,[2] support the implied finding of the trial court that they did.

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[1] *Annual Digest*, 1947, p. 171.]

[2] *International Law Reports*, 1951, p. 499.]

[The Court here set forth the history of Manchuria from 1644 to the Second World War, and continued:] " At the Cairo Conference in November 1943 President Roosevelt, Prime Minister Churchill and Generalissimo Chiang Kai-shek declared that it was their purpose that all territories which Japan had taken from the Chinese, such as Manchuria, should be restored to the Republic of China. The Yalta Agreement (February 11, 1945), to which China was not a party, promised the Soviet Union, which would enter the war against Japan, among other things that the Manchurian railroads should be jointly operated by a Soviet-Chinese Company, that the preeminent interests of the Soviet Union should be safeguarded and that China should retain full sovereignty in Manchuria. On August 9, 1945, the Soviet Union entered the war against Japan. On August 14 a Treaty of Friendship and Alliance between the Republic of China and the Soviet Union was concluded. In separate notes and agreements the advantages promised the Soviet Union at Yalta were granted by China and the Soviet Union pledged that it would respect Chinese sovereignty in the control of all of Manchuria as an integral part of China. On the same date Japan surrendered. The Japanese troops in Manchuria surrendered to the occupying troops of the Soviet Union, which agreed to remove its troops before February 1946. The removal met with some delay so that it took place mainly in April 1946. The conclusion of the Sino-Soviet Treaty improved the willingness of the Chinese Communists to cooperate with the National Government. In a conference of Mao Tse-Tung with the Government in Chungking it was decided in October 1945 that the leadership of President Chiang Kai-shek would be retained, that at an early date the one party political tutelage of the Kuomintang would be changed to a democratic constitutional government and that a Political Consultative Conference of all parties and non-partisan leaders would further discuss

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[[1] *International Law Reports*, 1953, p. 292.]

[[2] *Annual Digest*, 1927-1928, p. 135.]

the measures to be taken. On January 10, 1946, a cease fire agreement was concluded between the government and the communists, of which a provision for the movement of National Government troops into and within Manchuria for the purpose of restoring Chinese sovereignty there formed part. The Political Consultative Conference was in session till the end of January and published resolutions as to all pending problems. Further difficulties between the government and the communists prevented their implementation.

" When late in 1945 General Marshall had been appointed Special Representative of the President in China, part of his stated task was to assist the Chinese National Government in transporting Chinese troops to Manchurian ports with American means of transportation and to evacuate Japanese troops; both before and after his arrival such was done on a large scale. However, notwithstanding the stated provision of the cease fire agreement, the arriving government troops met communist resistance in Manchuria. The Soviet troops were not cooperative in having the Chinese Government troops take over, but often arranged their retreat so that the Chinese Communists could take over the parts evacuated and the Japanese war equipment there present. On April 18, 1946, the Chinese Communists occupied Changchun, the former capital of Manchoukuo, and not long thereafter Harbin. On May 23, 1946, Changchun was captured by government troops, who from there continued their march north and east into territory where the communists predominated. On June 6, 1946, a temporary truce as to Manchuria was concluded between the government and the communists, the government reserving its right under the Sino-Soviet Treaty to take over the sovereignty of Manchuria and on June 26, 1946, an agreement for cessation of all hostilities in Manchuria was reached; however, hostilities flared up again. On October 11, 1946, government troops took Kalgan an important communist center in northern China. Pending negotiations and increased fighting between communists and government troops also in Manchuria, the government troops mainly advancing, the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of China was signed on November 4, 1946. It was to enter into force on the day of exchange of ratifications (which took place on November 30, 1948) and was to continue in force for a minimum period of five years from that day. The negotiations between the government and the communists ended in November 1946. On February 1, 1947, the Central Committee of the Chinese Communist Party declared that the party would not recognize any of the loans, treaties and agreements established by the Chinese Kuomintang Government after January 10, 1946, which had not been passed by the Political Consultative Conference. When in 1947 the civil war fighting was resumed on a large scale, the government, though winning much ground in other parts, weakened in

Manchuria so that it held there only some main points, the railway communications of which were cut by the communists. During 1948 all of Manchuria with all government troops there fell to the communists. Also in other parts of China the government lost heavily so that in the beginning of 1949 its position was critical although it still held many of the main cities like Peking, Nanking, Shanghai and Canton.

" Most of the above historical facts are found in a voluminous book ' United States Relations with China, With Special Reference to the Period 1944–1949 ', released by the State Department in August 1949. It may be noted that the map which forms part of this book shows the Manchurian provinces as part of China. From these facts it must be concluded that at all times involved in this case, from the signing of the Treaty on November 4, 1946, to the death of decedent on January 13, 1949, Manchuria was an integral part of China. There might have been some doubt in this respect during the existence of the unrecognized Japanese puppet state of Manchoukuo, but that doubt disappeared with the surrender of Japan, the occupation of Manchuria by the Soviet Union, the recognition by the Soviet Union of the sovereignty of China over Manchuria and the withdrawal of the Soviet troops from Manchuria, all prior to the period here involved. It is evident that the Kuomintang Government, the Chinese Communists and the United States Government equally favored the unity of China with the inclusion of Manchuria as a sovereign nation, and that all foreign states so recognized it at the time in question.

" As to China as a whole we must hold that the Treaty was in force on January 13, 1949. The exchange of ratification which made it effective had taken place only one and a half months before. At that time the same civil war and the same weakened National Government had existed in China as on the above date of death of the decedent herein mentioned. The ratification exchange shows that the United States Government did not then consider the conditions existing in China an unsurmountable obstacle to the effectiveness of the Treaty. It had not denounced the Treaty at the date of decedent's death. As to the ability of a foreign state to perform its treaty obligations and as to the question whether a treaty has been terminated the action of the political departments of our government is controlling. *Clark* v. *Allen*, [*supra*]; *Terlinden* v. *Ames*, 184 U.S. 270, 285, 288, 22 S.Ct. 484, 46 L.Ed. 534. In *Clark* v. *Allen* it was held that the fact that Germany after its defeat in the Second World War was under Allied occupation could not be considered by the court to have terminated a treaty between that country and the United States concerning the right to succession to real property when there was no evidence that the political departments had so considered it. The same must apply a fortiori to the civil war in China.

" Appellant's contention that the scope of the Treaty is limited to the territory over which the Nationalist Government of China under Chiang Kai-shek had effective control is without merit. When Article XXVII of the Treaty, on which appellant relies, provides that the Treaty shall extend to ' all areas of land and water under the sovereignty or authority of either High Contracting Party, except the Panama Canal Zone ' the parties referred to are the two states as such, not their governments of the moment. Treaties are contracts between sovereign states and are binding on those states even when the government and its form changes. See Oppenheim/Lauterpacht, *International Law*, 7th ed., pp. 791, 795, 830; Draft Convention on the Law of Treaties, § 24 and comment, 29 *A.J.I.L.* Supp. 1044; V Hackworth, *Digest of International Law* 360 et seq.; II Hyde, *International Law* 1528; *Ivancevic* v. *Artukovic*, 9 Cir., 211 F.2d 565, 566.[1] At the time in question, there was only one sovereign Chinese state although it was in a condition of civil war. The Chinese Communists were a Chinese political party taking part in the civil war, but they had not seceded from the Chinese state. It is a wholly unacceptable proposition, not supported by any authority, that with every change in the fortunes of a fluid civil war, the territory of the state and the sphere of applicability of its treaties should change.

" With respect to the scope of the Treaty the court cannot attach any significance to the fact that the Chinese Communist Party has declared after the signing and before the ratification of the Treaty that it would not recognize it. It is very doubtful whether our courts can consider even the formal denunciation by a foreign state of a treaty to which the United States is a party so long as the political departments of our government have not conceded its termination. *Terlinden* v. *Ames*, *supra*, . . .; The Legal Nature of Treaties, 10 *A.J.I.L.* 722. Certainly the adverse declaration of a party to a continuing civil war, which declaration did not halt the ratification of the Treaty by our government can have no effect on our decision as to the Treaty.

" The next question is whether the Treaty sufficiently proved the existence of the right of citizens of the United States to take in China personal property by succession upon the same terms and conditions as Chinese residents and citizens as required by Section 259, Probate Code, *supra*. It is undisputed and undisputable that the Treaty provides for such right. However appellant contends that it does not prove the actual existence of such right because of the absence of proof of the construction and application of the Treaty by the Chinese Government and of the enforceability of the right under it so that American citizens would actually receive their inheritance. Appellant restricts his contention to Manchuria, but we are of the opinion that ' country ' in Section 259, Probate Code,

[[1] *International Law Reports*, 1954, p. 66.]

means state and that so long as there is no stabilized secession of a part of a state the decision as to reciprocity must be based on the conditions in the foreign state as a whole and not on temporary conditions in the specific locality or province of which the claimants are residents. At the time here controlling (January 13, 1949) there existed no separate and stabilized ' Communist Government of China ' as alleged in appellant's answer. Only on September 21, 1949, did Mao Tse-Tung proclaim the People's Republic of China in Peiping, which government was first recognized by the Soviet Union on October 2, 1949. The situation must be viewed as of January 13, 1949, not by hindsight.

" Treaties may be considered as evidence of foreign law, *In re Estate of Arbulich, supra,* . . . and the Treaty in this case was at least *prima facie* proof that one and a half months after its effective date it represented the law in China. It is a recognized rule of international law that ' A State is bound to carry out in good faith the obligations which it has assumed by a treaty (*pacta sunt servanda*)': Draft Convention on the Law of Treaties, Art. 20 with comment, 29 *A.J.I.L.* Supp. 977; I Oppenheim/Lauterpacht, *International Law,* 829; V Hackworth, *Digest of International Law,* 164. There are rebuttable presumptions that the law has been obeyed, Section 1963, subd. 33, Code of Civil Procedure, and that official duty has been regularly performed, Section 1963, subd. 15, Code of Civil Procedure, which the trial court could accept as evidence. For the rule that a presumption can constitute evidence as to reciprocity see *In re Estate of Kennedy,* 106 Cal.App.2d 621, 625, 235 P.2d 837. There was no proof or even contention in the trial court that the attitude of the recognized National Government of China or the domestic law of China on the point involved were at the time in question violative of the Treaty and we know in that respect of no facts of which the court should take judicial notice. It is true that the existence of a state of civil war may have impeded in many parts of China the effective enjoyment of the reciprocal rights but such circumstances need not be considered decisive. In *Re Estate of Blak,* 65 Cal.App.2d 232, 238, 150 P.2d 567, 570,[1] the effect of the occupation of the Netherlands by the Germans was under consideration and it was held [that the fact that]

> ' the exigencies of war may temporarily suspend or defer the remedy to enforce the right to receive does not militate against the right '.

The trial court could apply the same rule to the exigencies of the civil war.

> ' A finding by the trial court on the issue of reciprocity is to be treated like a finding on any other issue of fact and if there is evidence to support it such finding will not be disturbed on appeal '. *In re Estate of Arbulich, supra,* 41 Cal.2d at page 90, 257 P.2d at page 435.

On that basis we must sustain the finding of reciprocity in this case.

[[1] *Annual Digest,* 1943–1945, p. 420.]

"At the oral argument appellant has abandoned the contention that under the provision of Section 1354, Code of Civil Procedure, *supra*, the federal requirement that distribution to the claimants must be made by deposit in a domestic bank prevents their recovery. Correctly so. Section 1354, Code of Civil Procedure, does not require proof that the heirs will receive the property, immediately, free from restrictions, in the country of their residence. We understand the purpose of the provision to be the prevention of futile proceedings with respect to deposited property for which no entitled heirs are actually in existence. *In re Estate of Zimmermann*, 132 Cal.App.2d ——, 283 P.2d 68; *In re Estate of Costa*, 109 Cal.App.2d 735, 741, 241 P.2d 621. Such purpose does not require acquisition free of restrictions. It is undisputed that claimants are decedent's next of kin and sole heirs at law and we have decided that they are not excluded from succession by Section 259, Probate Code. The Foreign Assets Control Regulations do not divest the title of these claimants to their distributive shares when deposited in a blocked account and do not prevent them from all enjoyment of them. When the owner of a blocked account comes into the United States he can pay from it for living, travelling and similar expenses within the United States (§ 500.518). (There was a statement at the trial that two of the claimants had left China for Brazil and might come to the United States.) Section 500.521 permits remittance of $100 per calendar month to each blocked account holder or member of his household, by means of crediting the amount to be transferred to a blocked account in the name of a banking institution in China. The finding that the claimants will receive the property so as to satisfy the requirement of Section 1354 of the Code of Civil Procedure must be upheld."

(The Court concluded its opinion with a consideration of a question of the law of California concerning the payment of the attorney's fee.)

[Reports: 134 Cal.App.2d 161, 285 P.2d 672.]

Recognition—Of Governments—*De facto* Recognition of Government of Lithuania—Retroactive Effect of—Recognition of Acts of Foreign Governments—Law Enacted by Unrecognized Government—Conclusiveness of Statements of Executive—Foreign Office Certificate—Supplementation by Evidence *ex aliunde*.

IN THE ESTATE OF PIKELNY.

England, High Court of Justice (Probate, Divorce and Admiralty Division). June 30, 1955.

(Karminski J.)

THE FACTS.—On June 15–16, 1940, Soviet forces occupied the Baltic States of Estonia, Latvia and Lithuania. In Lithuania, a new Government was elected, which on August 3, 1940, decided to join the Union of Soviet Socialist Republics. On June 22, 1941, Germany invaded the U.S.S.R. On August 17, 1941, the German army entered Kovno, Lithuania. On that day, and again on October 28, 1941, the German police rounded up some thousands of Jews living in Kovno and marched them to the outskirts of the city, where they were massacred by machine-gun fire. Among those murdered on the second occasion were Feivel Pikelny, his wife, and his two children, all of whom were domiciled in Lithuania. Pikelny left certain estate in England, and this was an application on behalf of his next of kin, four brothers and a sister, resident in the United States of America, for a grant of administration to the estate of the deceased in England. On behalf of the applicants it was explained that it was made by persons who according to English law would be entitled to a grant of administration as next of kin. Where a person had died domiciled abroad, however, the grant had to be made according to the law applicable in the country of domicil at the date of death, namely, to the person who would be entitled to administer by the law of the deceased's domicil. The question which arose, therefore, was: What was the law of Lithuania in October 1941?

Evidence was filed by a lawyer who had formerly practised in Memel, to the following effect. Before the First World War, Lithuania was part of Russia and the laws then in force were contained in the Imperial Russian Code of 1832. After 1919, Lithuania, then an independent Republic, retained only part of the Code, including that contained in what was known as Volume 10, which contained the law relating to succession. Under the Code the present applicants were in the circumstances of Pikelny's death entitled to his estate.

In 1940 Soviet law was introduced into Lithuania, and under that law land, industries and private property were nationalized and the property of Pikelny became the property of the State. Counsel for the applicants at first suggested that at the date of Pikelny's death Lithuanian law might be said to be that of German occupation decrees. The Court observed, however, that English law would not recognise as law decrees made by an enemy invader.

With regard to the law imposed by the Soviet Government in 1940, Counsel submitted that the English courts would not recognise law laid down as the result of the usurpation of a Government when that Government was not recognized *de facto* or *de jure* by Her Majesty's Government. If that were the correct view it would be necessary to refer to the prior law, which was that of the Lithuanian Republic. The present position of Lithuania was recognized after the end of the Second World War, and there was authority for the proposition that such recognition related back to the date of the establishment of the Government concerned.

The Solicitors for the applicants had written to the Foreign

Office enquiring the date of the recognition of the present Government of Lithuania, and had received the following reply:

"I am directed by Secretary Sir Anthony Eden to reply to your letter of the 22nd of February concerning the case of Feivel Pikelny deceased, and to furnish you with the following statement of Her Majesty's Government's position with regard to the annexation of Lithuania by the Union of Soviet Socialist Republics.

"I am to state that Her Majesty's Government recognize the Government of the Lithuanian Soviet Socialist Republic to be the *de facto* Government of Lithuania, but do not recognize it as the *de jure* Government of Lithuania. Her Majesty's Government recognizes that the Republic of Lithuania as constituted prior to June 1940 has ceased *de facto* to have any effective existence. The effect of such recognition and in particular the date to which it should be deemed to relate back would be questions for the Court to decide. On request from the Court a certificate setting out the position as stated above would be furnished to the Court.

"With regard to the Lithuanian Legation in London. I am to state that although the Representatives of the former Lithuanian Government have remained in London, Her Majesty's Government do not recognize them in any representative capacity."

As it was not clear from this letter on what precise date the *de facto* recognition of the Lithuanian Soviet Socialist Republic took place, an adjournment was granted in order that the question might be answered, if possible, *ex aliunde.* When the hearing was resumed, Counsel referred to a passage in *Hansard* for February 10, 1947,[1] to the following effect: Upon a Member of the House of Commons asking whether His Majesty's Government had ever approved of the incorporation of Estonia, Latvia and Lithuania in the U.S.S.R., the Minister of State, replying for the Secretary of State for Foreign Affairs, said: "No, Sir. His Majesty's Government recognize that the Baltic States have *de facto* been absorbed into the Soviet Union but have not recognized this *de jure.*"

Held: that administration should be granted to the applicants. The Court said that the reference to *Hansard* solved the difficulty which had arisen, and continued: "I am satisfied that the *de facto* recognition of the present Lithuanian Government took place on about February 10, 1947, or thereabouts, some five years after the death of the deceased." Letters of administration would therefore be granted to the attorney for those who would have been the next of kin according to English law, that being the law of the Lithuanian Republic.

[Report: *The Times* newspaper, June 30 and July 1, 1955. (See also the Note by Lyons in *British Year Book of International Law,* XXXII (1955–6), pp. 289–295).]

NOTE.—(1) There is some novelty in the acceptance by the Court of an extract from *Hansard*, the House of Commons Official Report, as evidence of the recognition by the British Government of the " absorption " of Lithuania into the U.S.S.R. Such an extract is hearsay evidence and thus not strictly admissible. In the present case it was used to elucidate the " temporizing " Certificate given by the Foreign Office.

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[1] 433 House of Commons Debates, 5 s., col. 5.

(2) The " absorption " of Lithuania into the U.S.S.R. took place in 1940. The statement in the House of Commons was made in 1947, and was in the present tense: " His Majesty's Government *recognize* that the Baltic States have *de facto* been absorbed into the Soviet Union." On this, the Court was satisfied that the *de facto* recognition of the present Lithuanian Government had taken place " on about February 10, 1947, or thereabouts "; it held, in other words, that the statement in Parliament constituted, or at least was contemporary with, that recognition. It would appear, therefore, that unless a public statement by the Executive about the recognition of a foreign State or Government specifies the date on which that recognition took place, the Court will deem it to have taken place on or about the date on which the statement is made. As regards the retroactive effect of recognition it will be observed that the Court held that the recognition of 1947 did not relate back as far as 1941 (when the deceased was killed), and that therefore the law of the Lithuanian Republic and not Soviet Russian law concerning the succession to the estate of a deceased person was applicable to the property of Feivel Pikelny. [A.B.L.]

(3) See also *Kling and Others* v. *Lesser and Rotterdamsche Bank* (*infra*, p. 101).

V.—Of Annexation

Recognition—Of Annexation—Non-Recognition of Effect on Treaties—Treaty between France and Austria—Annexation of Austria by Germany—Whether Treaty Affected by Annexation—Subsequent Outbreak of War between France and Germany—Whether Treaty Affected by Outbreak of War.

NEMEC *v.* ÉTABLISSEMENTS L.A.B. AND OTHERS.

France, Tribunal Civil de la Seine. February 22, 1955.

THE FACTS.—The plaintiff, an Austrian citizen, brought an action against the defendants, a French company. The defendants applied for security for costs and contended that the Franco-Austrian Treaty of March 4, 1925, which exempted Austrian citizens in France (and French citizens in Austria) from the requirement of providing security for costs, had lapsed as a result of the disappearance of Austria as an independent State (following the annexation of Austria by the German Reich) and that, quite apart from that, the subsequent outbreak of war between France and Germany had caused the Treaty to lapse.

Held: that (i) according to a letter received from the French Ministry of Foreign Affairs, there was no state of war between France and Austria; (ii) the Moscow Declaration of 1943 by which the Allied Powers undertook to restore the independence of Austria and declared that they considered the annexation of Austria to be null and void implied the continued existence of Austria as a State; and (iii) accordingly, the Treaty of March 4, 1925, continued to apply and the plaintiff was exempt from the requirement of providing security for costs.

The Court said: " The applicants for security for costs (defendants herein) contend that as the annexation of Austria by Germany and the Munich Agreements of 1938 sanctioned the disappearance of Austria, the Treaty must be regarded as having lapsed for lack of subject-matter as far as France is concerned, and as being *res inter alios acta* as far as Germany is concerned. They further contend that the war would, in any event, have brought about this result. The plaintiff, however, has produced a letter from the Ministry of Foreign Affairs, dated February 7, 1955, which states that 'Austria is not in a state of war with France' and that 'the four Powers which are Parties to the Declaration of Moscow of October 1943 undertook to restore the sovereignty and independence of Austria and to consider the annexation of that country by Germany, which occurred on March 15, 1938, as null and void'. A state of war, which can be ended only by a peace treaty, has never existed between France and Austria, the latter country having disappeared as a sovereign Power when hostilities broke out. The annexation of Austria by Germany has never been more than a state of fact from which the Powers were entitled to draw such conclusions as they deemed appropriate. The conclusions drawn by the Powers which are Parties to the Moscow Declaration are those set out in the letter of February 7, 1955. In recognizing the continuity between the Austrian Government of 1938 and the present Austrian Government, notwithstanding the intervening events, the Powers have stated a fact which results in the continued operation of the Treaty of March 4, 1925. The plaintiff is accordingly exempt from the requirement of providing security, by virtue of the Franco-Austrian Treaty on Judicial Assistance signed in Paris on March 4, 1925."

[Report: *Clunet,* 82 (1955), p. 164.]

Recognition—Of Annexation—Incorporation of Annexed Territory in Foreign State—Recognition of Acts of Belligerent Occupant—Recognition of Merger of Lithuania with Soviet Russia—Occupation of Lithuania by Germany—Legislative Measures of Occupant.

KLING AND OTHERS *v.* LESSER AND ROTTERDAMSCHE BANK.

Holland, Court of Appeal of The Hague. June 24, 1955.

THE FACTS.—This was an appeal from a judgment of the District Court of Rotterdam of December 30, 1953.[1] The District

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[1] See *International Law Reports,* 1953, p. 57, *sub nom. Lesser* v. *Rotterdamsche Bank and Kling and Others.*

Court had held that Soviet Russian law governed the succession to the estate of a Dr. Zivas who on September 30, 1943, had died in Kaunas (Lithuania). The Court had based this decision on the ground that the present Soviet Republic of Lithuania, which forms part of the Union of Soviet Socialist Republics, originated in a Decree of the Parliament of that Republic dated July 1940 by which it was decided that Lithuania was to become a member State of the U.S.S.R. By a Law of August 3, 1940, the Soviet Republic of Lithuania was incorporated in the U.S.S.R. By a Decree of the Praesidium of the U.S.S.R. of September 7, 1940, Soviet nationality was, as from August 3, 1940, granted to all nationals of the Soviet Republic of Lithuania then residing in the territory of the Soviet Union. By a Decree of the same Praesidium of November 6, 1940, the Civil Code of the U.S.S.R. became operative for and was made enforceable in the Soviet Republic of Lithuania. Therefore, the provisions of Russian inheritance law were substituted for those of former Lithuanian law.

Held: that the judgment of the Court below must be affirmed. The Court said: " In the case of Lithuania there was no annexation in the sense of international law, but a lawful decision of a sovereign State aiming at its incorporation in the U.S.S.R. while retaining its sovereignty. From this it follows that a Netherlands court is not competent to examine such incorporation or the way in which the relevant Decree came into being. This is all the more so since the Netherlands Government in 1942 recognized the U.S.S.R. without any reservation as regards the former Baltic States, among which was Lithuania. It has further been established that by virtue of the Decree of the Praesidium of the Supreme Soviet of the U.S.S.R. of September 7, 1940, Soviet nationality was granted to all individuals of Lithuanian nationality residing in the territory of the U.S.S.R. By virtue of a Decree of the same Praesidium of November 6, 1940, the Soviet Russian Civil Code became operative for and was made enforceable in the Soviet Republic of Lithuania. Therefore Soviet Russian civil law and its provisions concerning inheritance and succession governed the estate of Dr. Zivas. In this respect it is of no importance that during the German occupation of Lithuania, which lasted from June 1941 till the end of October 1944, Soviet Russian law had been abolished by the German Occupant and former Lithuanian law had been reinstated. By virtue of Article 43 of the Hague Regulations, the German Occupant was not entitled to abolish the law obtaining in occupied territory save in cases of absolute necessity. Since the end of the war the Lithuanian Government has not recognized as valid the reinstatement of former Lithuanian law as established by the Germans."

[Report: *Tijdschrift*, 1958, Vol. I.]

See also *In the Estate of Pikelny* (*supra*, p. 97).

Recognition—Of Annexation—Effect of Non-Recognition—Incorporation of Latvia into Soviet Union—*Locus standi* of Latvian Diplomatic Representative in Court Proceedings.

See p. 230. (*Republic of Latvia Case*).

E—STATE SUCCESSION

I.—Succession to Rights

State Succession—Succession to Rights—Succession to Properties and Institutions—Whether State-Owned or State-Controlled—Succession of Libya to Italian Property in Libya—Tribunal Set up under Peace Treaty—Duty of Tribunal—Decisions Based on Law Not Decisions *ex aequo et bono*—Separate Consideration of Individual Cases—Treaties—Interpretation of—Comparison of Languages of Text—Reference to Other Parts of Treaty—*Travaux préparatoires*—Reference to Municipal Code.

ITALY *v.* LIBYA.

United Nations Tribunal for Libya. June 27, 1955.

(Wickström, President; Sanchez-Gavito, Yörükóglu.)

THE FACTS.—This Tribunal was set up under Resolution 388 (V) of December 15, 1950, of the General Assembly of the United Nations,[1] to determine economic and financial provisions before the transfer of power in Libya took place. Articles I and VII of the Resolution provided, so far as concerns the present case, as follows:

> " *Article I*
>
> 1. Libya shall receive, without payment, the movable and immovable property located in Libya owned by the Italian State, either in its own name or in the name of the Italian administration of Libya.
>
> 2. The following property shall be transferred immediately: (*a*) The public property of the State (*demanio pubblico*) and the inalienable property of the State (*patrimonio indisponibile*) in Libya, as well as the relevant archives and documents of an administrative character or technical value concerning Libya or relating to property the transfer of which is provided for by the present resolution; (*b*) The property in Libya of the Fascist Party and its organizations.
>
> 3. In addition, the following shall be transferred on conditions to be established by special agreement between Italy and Libya: (*a*) The

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[1] *Official Records*, Fifth Session, Supplement No. 20 (A/1775). (And see the Treaty of Peace with Italy, 1947, Article 23, Annex XIV, para. 19, and Annex XI, para. 3.) Article X of the Resolution provided that " a United Nations Tribunal shall be set up composed of three persons selected by the Secretary-General for their legal qualifications from the nationals of three different States not directly interested. The Tribunal, whose decisions shall be based on law, shall have the functions . . . (b) to decide all disputes arising between the Administering Power, the Libyan Government (after its establishment) and the Italian Government concerning the interpretation and application of the present Resolution . . . The seat of the Tribunal shall be in Libya."

> alienable property (*patrimonio disponibile*) of the State in Libya and the property in Libya belonging to the autonomous agencies (*aziende autonome*) of the State; (*b*) The rights of the State in the capital and the property of institutions, companies and associations of a public character located in Libya.
>
> 4. Where the operations of such institutions, companies and associations extend to Italy or to countries other than Libya, Libya shall receive only those rights of the Italian State or the Italian administration which appertain to the operations in Libya. In cases where the Italian State or the Italian administration of Libya exercised only managerial control over such institutions, companies and associations, Libya shall have no claim to any rights in those institutions, companies or associations.
>
> " *Article VII*
>
> Property, rights and interests in Libya which, as the result of the war, are still subject to measures of seizure, compulsory administration or sequestration, shall be restored to their owners, and, in cases submitted to the Tribunal referred to in Article X of the present resolution, following decisions of that Tribunal."

The report of the *Ad Hoc* Political Committee[1] contained an " *Explanation of Certain Points in the Draft Resolution* ", of which the following are relevant:

> " *Article I—paragraph* 3 (*b*). The rights mentioned in this sub-paragraph include share-holdings and similar rights owned by the Italian State either in its own name or in the name of the Italian administration of Libya."
>
> " *Article X—paragraph* 1. The Tribunal ' whose decisions shall be based on law ' shall apply the rules of law and shall not decide *ex aequo et bono*. It will thus apply the General Assembly resolution in the light of the principles of international law and of the rules for the interpretation of international texts."

This case related to some thirteen institutions connected with Italian colonization in Libya, including the Bank of Naples, the Bank of Sicily, the National Assurance Institute, the Royal Automobile Club of Italy and the Institute for the Colonization of Libya. Certain preliminary questions arose at the hearing before the Tribunal.

I. On the question whether certain of the institutions in question fell within the terms of Article 5 (7) of the Accord between the British and Italian Governments dated June 28, 1951, concerning the disposition of certain Italian property in Libya [which had assumed that the property of the institutions was privately owned], it was contended on behalf of the Italian Government, and the Tribunal accepted, that, in order to decide whether the Italian Government possessed in the concerns mentioned in Article 5 (7) of the Accord a *droit patrimonial*[1] which ought to be transferred to Italy, it was necessary to apply the provisions of para. 3 (*b*) of Article I of the Resolution, read with para. 4 of the same Article. One of the conditions laid down in para. 3 (*b*) for the transfer of the rights of the Italian State to Italy was that the institutions, companies and associations in question must be of a public nature. It was contended that the Resolution referred to institutions, companies and associations which were public in the strict sense of the word, that is, "*enti pubblici*", and that in deciding the juridical character of those institutions, companies and associations, the Tribunal could base its opinion on Italian law (*la législation et la jurisprudence italiennes*) only.

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[1] General Assembly, A/1726, December 14, 1950.

In reply, it was contended on behalf of the Libyan Government that under Article 23 of the Treaty of Peace with Italy,[2] the latter renounced all rights and titles belonging to her in Libya. The provisions of Article I (1) of the Resolution being based on the said Article 23, their effect was to bring about the realization of a right which had already come into existence as the result of the general renunciation effected in that Article. That renunciation covered two categories of rights: those which were attached to State sovereignty and those which belonged to the State as a juridical person, unconnected with its sovereignty. Article I (3) of the Resolution did no more than apply the principle laid down in para. 1 of the Article, with the result that the effects of the distinction between institutions of a public and those of a private character were only the following: (i) property of "public institutions (*enti pubblici*), that is, public law *personnes juridiques* [corporations]" belonged to the Italian State in its entirety (as provided by Article 830 of the Italian Civil Code) and that property must be transferred to Libya, seeing that the last sentence of Article I (4) of the Resolution could apply only to private institutions; (ii) para. 3 (*b*) of Article I presupposed that the institutions which exercised public utility functions without being public institutions in the strict sense of the word, were essentially private and, in consequence, gave Libya only that part which belonged to the Italian State; and (iii) the shares and all *droit patrimonial* of any kind owned by the Italian State in purely private institutions which did not exercise public utility functions, must be transferred to Libya as part of the *patrimonio disponibile* under Article I (3) (*a*) (as was indeed admitted on behalf of the Italian Government with regard to the Società Agricola Coloniale della Stampa Emilio de Bono[1]).

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[1] This expression, and the word "*patrimoine*", which appear to mean variously "assets", "rights", "net balance", "property", "capital assets", etc., have been left untranslated throughout the present report.

[2] Peace Treaty of Paris, 1947, Article 23 of which provides:

"1. Italy renounces all right and title to the Italian territorial possessions in Africa, *i.e.* Libya, Eritrea and Italian Somaliland.

"2. Pending their final disposal, the said possessions shall continue under their present administration.

"3. The final disposal of these possessions shall be determined jointly by the Governments of the Soviet Union, of the United Kingdom, of the United States of America, and of France within one year from the coming into force of the present Treaty, in the manner laid down in the joint declaration of February 10, 1947, issued by the said Governments, which is reproduced in Annex I."

Held: that the Tribunal must examine each institution separately and base its decision on the circumstances of each.

The Tribunal said: " In the first place, it must be noted that it is the duty of the Tribunal to apply the Resolution, and it is only in the event of some one of its provisions not being sufficiently clear that in order to interpret it the Tribunal should take into consideration the Treaty of Peace with Italy. The Tribunal . . . observes that Article I of Annex XIV of the Treaty of Peace with Italy uses the expression ' *établissements publics* ' [in the English text of the Treaty ' public institutions ']; that in Articles 1 and 2 of the Annex to the proposals presented by the Commissioner of the United Nations in Libya to the First Sub-Commission which drafted the Resolution, appear the expressions ' *institutions publiques* ' and ' *entreprises, compagnies et sociétés publiques* '; that, on the other hand, in para. 3 (*b*) of Article I of the Resolution there appear none of the expressions cited nor such an expression as ' *établissement de droit public* ', but the expression used is ' *établissements, sociétés et associations de caractère public* '; and that paras. 2 and 3 (*a*) of Article I of the Resolution contain, in parenthesis, Italian juridical terms corresponding to the English and French juridical terms there employed, namely, ' *demanio pubblico* ', ' *patrimonio indisponibile* ', ' *patrimonio disponibile* ' and ' *aziende autonome* ', while para. 3 (*b*) does not contain an Italian juridical expression corresponding to ' *établissements, sociétés et associations de caractère public* ', although it would have been natural and logical to insert ' *enti pubblici* ' if that expression had been thought to be the Italian equivalent.

" From these observations and from the general impression gained from a study of the reports of the meetings of the Sub-Commission mentioned above, the Tribunal draws the conclusion that those who drafted the Resolution deliberately chose an expression having a general meaning and one which was wider than that which the term ' *ente pubblico* ' has in Italian law. In consequence, when it is a question of deciding whether an institution is of a public or a private character, the Tribunal is not bound by Italian legislation or judicial precedents. The Tribunal will therefore examine this question while taking full account of the various circumstances of each case."

II. It was contended on behalf of the Libyan Government that, in view of the provisions of Article 830 of the Italian Civil Code, the property of all public institutions belonged to the State.

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[1] See *infra*, p. 113.

Held: that this contention must fail. " The Tribunal observes that it in no way results from the provisions of Article 830 of the Italian Civil Code that, as is contended on behalf of the Libyan Government, the property of all public institutions (*enti pubblici*) belongs to the Italian State; and in this regard the Tribunal notes that the chapter which contains that Article is headed thus: '*Dei beni appartenenti allo Stato, agli enti pubblici e agli enti ecclesiastici*'. The argument put forward on behalf of the Libyan Government is moreover refuted by the fact that a part of the capital of the Bank of Italy, which is a public law institution (*ente pubblico*), belongs to savings banks . . . and that funds emanating from such banks clearly belong, to a large extent at least, to private individuals."

III. It was contended on behalf of the Libyan Government that the shares and every *droit patrimonial* owned by Italy in purely private concerns should be transferred to Libya as being part of the inalienable property mentioned in para. 3 (*a*) of Article I of the Resolution.

Held: that that contention must fail. The Tribunal said: " . . . if Article I is read as a whole, it is clear that paras. 2 to 7 constitute not only an application of the provisions of para. 2, but also an interpretation and a definition; that it appears from a comparison between the wording of paras. 3 and 4 that the last sentence of the latter cannot (as is contended) apply to concerns of a private nature; that the fact that concerns of a private nature are not mentioned can be explained only by the fact that shareholding and similar rights belonging to the Italian State are not to be transferred to Libya; that it appears from the reports of the fifteenth and sixteenth meetings of the First Sub-Commission mentioned above that the latter did not mean to recommend such a transfer; and that in the case of the Società Agricola Coloniale della Stampa Emilio de Bono a totally different question is raised, as will be shown hereafter."

IV. It was contended on behalf of the Italian Government that the provisions of para. 3 (*b*) of Article I of the Resolution were not applicable to the Bank of Sicily [and certain other organizations] seeing that these concerns had their *siège social* in Italy.

Held: that this contention must fail. The Tribunal said: " This argument was not fully developed, but the Tribunal considers that the words '*situés en Libye*' in para. 3 (*b*) refer to '*dès établissements, sociétés et associations de caractère public*' and not to '*les capitaux et les biens*'. But it is necessary to look not only at the French text of the paragraph cited above but also at the English text, which is the original, and which runs thus: 'The rights of the State in the capital and the property of institutions, companies and associations of a public character located in Libya'.

"The Tribunal is of the opinion that it is plain from the wording of the two texts that the words '*situés en Libye*' and 'located in Libya' can relate only to '*les capitaux et les biens*' and to 'the capital and the property' respectively. This opinion is confirmed (1) by the fact that where the reference is undoubtedly to *siège social*, as in paras. 3 and 4 of Article VI of the Resolution, the expression '*siège social*' is used in both the French and the English texts; and (2) by an examination of the French text of para. 3 (*a*) of Article I, from which it appears that the words '*situés en Libye*' relate here to '*les uns et les autres*' and that the words '*les uns*', being in the plural, can relate only to '*les biens disponibles*' and not to '*l'Etat*'. It is true that in the corresponding English text, the expression 'located in Libya' is not used, but as the French text is an official translation it must be presumed to reflect the true meaning of the English text. The argument put forward on behalf of the Italian Government is therefore rejected."

V. It was also contended on behalf of the Italian Government that the rights of the Italian State which, under para. 3 (*b*) of Article I of the Resolution were to be transferred to Libya, were only those which the Italian State possessed 'in its own name or in the name of the Italian administration of Libya'.

Held: that the contention must succeed. The Tribunal said: "The expression 'in its own name or in the name of the Italian administration of Libya' appears also in para. 1 of the same Article, as well as in the 'Explanation of Certain Points in the Draft Resolution' in regard to para. 3 (*b*). The reason why these expressions are repeated in the 'Explanation' can only be because it was intended to exclude from the transfer to Libya rights which belong indirectly to the Italian State or to the Italian administration of Libya by the fact that the latter participate in the capital assets of corporations (*personnes morales*) not included in para. 3 (*b*), who themselves participate in the capital assets of the institutions, companies and associations mentioned in the said paragraph. That emerges more clearly if one reconstructs para. 3 (*b*) limiting it to joint stock companies and substituting the expressions used in the 'Explanation' for the corresponding expressions of the paragraph, which would then run as follows: 'The holdings in the way of shares by the Italian State, either in its own name or in the name of the Italian administration of Libya, in companies of a public character having property located in Libya'." The Tribunal then proceeded to examine "in the light of the principles thus enunciated" the history, constitution, etc., of the various institutions severally. Following are the Tribunal's findings in typical instances:

Bank of Naples. It appeared from the Statutes of the Bank that it was a public law corporation, and in Italian law it was regarded as a "foundation". The Tribunal found that the Italian State did not contribute towards the capital (*patrimoine*) of the Bank, and it appeared from the Statute that the Italian Government had no right to any share of its profits.

The Tribunal said: " The capital of a public law corporation, of an '*ente pubblico*', does not necessarily belong to the State, as we have shown above, and the facts that the Italian Government exercises a close control over the Bank, and that the Bank has taken part in several Government enterprises, are not sufficient to confer on the Italian Government a right in the capital (*patrimoine*) of the Bank.

" The Statutes of the Bank contain no provision relating to the liquidation of the Bank. Under Article 830 of the Italian Civil Code . . . [in the absence of such a provision] . . . it is for the Italian Government to decide on the destination of the *reliquat* [ultimate residue] and to allocate it to other institutions having similar objects. In these circumstances, the Tribunal finds that the Italian State has no *droit patrimonial* in the capital and the property of the Bank and that it exercises supervisory functions only. Paragraph 4 of Article I of the Resolution provides that in such cases 'Libya shall have no claims to any rights in those institutions'. Consequently, the property of the Bank is not to be transferred to Libya under para. 3 (*b*) of Article I of the Resolution."

Istituto Nazionale per le Case degli Impiegati dello Stato (*National Institution for the Housing of Employees of the State*). The Tribunal found that this was an institution of a public character which was created by the Italian Government in order to provide employees of the State with homes on favourable terms. The Italian Government had absolute control of the Institution, through the Ministries of Finance, Public Works and War, and also, and especially, through the Central Committee of the Institution, almost all of whose members were civil servants or Government nominees. In Libya there was control through the Governor, who was the local agent of the Institution. The latter could call upon the services of the civil and military engineers for the supervision of works and the upkeep of its buildings. The Italian Government had, without charge, supplied the Institution with a certain quantity of building land. The loans of the Institution were discharged with funds granted by the Italian Government, mortgagors of houses (*loyers encaissés*) paying only interest on the sums borrowed.

The Tribunal said: " It is evident that apart from the above-mentioned loans, all the capital invested in the Institution's immovable property comes from the Italian Government. In these circumstances, the Tribunal is of opinion that in the event of the liquidation of the Institution, the Italian State would have the right to appropriate the *reliquat* of the assets of the Institution." That being so, the property of the Institution must be transferred to Libya under para. 3 (*b*) of Article I of the Resolution.

Istituto Nazionale delle Assicurazioni (*National Assurance Institute*). The Tribunal found that this was an institution of a public character created by the Italian State, which had full control of it through the Board of Directors (*Conseil d'administration*) of which all the members were nominated by the Government. The State guaranteed payment of the assurance policies issued by the Institute, provided the latter with its initial capital, and was entitled to a large part of its annual profits.

The Tribunal said: " In these circumstances, the Tribunal finds that on a liquidation the State would have the right to receive whatever remained of the capital after setting aside the sums necessary to meet the Institute's obligations to policy holders. It is true that it was stated on behalf of the Italian Government that the actuarial reserves (*réserves mathématiques*) constitute at present the sole *patrimoine* of the Institute, but that is not sufficient to base a finding that in case of liquidation there would be nothing left for the State." The property of the Institute must therefore be transferred to Libya under para. 3 (*b*) of Article I of the Resolution.

Società Anonima Azienda Tabacchi Italiani (*Italian Tobacco Company*). The Tribunal found that the Company was incorporated on the initiative of the Italian Government and that it performed functions which were in the public interest. In Libya, it had done this extensively, having assisted the Italian administration in the work of colonization. The Italian authorities regarded the Company as a "para-statal" institution and the Italian Government, which was the largest shareholder, could require persons dependent on it to be elected as members of the *Conseil d'Administration* of the Company and could through them direct the management of the Company.

The Tribunal said: " The fact that Article IX of the Resolution[1] contains no provisions regarding contracts between the Company and the settlers [*i.e.*, loans for the acquisition of plant, livestock and implements and for their necessary living expenses] cannot be regarded as evidence of the private character of the Company. This is therefore, in the opinion of the Tribunal, a company of a public character." The property of the Company must therefore be transferred to Libya under para. 3 (*b*) of Article I of the Resolution.

Reale Automobile Club d'Italia (*Royal Automobile Club of Italy*). The Tribunal found that this institution (hereinafter called " the R.A.C.I.") and its provincial offices exercised functions of a public nature, among which were such important services as the maintenance of the public register of motor vehicles and the collection of taxes on motor vehicles; moreover, for some years the Automobile Club of Tripoli (hereinafter called " the Club "), which was a provincial office of the R.A.C.I., had conducted a lottery the management of which was eventually assumed directly by the Ministry of

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[1] Article IX contained special provisions applicable to concessions.

Finance. It appeared from the Articles of Association of the R.A.C.I. not only that it was under the control of the Ministry of Popular Culture, but also that the Italian Government had full control of the management of the R.A.C.I. and of its provincial offices—in fact, all the directors and controllers of the central office were nominated by the Government, and all the directors of the provincial offices were nominated by the Presiding Council of the central office. It also appeared that the dissolution of the R.A.C.I. could only take place as the result of a governmental decision.

The Tribunal said: " In these circumstances, the Tribunal considers that the R.A.C.I. and its provincial offices, including the Club, must be regarded as being of a public character. As regards the *patrimoine* of the Club, the Tribunal finds that a large part at least comes from the profits of a lottery conducted for some years by the Club, and latterly directly by the Ministry of Finance. The Tribunal considers that the moneys thus received by the Club represent in fact a contribution on the part of the Italian State, which became clearly apparent when the conduct of the lottery was assumed by the Ministry of Finance, who evidently paid over to the Club sums allocated to the latter by governmental decision.

" The Articles of Association of the R.A.C.I. provide that on the liquidation of a provincial office, its *patrimoine* shall be transferred to the central office, and on the dissolution of the whole R.A.C.I. the Italian Government shall decide on the appropriation of the *patrimoine*. In these circumstances, the Tribunal is of opinion that in the event of the liquidation of the Club the Italian State would have the right to appropriate at least a part of its *patrimoine*." The property of the Club must therefore be transferred to Libya under para. 3 (*b*) of Article I of the Resolution.

Ente Italiano Audizione Radiofoniche (*Italian Broadcasting Corporation*). The Tribunal found that the Corporation was conducted not only for profit but also in the public interest. The Italian Government intervened at the time of the incorporation to impose certain terms, and it had a direct influence on the management of the Corporation through nominated directors. The Corporation was controlled by the Ministries of Communications and the Interior, while the postal authorities controlled the taxes, etc., which were part of the income of the Corporation. The latter had the power to declare its work and installations as being of public utility and to proceed to expropriate lands, buildings, etc., which it needed. The Italian Government had reserved to itself a right to repurchase the property of the Corporation.

The Tribunal said: " In these circumstances the Tribunal considers that the Corporation should be regarded as being of a public character. The Italian State is not a shareholder in the Corporation either in its own name or in the name of the Italian administration of Libya, and the Tribunal has found in other instances that rights which Italy may possess through other corporations (*personnes morales*) are not to be transferred to Libya. However, by the terms of the agreement between the Corporation and the Italian Government, the latter, on the liquidation of the Corporation, would have the right to participate in 50 per cent. of the total amount by which the net value of the *patrimoine* of the Corporation exceeds the contribution of the shareholders. The Italian Government has not established that in this regard it has no rights in regard to the exploitation of the concession for Libya." The property of the Corporation must therefore be transferred to Libya under para. 3 (*b*) of Article I of the Resolution.

Magazzini Generali di Tripoli. The Tribunal found that this organization was not a corporation (*personne morale*) and that, consequently, it was necessary to examine whether the three banks, of Italy, Naples and Sicily respectively, which together managed the organization, were themselves of a public character and, if so, whether the Italian State had any rights with regard to their capital and their property. The Tribunal had already found that the Bank of Naples and the Bank of Sicily were public institutions, but that the Italian State had no *droit patrimonial* over their capital or their property. As to the Bank of Italy, it had by a Royal Decree of 1936 been declared that it was a public law institution and that its shares could belong only to savings banks, finance houses (*institutions de crédit*) and banking institutions (*banques de droit public*), provident institutions (*institutions de prévoyance*) and assurance companies. The Italian State was therefore not a shareholder in the Bank of Italy, either in its own name or in the name of the Italian administration of Libya, and the Tribunal had already found that rights which the Italian State might possess through other corporations (*personnes morales*) were not to be transferred to Libya. Hence the Bank of Italy was not caught by the provisions of para. 3 (*b*) of Article I of the Resolution and its property was not to be transferred to Libya.

Società Coloniale Italiana. The Tribunal found that this Company was formed by private individuals for purposes of commerce and not with a view to exercising functions in the public interest. The Company was governed by the provisions of the Italian Code of Commerce and later by those of the Italian Civil Code. No special control over it was exercised by the Italian Government.

The Tribunal said: " In the circumstances, the Company must be regarded as being a company of a private character. The Italian State is not a shareholder in the Company, either in its own name or in the name of the Italian administration of Libya, and the Tribunal has already held that rights which the Italian State may possess through other corporations (*personnes morales*) are not to be transferred to Libya." Hence the property of this Company was not to be transferred to Libya under para. 3 (*b*) of Article I of the Resolution.

Società Agricola Coloniale della Stampa Emilio de Bono. The Tribunal found that the Italian State had no rights in the capital or the property of this Company which, moreover, was a company of a private character so that para. 3 (*b*) of Article I of the Resolution did not apply to it. But it appeared that the Italian State and the Company were owners in undivided shares of certain land, and that the share of the Italian State ought to be transferred to Libya, in accordance with para. 3 (*a*) of the same Article. The land in question had been placed under sequestration, but after the Accord of June 28, 1951, the sequestrator had released that part of the land which was registered in the name of the Company, retaining under sequestration that part which belonged to the Italian State.

The Tribunal said: " In the circumstances of this case, all the land in question should have remained under sequestration until the the special agreement [between Italy and Libya] envisaged in para. 3 had been concluded. The sequestrator had, despite this, allowed the Company to go into effective possession of all the land." The lands in question must therefore be transferred to Libya under para. 3 (*a*) of Article I of the Resolution.

[Report: Unpublished.]

II.—Succession with Regard to Contractual and Other Obligations, and Concessions

State Succession—To Contractual Obligations—Refusal by Successor Authorities to Recognize Validity of Contract—Continuity of Legal Relations Created before Change of Sovereignty—The Law of Israel.

PALES LTD. *v.* MINISTRY OF TRANSPORT.

Israel, Supreme Court (*sitting as the Court of Civil Appeals*).

(Cheshin, Deputy Chief Justice, Silberg and Goitein JJ.)

March 17, 1955.

THE FACTS.—By a contract dated June 17, 1938, between the appellants and the General Manager of the Palestine Railways, the appellants were granted a concession for newspaper kiosks and bookstalls on the Haifa Central Railway Station. The contract could be terminated by three months' notice in writing on either side. The contract remained in full force up to March 1948. On March 1, the General Manager of the Palestine Railways informed the appellants in writing that, while he had no intention of interfering with the subsistence of the contract, having regard to the " present situation " and the impending relinquishment of control of the railways by the Mandatory authorities, he gave notice that the contract could not be regarded as binding any substitute for the General

Manager of the Palestine Railways after the end of the British Mandate on May 15, 1948. From that time onwards the appellants ceased to enjoy the benefits of the contract—at first because of the complete cessation of all railway traffic, and subsequently because of the respondent's refusal to recognize the contract. Negotiations for a revival of the contract having been unsuccessful, the appellants brought an action in the Haifa District Court claiming (a) a declaration that between the parties there existed a protected tenancy according to the terms of the original contract, and (b) an order calling upon the defendant (respondent) to grant the plaintiff, in addition to its constructive possession, possession of the kiosk in accordance with the terms of the contract.

In the lower Court both pleas were dismissed (see *International Law Reports*, 1950, at p. 79), whereupon the present appeal was brought. In argument, it was common ground between the parties that the original tenancy was not protected under the Rent Restriction laws, and that the letter of March 1, 1948, was not a notice of termination. Likewise it was agreed that—following *Sifri* v. *Attorney-General* (*International Law Reports*, 1950, Case No. 22) and *Shimshon Portland Cement Factory Ltd.* v. *Attorney-General* (*ibid.*, Case No. 14)—Israel was not the successor of Palestine. The appeal was argued on the basis of an enquiry into the rights of the appellants to sell newspapers, etc., under a contract which provided a method for cancellation—which method, according to the appellant, had not been followed.

By sect. 19 (a) of the Law and Administration Ordinance, 5708–1948 (*Laws of the State of Israel*, vol. 1, p. 7):

> "Any order, direction, notice, demand, certificate, instrument, authorization, licence, patent, design, trade mark and any other right or concession, and any debt, obligation or liability made, given or imposed by the High Commissioner, the High Commissioner in Council, the Government of Palestine or its authorities or officers, and which was in force on the territory of the State on May 14th, 1948, shall continue in force until varied, amended or revoked, unless otherwise provided in any of the Ordinances of the Provisional Council of Government."

The appellant's principal argument was that although Israel was not the successor to Palestine, this provision demonstrated its intention to recognize certain of the obligations of the outgoing Government, and that the obligations under the contract of 1938 were included in that category. Therefore, it was contended, the contract could only be cancelled in accordance with its terms, *e.g.*, by three months' notice.

Held: that the Israel authorities were not bound by the contract. Three different opinions were handed down by the Court.

Per Cheshin, Deputy C.J.: "I cannot accept this argument. The possibility of revoking the contract by three months' notice exists at all events, according to the contract itself. To accept the appellant's argument would mean that there could be no legally valid cancellation of the contract except by means of a notice, so that the words ' until varied, amended or revoked ' in sect. 19 (a) would be superfluous. Furthermore, the requirement as to notice derives from the contract itself. Why should that single provision be in a different position from any other provision of the contract? By sect. 19 (a) it too may be ' varied, amended or revoked '. In my opinion the following is the correct interpretation of sect. 19 (a)—and this determines the relations of the parties:

"All the obligations and undertakings, rights, permissions and licences mentioned at the beginning of sect. 19 (a) can be varied, revoked or amended by the Israel authorities in any manner, but so long as they are not varied, revoked or amended, they remain in force as they were on the date of the establishment of the State. In the present case the respondent, through the General Manager of the Railways, unequivocably, though not in accordance with the terms of the contract, made clear his intention not to continue in the contractual relationship created by the contract, and in fact he created a new contractual relationship with a third person, to whom was granted the rights which the appellant formerly enjoyed. In this way the appellant's rights lapsed.

" Counsel for the appellant then raises this difficulty. Did the legislator intend that the Government would be entitled to vary, revoke or amend a patent—which is also included in the enumeration of sect. 19 (a)—despite the protection given by the law to patent-owners, and in a manner contrary to the law? Is it to be assumed that a patent, the period of which was determined by a special law which is part of the law of the land, is now valid only because of sect. 19 (a)?

" The answer is: in fact that is so. By sect. 11 of the Law and Administration Ordinance, by which the Patent Ordinance, amongst others, became part of the law of the State of Israel, the rights and restrictions and duties specified in the Patent Ordinance were made applicable to patents already granted and to be granted and to actions performed and to be performed by the new State's authorities in accordance with that Ordinance. This means that in granting a new patent the Government of Israel is to observe the provisions of the Patent Ordinance which lays down how to receive a patent, and its nature. The Government cannot vary, amend or revoke the patent except in accordance with those instructions. But sect. 11 cannot impose obligations upon the State, which is not the successor of the Mandatory Government—and it never crossed the legislator's mind to impose obligations through that section—which the Mandatory Government had assumed by virtue of its own law. For this reason the commencing words of sect. 19 (a) were inserted. They gave special and specific validity to all patents which had previously been registered before the establishment of the State. But while the legislator imposed upon the State the obligations deriving from that validation, it also laid down, in the concluding words of that section, that the life of the rights deriving from those obligations would subsist so long as the obligations were not ' varied, amended or revoked '. From this it follows that the rights of the owners of patents registered during the period of the Mandate are liable to variation or revocation by the authorities, but so long as they are not varied or revoked they remain in force despite the change of sovereign and despite the legal consequences of the change of sovereignty.

" Since writing my judgment I have read Justice Silberg's opinion, seven out of the eight paragraphs of which are devoted to a discussion of my interpretation of sect. 19 (a) . . . This is a sign that I have been too brief, and that I ought to expand a little . . .

" It is today axiomatic that Israel is not the successor of the Government of Palestine. Upon the establishment of the State of Israel a new personality was created. This retains no signs of identification with the previous political body, which completely disappeared as May 14, 1948, drew to its close.[1] The new State had, in fact, to begin from the beginning and to re-instate not only a legal system but also to re-establish law courts and to re-impose or re-validate orders, directions, notices, demands, certificates, instruments, licences, patents etc., since it did not consider itself bound by what had been done before its existence. But it was alarmed lest confusion should reign until all these things were duly ordered. What did it do? It enacted three transitional provisions: one relating to the legal system, one relating to the Judiciary, and one relating to the Executive. The three provisions are: sect. 11 of the Law and Administration Ordinance, regarding the existing law; sect. 17 regarding the courts; and sect. 19 (a) regarding the Executive. I fully concur in the remarks of Justice Goitein that the appellant must show that the contract was subsisting despite that the Government of Israel is not the successor of the Government of Palestine. I do not agree with him that the appellant has not succeeded in that . . . When the Mandate came to an end the appellant's right also came to an end. If there is doubt how far a successor State is bound by the contracts and concessions of its predecessor (see *Oppenheim's International Law*, 7th ed. (1948), vol. I, pp. 155, 156), how much the more is this so as regards a State which is not a successor? But here the beginning of sect. 19 (a) reserves the appellant's right until the respondent, exercising the authority conferred upon him by the latter part of that section, destroys it again. Justice Silberg then raises the difficulty: ' Who may cancel the contract? ' He replies that sect. 19 (a) of the Interpretation Ordinance, 1945, [by which a regulation may be at any time amended, varied, suspended, rescinded or revoked by the same authority and in the same manner by and in which it was made], supplies the answer: the authority which enacted, or its successor, may revoke. In my opinion conclusive proof that sect. 19 (a) of the Law and Administration Ordinance referred to the administrative and not to the legislative organs is supplied by the last words of the section . . . Those last words do not qualify the earlier phrase ' shall continue in force '. Had it been intended that those orders, etc., ' shall continue in force unless otherwise provided ', the two limbs of the sentence would not have been separated. In my opinion the words ' unless otherwise provided ' relate to ' until varied, etc.,' so that the correct meaning of the provision is: those orders, etc., shall continue in force until varied, etc. (by the competent department of the executive branch) unless otherwise provided in any of the ordinances of the Provisional Council of Government. If this interpretation does not prevail, I see no point in the reference to the legislative branch in that section."

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[1] *Cf.* the (United Kingdom) Palestine Act, 1948.

Per Silberg J.: " The first question is, what is the meaning of the words ' until varied, amended or revoked '? Do they mean ' varied, amended or revoked in accordance with the law or by the administration following its own discretion and without any particular legislative sanction other than sect. 19 (a) itself?

" In my view, the first interpretation is correct. I consider that the words ' varied, amended or revoked ' can only mean ' varied, amended or revoked ' in accordance with the law; and the law is either the old Mandatory enactment retained in force by virtue of sect. 11 of the Law and Administration Ordinance, or a new Israel enactment enacted or to be enacted by the legislative authorities of the State of Israel. Otherwise we would reach the difficult situation—to me undesirable from every point of view—by which the authorities of the State would, in principle, be entitled at their whim to revoke every right acquired by any order, licence, certificate or document issued during the Mandate, by any one of the 600,000 persons who passed from the Mandatory rule to that of the State of Israel on the proclamation of independence. It was not a mere handful of people who enjoyed such rights, but on the day of independence nearly every other person enjoyed some right so granted. For instance: an artisan plying his craft by virtue of an annual licence from one of the 92 classes defined in the Trade and Industries (Regulation) Ordinance, a shopkeeper selling alcoholic liquor or cigarettes by virtue of annual licences issued under the Intoxicating Liquors or Tobacco Ordinances, a physician exercising his profession under a licence issued by the Director of Medical Services according to the Medical Practitioners' Ordinance, a lawyer practising in Court by virtue of a licence issued by the Chief Justice under the Advocates' Ordinance—and many hundreds of other licencees scattered through the Mandatory statute book. Can we, in face of this enormous number of licences, now say that henceforth not the law, but the good will of the administration, will determine the fate of all these rights acquired, during the period of the Mandate, by citizens now resident in the territory of Israel?

" I am quite aware that today, in 1955, it is perhaps too late for the authorities to repeal those licences administratively, and that the fact of their silence through the existence of the seven years of the State is, perhaps, to be regarded as implied acquiescence in the existence of the rights thus acquired. I am also aware that most—but not all—of the licences are annual, and during the last seven years will certainly have been renewed by the competent authorities of the State. But this does not, from the legal point of view, settle the problem. We must interpret sect. 19 (a) in the light of its actual or likely impact in 1948, immediately upon the establishment of the State, and I am not prepared to assume that the Israel legislation, which intended to set up, and did set up a *State of law*, and not one of arbitrary régime, intended to destroy the existing legal order in so far as concerned matters regulated by law during the period of the Mandate. The very fact that in sect. 11 the State accepted in the abstract the burthen of the law of Palestine as it had existed on May 14, 1948, is evidence that, for the time being, it was satisfied with the legal system previously in force through the Mandatory legislation in this part of Palestine. If it is appropriate that a patent granted to a resident in Israel at the end of 1948 shall subsist until the end of 1964, and shall not be cancelled before then except in accordance with the law, and through the courts, why should a patent validly issued to that same resident at the beginning of 1948 be in any worse position, and why should that patent be voidable, not through the courts, before the expiry of its legal life of 16 years at the beginning of 1964?

" It is no argument that the possibility of administrative cancellation of rights granted in the period of the Mandate was due to a temporary necessity, to prevent the submission of claims based upon Mandatory titles by enemies and ill-disposed persons resident abroad. No such danger ever existed. Apart from the impracticability of such an event—given the state of quasi-belligerency between Israel and the Arab States—there is also an important legal reason to be kept in mind. The State of Israel was created only in *part* of the territory of Palestine, and not in the whole of it, and for that reason any law of Israel which keeps in force the validity of acts of the Palestine Administration, of necessity applies only to those acts performed in territory now part of the State of Israel, and in favour of the inhabitants of that territory. It is very possible that such was the intention of the Legislature in enacting, in sect. 19 (a), the words ' which was in force *on the territory of the State* '. For that reason an inhabitant of Shechem or Jenin cannot come and demand from the Government of Israel the fulfilment of rights acquired by him through some licence issued by the Government of Palestine. *Even if* Israel was the ' successor ' of Mandated Palestine, even then it would not be burdened by obligations acquired in relation to any part of Palestine or its inhabitants who remained outside the boundaries of the State; but now that Israel is not the successor, how much the more is it not encumbered, except to the extent of its own volition, by rights acquired outside the present area of the State? To be precise, that is what was decided by the late Justice Dunkelbloom in *Shimshon Ltd.* v. *Attorney-General* [*International Law Reports*, 1950, Case No. 19].

" I wish to lay special emphasis upon the following remark. I have no hesitation in saying that had the Israel Legislature so desired, it could have refrained from according any recognition whatsoever to any rights acquired by any person during the period of the Mandate. It could have done so by simply doing nothing, *i.e.*, by not enacting sect. 19 (a). There is no accepted rule of international law requiring an occupying State, or an emancipated State, to recognize, in its domestic legislation, any action performed by the previous authority—including acts creating private rights for the individual—and even if such a rule were to exist, there is grave doubt whether it would be binding upon the domestic courts as municipal law. See Oppenheim, *International Law*, Vol. I (7th ed., 19), p. 304; Castren, ' La Sucession d'Etats ', in *Recueil des Cours*, 78 (1951), p. 490; *West Rand Central Gold Mining Co. Ltd.* v. *The King*, [1905] 2 K.B. p. 391; *Cook* v. *Sprigg*, [1899] A.C. p. 572. But in sect. 19 (a) the Israel Legislature did grant some recognition, and the question reduces itself to a single point: what was its intention? From this aspect, so it seems to me at least, it is not reasonable to assume an intention to give the Israel administration a free, or almost free, hand to cancel those licences.

" There is one further consideration which may well be found to be decisive support for this interpretation of sect. 19 (a). That is by an argument *a contrario*. Let it be assumed that the words ' varied, amended or revoked ' mean ' by the Israel authorities ', then immediately the question arises: Who will vary . . .? What person is competent to vary, amend or revoke orders and licences originally granted by the Mandatory Government? If the Legislature intended to convey ' revocation by the administration ' and not ' revocation by application of the existing law ', how come that it did not state explicitly what authorities are clothed with this far-reaching power? It would not be sufficient to enact that they could be revoked by the authorities without specifying exactly who those authorities are.

" It might be argued that this is a matter covered by sect. 19 (a) of the Interpretation Ordinance (*supra*) . . . My answer to that is that this is a broken reed, and that that section does not provide any answer. True, the definition of ' regulation ' in sect. 1 of the

Interpretation Ordinance is very wide and includes some of the matters mentioned in sect. 19 (a). But it does *not* include *all* of them, at all events not so far as concerns the powers given to the regulation-making authority by sect. 19 (1) of the Interpretation Ordinance . . . It seems to me that the power conferred by that section is an alternative power, utilizable only when the specific law conferring the power to make ' regulations ' contains no instruction as to the amendment or revocation of the regulation. The question therefore remains: What authority is competent to revoke each one of the matters mentioned at the beginning of sect. 19 (a)? Since the Legislature gave no answer to this question, and we have no means of answering it otherwise than on the basis of sect. 19 (a), the conclusion is inevitable that the words ' varied, amended or revoked ' mean ' in accordance with the law ', so that there was no need to set forth in detail the various competent authorities, since they are already to be found in the Statute Book.

" This brings me to the further difficulty mentioned by Justice Cheshin when he asked: If that is the correct interpretation, what was the necessity for those words? In truth, there is no proper answer to this difficulty. The Law and Administration Ordinance was drafted in the closing weeks of the Mandate. There was no regular legislative machinery, only a small group of private jurists performing a duty imposed upon them, in an eve-of-war atmosphere, in the state of urgent tension which prevailed as the Mandatory Government departed. Clearly, in such circumstances there was insufficient leisure to weigh fully all the possible implications of each word, and it would have been a miracle had no more serious defects been found in the first enactment of the State of Israel. This, it appears to me, is the only justification for those words, for the draftsmen of sect. 19 (a) feared, unjustifiably, that without them the enactment might be interpreted as if the seal of legality thereby conferred upon the acts of the Mandatory authority would have given them greater validity than they possessed during the period of the Mandate . . . At all events, when we are faced with the alternative of seeing those words as redundant, or as conferring that tremendous power upon the administrative authorities of the State, we must prefer the first as being more just, and fairer to the interests of the citizen.

" My view, therefore, is, that as regards all the items specified in sect. 19 (a), they can only be varied, amended or revoked in accordance with the law, that is, by duly authorized persons according to the conditions laid down for that purpose in a law dealing with the subject, or some general enactment, and whether it is Palestinian or Israeli.

" Nevertheless, and despite this conclusion, I think . . . that this appeal should be dismissed. The reason is that the ' concession ' before us is not a transaction coming within the compass of sect.

19 (a). It seems to me that we have to distinguish between acts performed by the previous Government in its capacity as the Government, and transactions concluded by it in its capacity as owner of property. Generally speaking, the new State will be interested in recognizing activities of the first category—they are usually universal in their import and relate to a great number of persons so that the new authorities are unwilling to snap the chain of continuity in the legal régimes of the citizen. Furthermore, in actions falling within this category the objective is, or ought to be, to protect the interests of the community, of all the citizens. But this is not so as regards the second category, which includes transactions such as the leasing of houses by the Government, the sale of land, the conclusion of commercial contracts, and so forth. These are all sporadic transactions in which the Government appears as the ' other party ' in relation to a citizen. It is, therefore, not the necessary or logical conclusion that a new State, in this case Israel, should recognize the validity of private transactions such as these. Since, as is well known, Israel is not the successor of Mandated Palestine, it does not automatically step into the shoes of the Government of Palestine and take its place opposite any person who was resident in Palestine as the partner in one of these transactions. See Oppenheim, *loc. cit.*, pp. 155–6.

" Close examination of sect. 19 (a) shows that the legislator had precisely this distinction in mind when enacting that section. In the first part of sect. 19 (a) thirteen types of transactions are mentioned. Eleven of them—order, direction, notice, demand, certificate, instrument, authorization, licence, patent, design, trade-mark—are certainly governmental acts performed by the Mandatory authorities *as the Government of the country*. Consequently, applying the well-known *ejusdem generis* rule of interpretation, we must also assume that the last two, ' right ' or ' concession ', refer to rights or concessions granted by the Mandatory authorities in their governmental capacity—such as the concession granted to the Palestine Electric Corporation or the Dead Sea Concession—and not to a transaction such as the one before us. That, to all appearances, was an ordinary commercial transaction between a landlord, who happened to be the Government of Palestine, and the appellant. In the light of this conclusion we have no need to examine the question whether the notice of cancellation given near the termination of the Mandate was valid or not. Even without it, the Government of Israel is not bound by the ' concession ' . . .

" One final remark. This problem is not unique to Israel. Every new State, or newly-emancipated State, arranges these matters according to its needs and objective capability. There is no special virtue in precedents. A very vast literature—starting with Gentili and Grotius in the 16th and 17th centuries and ending with Feilchenfeld, Guggenheim and Kelsen in the mid-twentieth—

has been composed on the question of the legal consequences of State succession. We still have no firm rules, only a series of compilations of historical facts showing how one or other State settled these questions in practice. Therefore, in approaching the question before us, we have to decide it not on the basis of rules and precedents, but from a realistic standpoint, and to take due account of all the special features presented by that unique historical phenomenon, the establishment of the State of Israel."

Per Goitein J.: " . . . In sect. 19 (a) the legislator mentioned thirteen types of papers to which that section applies; but the word ' contract ' or ' agreement ' is not one of them. Therefore there is substance in Justice Silberg's remarks that we have to distinguish between acts performed by the previous Government in its sovereign capacity and acts performed as a private property owner. It is difficult to assume that in enumerating these thirteen types of instruments the Legislature did not add the word which would comprise private agreement between the Government and the citizen, because he did not consider this necessary. True, the word ' document ' is wide enough to comprise all kinds of official writings issued by the Mandatory authorities; but the expressions ' contract ' or ' agreement ' were well-known to the legislator, and for that reason I am not prepared to interpret the word ' document ' as comprising also a contract. I might have reached a different conclusion had only the word ' document ' been used, but this is not the case. The section contains a lengthy catalogue of official writings, but the Legislature nevertheless did not see fit to include contract or agreement amongst them . . . Furthermore the conditions of the contract show that the contract is of a completely different type from the documents mentioned in sect. 19 (a).

"The appellant must prove that the contract upon which it is relying continues to exist despite the fact that the Government of Israel is not the successor to the Mandatory authorities. This it has not succeeded in doing.

" Finally, from the fact that in Israel the railways were not running from the end of the Mandatory period until the month of September 1949, it may be learned that not only did the original lessor cease to exist but also the object of the contract. Possibly the appellant could have claimed damages from the Mandatory authorities or from the Government of Israel for failing to run the railways. But obviously there can be no specific performance of a contract the object of which ceased to exist as from May 15, 1948."

[Reports: *Piskei-Din*, 9 (1955) p. 436; *Pesakim Elyonim*, 18 (1955) p. 304.]

State Succession—Succession to Obligations—Land Requisitioned by British Army in Palestine—Power of Army to Dispose of Property after Termination of Mandate—Status of British Army in Israel after Termination of Mandate—Anglo-Israel Agreement of March 30, 1950, for Settlement of Outstanding Financial Matters.

KHAYAT *v.* ATTORNEY-GENERAL.

Israel, District Court of Haifa. April 27, 1954.

THE FACTS.—In 1941 the British Army in Palestine requisitioned land belonging to the plaintiffs, although the formal requisitioning order was not issued until 1944, and subsequently erected buildings upon the land, which was retained by that army until the latter half of June 1948. Although the Mandate terminated on May 15th, British forces remained in Haifa thereafter to cover the final withdrawal, which was completed by mid-1948. There was no formal agreement between the Israel and British Governments regarding the presence of units of the British Army on Israel territory; at the time Israel was not recognized by the United Kingdom. About ten days after the British Army had relinquished the land and buildings, the Israel Defence Forces took possession of them, and remained in possession of them. In November 1949 the plaintiffs commenced negotiations with the Israel Ministry of Defence regarding payment of rent for the land and the buildings. Those negotiations led to no result as the Ministry thought that the buildings had passed automatically from the British Army to the Israel Government. The present action was for a declaration that the plaintiffs, as owners of the land, were owners of the buildings. Their argument was based on the maxim *solo cedit quod solo inaedificatur* and upon an agreement said to have been made in March 1948 (before the termination of the Mandate) regarding the costs of reinstatement, by which the plaintiffs, *inter alia*, waived part of their claim. Furthermore, there was produced a confirmation by the British Hirings Officer, dated June 11, 1948, to the effect that the buildings were regarded as the property of the plaintiffs. There was also adduced a further confirmation, dated October 29, 1951, from the British Services Claims Organization, an organization which was then operating in Israel in order to dispose of claims against the British Government following an Agreement between the Israel and British Governments of March 30, 1950.[1] By Article 7 of that Agreement, " the Government of the United Kingdom shall transfer to the Government of Israel their rights and interests in assets, including land, in Israel . . . held by, or on behalf of, His Majesty's Secretary of State for War . . ." Then followed details of certain properties excluded from the transfer, including " any asset which the Government of the United Kingdom have already agreed to sell to some other person and in respect of which they have already received a deposit on account of the purchase price ". In this connexion it was stipulated that the exclusion of those assets would not imply any admission by the Government of Israel of the title of the United Kingdom Government thereto, while the Government of the United Kingdom maintained their claim to such title. Paragraph (b) of that Article dealt with the continuing liability of the United Kingdom Government to deal with any claim of any person resident in Israel to reinstatement of land upon which there is a fixed asset, the rights and interests of the United Kingdom Government wherein were transferable to the Israel Government thereunder, to the extent and in so far as they were liable at the time of the evacuation of such land by H.M. Forces, upon the conditions there laid down; but if the land was retained by the Government of Israel for more than six months after the date of signature of the Agreement, the claims for reinstatement were to be dealt with by the Israel Government. The land belonging to the plaintiffs was not included in the assets excluded from the transfer.

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[1] *U.N.T.S.*, vol. 86, p. 231.

Held: that, as the domestic law did not recognize separate ownership of land and buildings thereon and that as any buildings accrue to the owner of the land, the plaintiffs were entitled to the relief sought. At the time of the alleged Agreement with the plaintiffs, the British Army was the legal owner of the buildings and was under a legal liability to reinstate the plaintiffs. A waiver of part of the compensation was good consideration for any agreement that might be made between them. Article 7 of the Israel-British Agreement of 1950 was inapplicable.

After disposing of the question of the domestic law, the Court turned to the question of the status of the British Army in Israel after the end of the Mandate and said: " The parties are agreed that between 1945 and 1948 the plaintiffs were in negotiation with the British Army regarding the evacuation of the land and the acquisition of the buildings, in consideration of a waiver of part of the costs of reinstatement. The point in dispute is whether these negotiations resulted in agreement. [Here the Court found that no agreement was reached in March 1948. However, the question then arose whether an agreement had not been reached in June 1948.] The Attorney-General does not dispute that if this Agreement was reached before May 15, 1948, and had the persons representing the British Army been duly authorized, he would have recognized the plaintiffs' ownership of the buildings as resulting from that Agreement. But with the end of the Mandate, so he argues, the British Army lost all authority to make any agreement affecting land held by it in Israel. After May 15, in his opinion, the British Army which remained in Israel had the status of a trespasser only. Furthermore, the situation changed following the Agreement of March 30, 1950 . . .

" It is not disputed that the powers conferred upon the District Commissioner as the competent authority were automatically transferred to the Israel-appointed District Commissioner upon the establishment of the State: *Sanber* v. *Haifa District Commissioner* (*Pesakim Elyonim*, 10 (1949–50) p. 16); and for the purposes of this action counsel for the plaintiffs accepts that the order issued on May 14, 1948 [by the O.C. Northern District], by which the British Army remained in possession of the property for the purpose of securing its own withdrawal and the maintenance of public order even after May 15, was ineffective, and that the British Army was a trespasser with respect to property held after that date. But he argues that this is of no consequence as regards the competence of the British Army to transfer land which had been in its ownership. According to him, the date of May 15, 1948, is of importance as regards the change which came about in the régime of the country and its legal system, but not as regards private rights. On May 15, 1948, the State of Israel acquired sovereignty and its officials competence; but the State was not the successor of the Mandatory Government or of the British Government, and a distinction has to be made between the British Government, the British Army and the Mandatory Government.

" It is true that the Property Division of the Israel Ministry of Defence once argued that the buildings formerly the property of the British Army became automatically the property of the State of Israel after the establishment of the State. But this argument was not repeated by the Attorney-General, and I may assume that he has abandoned it.

" The Attorney-General's principal objections to the arrangement of June 1948 are: (a) that it has not been established that the official who made it was duly authorized by the British Army; (b) that the agreement was not supported by any consideration. . . . True, he admits that before May 15, 1948 . . . the British Army authorities were entitled to come to agreement regarding the costs of reinstatement, but this authority lapsed with the end of the Mandate and became vested in the Government of Israel. [After finding as a fact that the official in question was duly authorized, the Court continued:] The only question that remains is whether the British Army was at all empowered to make the agreement with the plaintiffs. I am, it seems to me, entitled to assume that on May 15, 1948, the day of the establishment of the State, no change took place as regards the rights of ownership of the British Army, and that any change that did occur resulted only from the Agreement reached between the two Governments in March 1950, already mentioned. It follows from this that at the time of the Agreement of June 1948, the British Army was the legal owner of the buildings in question. A perusal of the Law and Administration Ordinance, 5708–1948 (*Laws of the State of Israel*, authorized translation, vol. 1 p. 7), shows clearly that the Government of Israel did not succeed to the obligations of the Mandatory Government, and that the only section to speak of ' succession ' is sect. 21, which deals with payment to the Israel Government of taxes and other sums due but not paid to the Mandatory Government. The Supreme Court has already explicitly held that the Government of Israel is not responsible for the liabilities of the Mandatory Government and is not its successor: *Sifri* v. *Attorney-General* (*International Law Reports*, 1950, Case No. 22).

" There is no doubt that at the end of the Mandate the Mandatory Government was liable to the plaintiff for rent and reinstatement. There is likewise no doubt that this liability did not pass to the Israel Government, and if it did pass, that was not until March 1950, when the agreement of March 30 was made and Article 7 established the necessary conditions. At all events, on June 10 or 11, 1948, when the Hirings Officer signed the first confirmation, no such liability rested upon the Israel Government; and since that was so I see no reason why the British Army could not surrender buildings to the plaintiffs in consideration of their waiving part of their rights to compensation, whether from the Mandatory Government or from the British Army. Whether the British Army was a trespasser or not, at the time of that arrangement it was the legal owner of the buildings; at the same time it was bound to compensate the plaintiffs for the occupation of their land. Therefore I am of opinion that their waiver of part of the reinstatement costs was good consideration . . .

" As to Article 7 of the Agreement of March 30, 1950, between the two Governments, its effect is limited only to those properties owned by the British Government at the date of the Agreement. But as I have already held, by then the buildings were no longer in the ownership of the British Army . . . It cannot be deduced that the non-inclusion of the buildings among the assets excluded from the transfer implies that either the British Government or the British Army had not transferred ownership of the buildings to the plaintiffs."

[Report: *Pesakim Mehoziim*, 9 (1954) p. 378.]

NOTE.—While this case is concerned primarily with a question of municipal law, the judgment is devoted to some extent to an interpretation of an international agreement relating to problems of State Succession. It also examines the status of British Forces in a former mandated territory. In view of this it has been thought desirable to include a report of this case.

The status of the British Military Forces in Palestine after the termination of the Mandate appears to have been anomalous. On May 15, 1948, the General Officer Commanding His Britannic Majesty's Forces in Palestine issued seven proclamations. Proclamation No. 1 contained the following preamble:

> " Whereas His Britannic Majesty did, prior to the 15th May, 1948, exercise a Mandate over the territory of Palestine.
>
> " And whereas the said Mandate terminated on the 15th May, 1948.
>
> " And whereas His Britannic Majesty's forces are now in the process of withdrawing from the said territory.
>
> " And whereas for the purpose of accomplishing the said withdrawal, I, being the Commanding Officer of the said forces, am vested with the powers of a Commander of Forces in occupation of foreign territory, as from . . . hours [*sic*] on the 15th May, 1948, in the occupied area. Now therefore I . . . hereby proclaim to all it may concern the following."

The proclamation provided for military jurisdiction over the occupied area " so far as may be necessary for the purpose of accomplishing the withdrawal of His Britannic Majesty's forces from Palestine, and will remain under such jurisdiction as long as I may determine ". The occupied area was defined by reference to a map, and included parts of Haifa. Other proclamations dealt with military crimes, general powers (including a power to " retain " possession of any land), military courts having jurisdiction over civilians only, British police force, operations outside the occupied area, and ports and railways. These proclamations were not promulgated in any manner consonant with the Palestine Orders-in-Council, 1922–48, and were not legislation in force in Palestine prior to the termination of the Mandate. A few copies were printed by the Palestine Government Printing Press in the month of April—which accounts for the absence of the time for the commencement of the military occupation.

State Succession—Succession to Obligations—Respect for Private Rights—Conquest—Status of Descendants of Semi-Independent Rulers in India—Conquest of Territories and Their Re-Grant to Ex-Rulers—Jagirdars as Ordinary Subjects of India—Eminent Domain.

THAKUR AMAR SINGHJI AND OTHERS (PETITIONERS) *v.* STATE OF RAJASTHAN AND OTHERS (RESPONDENTS).

India, Supreme Court. April 15, 1955.

(Mukherjea C.J.; Das, Bhagwati, Venkatarama Ayyar and Jafer Imam JJ.)

THE FACTS.—On August 20, 1949, the Government of India appointed a Committee to examine and report on the Jagirdari[1] and land tenures in Rajputana and Madhya Bharat, the object being to effect land reforms so as to establish a direct relationship between the State and the tillers of the soil and to eliminate all intermediaries between them. By its report dated December 18,

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[1] See *infra*, p. 131, n. 2.

1949, the Committee recommended, *inter alia,* the resumption of Jagirs[1] and payment of rehabilitation grants in certain cases. Following these recommendations, the Rajasthan Land Reforms and Resumption of Jagirs Act was passed and came into force on February 18, 1952. The State of Rajasthan issued notifications resuming (acquiring) the Jagir lands in accordance with that Act (by eminent domain), whereupon petitions were filed by the persons aggrieved challenging the validity of the Act. The High Court of Rajasthan having held the Act valid, the petitioners appealed to the Supreme Court. Most of them contended that they were not Jagirdars, but held the lands in question as semi-independent Chiefs and could therefore not be deprived of these lands under the Act or under the provisions of Article 31A of the Constitution (which validated the acquisition by the State of Zemindaris (Jagirs)).

Held: that most of the petitioners did not hold their lands as semi-independent Chiefs but that their titles to these lands had been long ago converted into Jagirs; their status was therefore that of subjects of India. The Court considered first the so-called Bhomichara tenures in the State of Marwar and recalled their history, which went back to the thirteenth century. In the course of time various Rulers in this area had to accept the suzerainty of the Ruler of Jodhpur and became his tributaries (Bhomicharas).

Discussing the status of these Rulers in the past, the Court said: " The area continued to be distracted by disputes and dissensions among its leaders and fell into such anarchy and confusion that in 1835 the British had to intervene to restore order. It should be remembered that they had entered into a Treaty of Alliance with Jodhpur in 1818, and their intervention was presumably by virtue of their obligations under that Treaty. Thereafter, the territory was put under the administration of a British Superintendent, and latterly of the Resident at Jodhpur. During this period the annual tribute was collected by the British and paid to the Jodhpur State. Writing on the status of the Bhomicharas during this period, Major Malcolm remarked in his report dated 1849 thus:

> ' . . . though the British Government had established a claim to the districts themselves, consequent on having reduced them to order and obedience, it was willing out of kindness and consideration to His Highness, to waive its just rights and to acknowledge His Highness as entitled to sovereignty over those districts, and the tribute they might yield . . . '

" In 1891 the British withdrew from the administration of the Province and handed it over to the Maharaja of Jodhpur, who thereafter continued to govern it as part of his Dominions.

" On these facts it [was] contended [by the petitioners] . . . that Bhomicharas are not holders of Jagirs or other similar grants within the meaning of Article 31A because a Jagir could be created only by a grant from the Ruler; the petitioners could not be said to hold under a grant from Jodhpur because they had obtained the territory by right of conquest long before Jodhpur established its suzerainty, and even prior to its foundation as a State. Although they lost their political independence when Jodhpur established its overlordship, it was maintained that they had not lost their right to property; that their status was that of semi-independent chiefs, not Jagirdars; and that 'Foujbal' was paid by them not on account of land revenue but by way of tribute . . ."

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[1] See *infra*, p. 131, n. 2.

With regard to these contentions of the petitioners, the Court said: "The petitioners acquired the lands in question by conquest and held them as sovereigns. Then Jodhpur came on the scene, imposed its sovereignty over them and exacted annual payments from them. What was their status thereafter? In *Vajesingji Joravar Singji* v. *Secretary of State*, A.I.R., 1924, P.C. 216 at p. 217, Lord Dunedin observed:

> 'When a territory is acquired by a sovereign State for the first time, that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has through his officers recognised. Such rights as he had under the rule of predecessors avail him nothing'."

Vide also the finding of the Privy Council in *Secretary of State* v. *Rustam Khan*, A.I.R., 1941, P.C. 64 (D).[1]

"Applying these principles when Jodhpur as a sovereign State imposed its sovereignty over the territory and permitted the ex-Rulers to continue in possession of their lands on payment of an annual sum, the position is that there was in effect a conquest of the territory and a re-grant of the same to the ex-Rulers, whose title to the lands should thereafter be held to rest on the recognition of it by the Ruler of Jodhpur . . . It is as if the Maharaja of Jodhpur annexed all the territories and re-granted them to the former Rulers. They must accordingly be held to derive their title under an implied grant.

"It is argued that notwithstanding that the Bhomicharas had acknowledged the sovereignty of the Ruler of Jodhpur, his hold over the country was slight and ineffective, and even the payment of Foujbal was irregular; in substance, therefore, they enjoyed semi-sovereign status, and their relationship to the Jodhpur Ruler resembled that of the Rulers of Native States to the British Crown. We are unable to accept this argument. The status of a person must be either that of a sovereign or that of a subject. There is no

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[[1] *Annual Digest*, 1941–1942, Case No. 21.]

'*tertium quid*'. The law does not recognize an intermediate status of a person being partly a sovereign and partly a subject, and when once it is admitted that the Bhomicharas had acknowledged the sovereignty of Jodhpur their status can only be that of a subject.

"A subject might occupy an exalted position and enjoy special privileges, but he is none the less a subject; and even if the status of Bhomicharas might be considered superior to that of ordinary Jagirdars, they were also subjects. The contention that the relation between Bhomicharas and Jodhpur was of the same kind as that which subsisted between the Rulers of Native States and the British Crown is untenable. On the question whether those States could be recognized as sovereign under the generally accepted principles of international law . . . the opinion of jurists was adverse to such recognition (see Lee Warner, *Protected Princes of India*, 1894 edition, Chapter XIII, sec. 150, pp. 373–376). But at least those States had each a distinct '*persona*', with a Ruler who possessed executive, legislative and judicial power of a sovereign character; but the Bhomicharas had ceased to have a distinct *persona* . . .

"That the status of Bhomicharas was that of subjects will also be clear from the subsequent course of legislation in Marwar. [After discussing this legislation, the Court said in conclusion:] We are of opinion that by long usage and recognition and by the legislative practice of the State, Bhomicharas had come to be regarded as Jagirdars . . . In the result it must be held that the legislation [relating] to Bhomichara tenure is protected by Article 31A [of the Constitution]."

[Report: A.I.R., 1955, S.C. 504.]

NOTE.—The other petitioners contended similarly that their tenures were not jagirs but were based on titles derived from the status of their ancestors as semi-independent or subordinate Chiefs. However, their titles were found to be even inferior to those of the Bhomicharas and the Court, after reviewing the relevant historical material submitted by the parties, dismissed their petitions.

State Succession—Obligations—Loan Issued in France by Independent Congo—Subsequent Change of Status of Congo to Belgian Congo—Whether Belgian Congo Subject to Jurisdiction of French Courts.

See p. 226 (*Montefiore* v. *Belgian Congo*).

V.—Respect for Private Rights

State Succession—Respect for Private Rights—Former Indian States—Instrument of Accession to Dominion of India—Act of State—Effect on Grants Made by Rulers of Indian States—Reliance on Act of State in relation to State's Own Subjects—The Law of India.

VIRENDRA SINGH AND OTHERS *v.* STATE OF UTTAR PRADESH.

India, Supreme Court. April 29, 1954.[1]

(Mahajan C. J.; Mukherjea, Bose, Bhagwati and Venkatarama Ayyar JJ.)

THE FACTS.—The petitioners were granted in January 1948 Jagirs[2] and Muafis of land by the Ruler of Sarila State in one village and by the Ruler of Charkhari State in three villages. In March 1948, a Union of 35 States (including the above-mentioned two States) was formed as the United State of Vindhya Pradesh. The Government of this State confirmed the grants in December 1948. In December 1949, the 35 Rulers dissolved the State as from January 1, 1950, and acceded to the Dominion (Union) of India, effecting an Instrument called the Vindhya Pradesh Merger Agreement. The States which had formed Vindhya Pradesh were then, on January 23, 1950, transformed into a Chief Commissioner's Province. The four villages (called enclaves) were taken out of this Province on January 25, 1950, and absorbed into the United Provinces (Uttar Pradesh) by an Order of the Governor-General of India under the provisions of the Government of India Act, 1935. The grant of the four villages made by the Rulers in favour of the petitioners was revoked, in August 1952, by the Government of Uttar Pradesh in consultation with the Government of India. The petitioners asked for the issue of a writ under Article 32 of the Constitution on the ground that the Order violated their property rights under Articles 31 (1) and 19 (1) (*f*) of the Constitution. The Government of Uttar Pradesh objected to the petition, *inter alia*, on the ground that the grants of Jagirs and Muafis by the Rulers in question were made *mala fide*. The question also arose whether the Government had the right and the power to effect the revocation of these grants as an Act of State.

Held: that the petitioners were entitled to a writ as their property rights had been violated. The properties in question were properties over which the Rulers had an absolute right of disposition at the date of the grants. The grants passed an indefeasable title to the grantees. The rights and titles of the petitioners to continue in possession remained valid. The petitioners were citizens of India and the action taken against them by the Government could not be defended as no Sovereign can exercise an Act of State against its own subjects.

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[1] See n. 1 on p. 73 *supra*.

[2] A jaghire (jagir) is an assignment of the King's or Government's share of the produce of a district to an individual or a body, as an annuity, either for private use or for the maintenance of a public (esp. military) establishment. A Jaghirdar is the holder of a jaghire.

The Court said (*per* Bose J.): "The present petition under Article 32 of the Constitution [is] against the State of Uttar Pradesh. The Union Government was allowed to intervene. The State of Uttar Pradesh made the following affidavit in reply:

> '(3) That immediately before or after the signing of the agreement some Rulers of the Indian States constituting the Vindhya Pradesh Union, whose territories were subsequently absorbed in Uttar Pradesh, had granted jagirs and muafis of land to their near relations *mala fide* and thereby indirectly increased their privy purse.'

"The operative order of revocation was made by the Governor of Uttar Pradesh, and under the Constitution it is clear that no State Government has the right to do anything in the nature of an Act of State. But in view of the fact that the revocation was made in consultation with the Government of India, we were asked to treat the Uttar Pradesh Governor as a delegate of the sovereign authority whose act has been approved and ratified by that authority, along the lines of *Buron* v. *Denman*,[1] *Secretary of State in Council* v. *Kamachee Boye Sahaba*[2] and *Johnstone* v. *Pedlar*,[3] and to decide on that basis whether the Union Government had the right and power to revoke these grants as an Act of State.

"Jurists hold divergent views on this matter. At one extreme is the view of the Privy Council in a series of cases. Their effect was summarised in *Vajesinghji Joravarsinghji* v. *Secretary of State for India in Council*[4] and again in *Secretary of State* v. *Sardar Rustam Khan*[5] in the following words:

> "'A summary of the matter is this, when a territory is acquired by a sovereign State for the first time, that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized Ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new Sovereign only such rights as that Sovereign has, through officers, recognized. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties';

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[1] 2 Exch. Rep. 167.

[2] 7 Moo. I.A. 476 at 540.

[3] [1921] 2 A.C. 262 at 279 [*Annual Digest*, 1919–1922, Case No. 161].

[4] 51 I.A. 357 at 360.

[5] 68 I.A. 109 at 124 [*Annual Digest*, 1941–1942, Case No. 21].

also in *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* [*supra*] and in *Johnstone* v. *Pedlar* [*supra*] as follows:

" ' Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy.'

" According to the Privy Council in *Secretary of State in Council* v. *Bai Rajbai*[1] and also in *Vajesinghji Joravarsinghji* v. *Secretary of State for India in Council*,[2] the burden of proving that the new sovereign has recognized the old rights lies on the party asserting it. The learned Solicitor-General relies on these cases.

" At the other extreme is the view of Chief Justice John Marshall of the United States Supreme Court. He said in *United States* v. *Percheman*[3] in the year 1833:

' It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged, if private property should be generally confiscated, and private rights anulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? . . . . A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The King cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilised world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property.'

" This view was followed by Cardozo J. in 1937 in *Shapleigh* v. *Mier*.[4] He said:

' Sovereignty was thus transferred, but private ownership remained the same. . . . To find the title to the land today we must know where title stood while the land was yet in Mexico.'

" We gather from Hyde's *International Law*, Vol. I, second edition, p. 433, that the same principle was laid down by the

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[1] 42 I.A. 229 at 239.

[2] 51 I.A. 357 at 361.

[3] 32 U.S. 51 at 86, 87.

[4] 299 U.S. 468 at 470 [*Annual Digest*, 1935–1937, Case No. 14].

Permanent Court of International Justice. The learned author quoted the Court as saying in its Sixth Advisory Opinion of September 10, 1923, on *Certain Questions relating to Settlers of German Origin in the Territory ceded by Germany to Poland*[1]—

> ' Private rights acquired under existing law do not cease on a change of sovereignty. No one denies that the German Civil Law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that, although the law survives, private rights acquired under it have perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice . . . It suffices for the purposes of the present opinion to say that even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty.'

" The learned counsel for the petitioners relies on this class of case and derives this much support for it from the Privy Council in *Mayor of Lyons* v. *East India Company*[2] where Lord Brougham said:

> ' It is agreed, on all hands, that [when] a foreign settlement [is] obtained in an inhabited country, by conquest, or by cession . . . the law of the country continues until the Crown, or the Legislature, change it.'

" It is right, however, to point out that Hyde places limitations on the doctrine at p. 432 and that the learned authors of *Corpus Juris: International Law*, vol. 33, p. 415, place the limitation that in the absence of express understanding a conqueror assumes no obligations of the conquered State. This distinction was also drawn by Lord Alverstone C.J. in *West Rand Central Gold Mining Company* v. *Rex*[3] where, commenting on the American cases, he said that there is a difference between the private rights of individuals in private property and contractual rights which are sought to be enforced against the new sovereign. He said:

> ' It must not be forgotten that the obligations of conquering States with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are altogether different from the obligations which arise in respect of personal rights by contract. As is said in more cases than one, cession of territory does not mean the confiscation of the property of individuals in that territory. If a particular piece of property has been conveyed to a private owner or has been pledged, or a lien has been created upon it, considerations arise which are different from those which have to be considered when the question is whether the contractual obligation of the conquered State towards individuals is to be undertaken by the conquering State.'

[[1] See *Annual Digest*, 1923–1924, Case No. 167.]

[2] 1 Moo. I.A. 175 at 270, 271.

[3] [1905] 2 K.B. 391 at 411.

" Lord Alverstone also pointed out that in the American cases on which the international jurists have based their views, the treaties of cession *as well as the subsequent legislation of the United States* protected the rights of owners of private property as they existed at the time of cession and so the only question for decision in each of those cases was whether any private rights of property actually existed at the relevant date. Now that is also the English law, for the Privy Council and the House of Lords have also held that the new sovereign can choose to waive his rights and recognise titles and rights as they existed at the date of cession. This recognition can be given either by legislation or by proclamation and it can even be inferred from the mode of dealing with the property after the cession: *Forester* v. *Secretary of State for India in Council*[1] (legislation); *Secretary of State* v. *Bai Rajbai*[2] (agreement, legislation and mode of dealing); *Mayor of Lyons* v. *East India Company*[3] (waiver) and (at p. 285) (relinquishment); also *Vajesinghji Joravarsinghji* v. *Secretary of State for India*[4] and *Secretary of State* v. *Sardar Rustam Khan*.[5]

" In dealing with the views of international jurists, Lord Halsbury insisted that they were only enunciations of what in their opinion the law ought to be, and had no binding force. He said in the House of Lords in *Cook* v. *Sprigg*:[6]

> ' It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by a sovereign against sovereign in the ordinary course of diplomatic pressure.'

" His view was endorsed by the Privy Council in *Secretary of State* v. *Sardar Rustam Khan* [*supra*] and again in the House of Lords in *Johnstone* v. *Pedlar*.[7] Lord Alverstone C.J. analysed in detail how far international law can be accepted and applied in municipal Courts of justice in *West Rand Central Gold Mining Company* v. *Rex*[8] and set out reasons for the above conclusion.

" The learned counsel for the petitioners also relies on another limitation which the English Courts have placed on an Act of State. He says that even if the right to confiscate be conceded, it must be taken to have been waived if either the Crown or its officers purport to act under colour of a legal title and not arbitrarily. He contended that arbitrariness was of the essence in an Act of State. He relied on *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*,[1] *Forester* v. *Secretary of State for India in Council* [*supra*] and *Johnstone* v. *Pedlar* [*supra*]. He pointed out that the affidavit of the respondent shows that the Government decided to confirm all grants except those which were *mala fide*. Therefore, this was no arbitrary act of annexation but an attempt to exercise what was thought to be a legal right.

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[1] 1872–73 I.A. Supplt. 10 at 17.
[2] 42 I.A. 229 at 237.
[3] 1 Moo. I.A. 175 at 281.
[4] 51 I.A. 357 at 361.
[5] 68 I.A. 109 at 123 [*Annual Digest*, 1941–1942, Case No. 21.]
[6] [1899] A.C. 572 at 578.
[7] [1921] 2 A.C. 262 at 281.
[8] [1905] 2 K.B. 391 at 401–8.

[After reviewing again the brief history of events relating to the case up to the date of accession of the Rulers to the Dominion of India (which was an Act of State), the Court said:] " Whether the Privy Council view is correct or that put forward by Chief Justice Marshall in its broadest outlines is more proper, all authorities are agreed that it is within the competence of the new sovereign to accord recognition to existing rights in the conquered or ceded territories and, by legislation or otherwise, to apply its laws to them; and these laws can, and indeed when the occasion arises must be examined and interpreted by the municipal Courts of the absorbing State.

" Now in the present case, what happened after the final accession? "

The Court answered this question by stating that " the titles of [the] petitioners to the disputed lands had not been repudiated up to the 26th January 1950 [date of commencement of the Constitution]. It is immaterial whether or not the right of the Dominion Government to do so remained in abeyance till exercised, despite the agreement embodied in the Instruments of Accession and the legislation and notification quoted above because, in fact, it was not exercised.

" Now what was the effect of the non-exercise of those rights? Even on the English view, the person in *de facto* possession is not without rights in the land, nor is he altogether without remedy. It is just a question of the means of redress. In *Johnstone* v. *Pedlar*[2] Lord Atkinson, speaking in the House of Lords, said:

> ' It is on the authorities quite clear that the injury inflicted upon an individual by the Act of State of a sovereign authority does not by reason of the nature of the act by which the injury is inflicted cease to be a wrong. What these authorities do establish is that a remedy for the wrong cannot be sought for in the Courts of the sovereign authority which inflicts the injury, and that the aggrieved party must depend for redress upon the diplomatic action of the State, of which he is a subject.'

After a discussion in this respect of the case of *Forester* v. *Secretary*

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[1] 7 Moo. I.A. 476 at 531.

[2] [1921] 2 A.C. 262 at 278 [*Annual Digest*, 1919–1922, Case No. 161].

of State for India,[1] *Mayor of Lyons* v. *East India Company*[2] and *Ex-Rajah of Coorg* v. *East India Company,*[3] the Court came to the conclusion that the petitioners

> ' had rights in them which they could have enforced up to 26th January 1950 in the Dominion Courts against all persons except possibly the Rulers who granted the land and except possibly the State. We do not by any means intend to suggest that they could not have enforced them against the Rulers and the Dominion of India as well, but for reasons which we shall presently disclose, it is not necessary to enter into that particular controversy. It is enough for the purposes of this case to hold that the petitioners had, at any rate, the rights defined above.'

[The Court then considered the position under the Constitution of January 26, 1950, and said:] " The Constitution, by reason of the authority derived from, and conferred by, the peoples of this land, blotted out . . . all vestiges of arbitrary and despotic power in the territories of India and over its citizens and lands . . . It is impossible to think of those who sat down together in the Constituent Assembly and of those who sent representatives there, as conqueror and conquered, as those who ceded and as those who absorbed, as sovereigns or their plenipotentiaries, contracting alliances and entering into treaties as high contracting parties to an Act of State . . . every vestige of sovereignty was abandoned by the Dominion of India and by the States and surrendered to the peoples of the land who through their representatives in the Constituent Assembly hammered out for themselves a new Constitution . . . Article 5 [of the Constitution] defines Indian citizens. They include in their wide embrace the Rulers of Charkhari and Sarila who made the grants, the petitioners who received them and those who now seek as an Act of State to make the confiscation. It is impossible for a Sovereign to exercise an Act of State against its own subjects. However disputable the proposition may be that an Act of State can be exercised against a citizen who was once an alien, the right being only in abeyance till exercised, there has never been any doubt that it can never be exercised against one who has always been a citizen from the beginning in territory which has from its inception belonged to the State seeking to exercise the right.

[The Court said in conclusion:] " It was not denied that if the present action of the State cannot be defended as an Act of State it cannot be saved under any provision of law. Whether the State would have the right to set aside these grants in the ordinary Courts of the land, or whether it can deprive the petitioners of these properties by legislative process, is a matter on which we express no opinion. It is enough to say that its present action cannot be defended." The Court then stated that "a writ will accordingly issue restraining the State of Uttar Pradesh from giving effect to the orders complained of and directing it to restore possession to the petitioners if possession has been taken."

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[1] 1872–73 I.A. Supplt. 10.

[2] 1 Moo. I.A. 175 at 274, 275.

[3] (1860) 29 Beav. 300.

[Report: 1955 S.C.R. 415.]

State Succession—Private Rights—Merger of Indian States in Dominion of India—Legislation Abolishing Rights under Merger Agreements—Enforcement of Obligations Contained in Merger Agreements—Act of State—The Law of India.

MAHARAJ UMEG SINGH AND OTHERS (Petitioners) *v.* STATE OF BOMBAY AND OTHERS (Respondents).

India, Supreme Court. April 6, 1955.

(Mukherjea C.J.; Das, Bhagwati, Venkatarama Ayyar and Jafer Imam JJ.)

THE FACTS.—The petitioners, who were Jagirdars[1] (land owners) and relations of the Rulers of former Princely States which had merged in Bombay, filed petitions under Article 32 of the Constitution challenging the Bombay Merged Territories and Areas (Jagirs Abolition) Act, 1953. The petitioners relied on Cl. 5 of the Letters of Guarantee which had been obtained by the Rulers of the above States from the Dominion Government and complained that they had been wrongfully deprived of their rights. The respondents denied the allegations of the petitioners and contended, *inter alia*, that the petitioners were not parties to the Agreements of Merger and Letters of Guarantee and that they were not entitled to enforce the same.

Held: that the petition must be dismissed. If the petitioners "were deemed to be parties to the Agreements of Merger and Letters of Guarantee they would be faced with a bar to the maintainability of the petitions under Article 363 of the Constitution[2] . . . If, on the other hand, they were deemed not to have been parties to the same, they would not be the contracting parties and would certainly not be able to enforce these obligations." The Court discussed the Merger Agreements in the light of the theory of Act of State, but did not decide the question whether the obligations of the Dominion of India under these Agreements were enforceable by the petitioners.

The Court said: "All these petitioners have challenged the *vires* of the impugned Act, relying mainly upon the Agreements of Merger entered into by the Rulers of the respective States with the Dominion of India on or about March 19, 1948, and the collateral Letters of Guarantee passed by the Ministry of States in their favour on subsequent dates, the contents of which were regarded as part of the Merger Agreements entered into by them with the Dominion of India."

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[1] See *supra*, p. 131, n. 2.

[[2] As to which see *infra*, p. 140.]

Clause 5 of the Letters of Guarantee provided:

> "Pensions, gratuities, annuities and allowances granted by the State [*i.e.*, former Princely State] to the members of its public services . . . as also the enjoyment of the ownership of Khangi villages, lands, jagir grants, etc. existing on 1st April 1948 are hereby guaranteed. This guarantee is without prejudice to the right of the Government of Bombay to issue any legislation which does not discriminate against the States and their subjects."

The petitioners contended that "the State of Bombay was . . . bound by all the obligations which had been undertaken by the Dominion Government under the Agreements of Merger and Letters of Guarantee above referred to, and it could not lie in the mouth of the State of Bombay to repudiate the same."

The Court continued: "This argument is not without force, but we do not consider it necessary to decide this question because, even assuming that the State of Bombay was bound by these obligations, the question still remains how far the petitioners before us are entitled to enforce these obligations against the State of Bombay. The petitioners were certainly not parties to these Agreements of Merger and Letters of Guarantee '*eo nomine*'. They could only claim to be parties to the same by reason of the fact that the Rulers of the erstwhile States did not negotiate these Agreements of Merger or obtain the Letters of Guarantee only in respect of their personal rights and properties, but also represented the States and their subjects in the matter of obtaining the same; the subjects of these States were therefore represented by the Rulers and were entitled to the benefit of whatever obligations were undertaken by the Dominion of India *qua* the States and their subjects. It is therefore arguable that the Rulers of the erstwhile States, as also their subjects, would be in a position to enforce these obligations. This position was, however, sought to be negatived by reliance on the following observation of their Lordships of the Privy Council in *Vajesingji Joravarsingji* v. *Secretary of State*, A.I.R., 1924, P.C. 216 at p. 217:

> 'But a summary of the matter is this: when a territory is acquired by a sovereign State for the first time, that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new Sovereign only such rights as that Sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy

certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties.'

" These observations were quoted with approval in *Secretary of State* v. *Rustam Khan*, A.I.R., 1941, P.C. 64 at pp. 67, 68.[1] It was therefore urged that it will be the high contracting parties, *viz.*, the Rulers of the respective States, who would be in a position to enforce these obligations and not the petitioners for whose benefit these obligations were undertaken by the Dominion Government.

" We do not feel called upon to pronounce upon the validity or otherwise of these contentions, also for the simple reason that the petitioners would be out of Court either way. If they were deemed to be parties to the Agreements of Merger and Letters of Guarantee they would be faced with the bar to the maintainability of the petitions under Article 363 of the Constitution, which lays down that neither the Supreme Court nor any other Court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of the Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India . . . was a party. If, on the other hand, they were deemed not to have been parties to the same, they would not be the contracting parties and would certainly not be able to enforce these obligations."

From the constitutional point of view the Court declared the Jagir Abolition legislation *intra vires* and non-discriminatory and dismissed the relevant petitions.

[Report: A.I.R., 1955, S.C. 540.]

NOTE.—There is a fundamental difference between the above case and *Virendra Singh and Others* v. *State of Uttar Pradesh* (see *supra*, p. 131): in the latter the grants of Jagirs had been revoked by executive action, whereas in the present case the Jagirs were abolished by legislative action which the Court declared *intra vires*. Though the Court did not pronounce on the question of enforcement of obligations under the Merger Agreements (Letters of Guarantee) by the petitioners, its reference to two cases decided by the Privy Council shows that the merger of the territories of the Princely States in the Dominion of India must be regarded as an Act of State, with all the legal consequences flowing therefrom.

[[1] See *Annual Digest*, 1941–1942, Case No. 21.]

VII.—International Conventions

State Succession—Treaties—Absorption of One of the Parties—Treaties Concluded by German *Länder* — Extinction of International Personality of *Länder* in 1934—Tacit Renewal of Validity of Treaties—Actual Application of Treaty.

BERTSCHINGER *v.* BERTSCHINGER.

Switzerland, Federal Tribunal, Civil Division. July 14, 1955.

THE FACTS.—Robert Bertschinger, a citizen of Zürich, Switzerland, died on September 29, 1954, in Germany. At the time of his death he owned a house in Öhningen, Germany, and a flat in Zürich, and was registered with the police in both places. By holograph will made in Öhningen on August 21, 1954, he left his entire property to his fourth wife.

In October 1954 proceedings were begun in the District Court of Zürich for the grant of probate. The wife entered a plea to the jurisdiction, contending that the courts of Öhningen, Germany, were solely competent to grant probate. The District Court of Zürich on November 1, 1954, rejected the plea, and its decision was confirmed by the Obergericht of Zürich on January 13, 1955. That decision was based on the following considerations: The last domicile of the testator was in Öhningen, Germany; Article 25 of the German Law concerning Transfer on Death provides that the law of his nationality is applicable to the succession of an alien resident in Germany at the time of his death; Swiss law provides that Swiss nationals resident abroad who according to the law of the country of their residence are not subject to that law shall in matters of succession be subject to the law and jurisdiction of their home canton unless international treaties provide otherwise; Article 6 of a Treaty between Switzerland and the Grand Duchy of Baden of 1856 would, if the Treaty were still in force, make the courts of Baden competent to grant probate in this case and make German law applicable to the succession; that Treaty had ceased to exist as a result of the German Law of January 30, 1934, putting an end to the existence of Baden as a subject of international law; it could not be assumed that the obligations arising under that Treaty had passed to a successor State; accordingly, Swiss law remained applicable to the succession of Bertschinger, and the Courts of Zürich had jurisdiction to grant probate.

Mrs. Bertschinger now asked the Federal Tribunal to set aside the decision of the lower Courts, contending that the Treaty of 1856 was still in force. A son of the first marriage of the deceased asked the Tribunal to hold, on the contrary, that the deceased had been domiciled in Zürich at the time of his death.

Held: that the decision of the lower Courts must be set aside. The validity of the Treaty of 1856 had been tacitly renewed. The Courts of Baden, and not the Courts of Zürich, were accordingly competent to grant probate.

The Court said: "The fact that the Treaty of 1856 is included in the *Revised Collection of Federal Laws and Orders, 1848–1947*, does not mean that the federal Legislature has determined, with effect binding on this Tribunal, that the Treaty was still in force on the decisive date for that Collection, namely, January 1, 1948. According to Article 1 of the Federal Law of March 12, 1948, the legal effect of that Collection lies exclusively in the abrogation of the laws and orders not therein included. With respect to the treaties concluded by the Confederation, the Collection does not even have that negative effect, as is made clear in a decision of the Federal Council of December 10, 1951; it certainly does not have any positive effect.

"The lower Court is correct also in its view that in deciding upon the validity of an international treaty a court is not bound by the views of the political authorities which concluded that treaty. These authorities are admittedly alone competent to denounce the treaty or to order its temporary non-enforcement as a measure of retorsion. Such measures of the political authorities must accordingly be applied by the courts. For the rest, the courts must decide independently on the applicability of treaty provisions in cases before them, even where the question at issue is not whether a treaty is applicable to the facts of the case, or how it must be interpreted, but whether the treaty is in force.

"This does not mean, as the lower Court assumed, that the courts need not take the views of the political authorities into consideration at all. The position of these authorities is, together with the views of writers and the practice of courts and administrative bodies, of considerable interest to the Court in arriving at its own conclusions. The Federal Tribunal accordingly asked the Federal Political Department and the Federal Department for Justice and Police for their views on the validity of the Treaty of 1856. Such views, which serve not to determine facts but as documentation for a legal question of principle, are admissible in the same way as legal writings. The agreed views of both Departments were embodied in a report of July 2, 1955, drawn up by the Federal Political Department in agreement with the Federal Department for Justice and Police.

"There is no doubt that the Treaty of 1856 was still in force under the Constitutions of the German Reich of 1871 and 1919. On the other hand, writers are divided on the question whether it lapsed when the German Law of January 30, 1934, concerning the reconstruction of the Reich withdrew their independent sovereignty from the *Länder* and made them into simple administrative districts, and when the Order concerning German nationality dated February 5, 1934, abolished the citizenship of the German *Länder*, or whether the Treaty remained in force despite all these events. The continued validity of the Treaty is denied by von Carolsfeld (in *Zeitschrift für Ausländisches und Internationales Privatrecht*, 1938-9, pp. 285 ff.) and Schnitzer (*Handbuch des internationalen Privatrechts*, 3rd ed. (1950), vol. II, p. 502). Doubts as to the validity of the Treaty are also expressed by Ferid and Firsching. Palandt (*Bürgerliches Gesetzbuch*, 14th ed. 1955) declares in No. 1 to Article 56 of the Law concerning Transfer on Death (at p. 2012), in general terms, that the former treaties of the German *Länder* are no longer in force. On the other hand, Müller has expressed the view, in *Festschrift für Raape*, 1948, pp. 229–31, that the relevant articles of the Treaty of 1856 continue to be in force. This is also the view of Wengler (in *Neue Juristische Wochenschrift*, 1951, p. 301) and Boschan (*Europäisches Familienrecht*, 2nd ed., 1954, p. 287). Guldener lists the Treaty of 1856 amongst the valid Treaties of the Confederation concerning jurisdiction, and Wolff (*Das internationale Privatrecht Deutschlands*, 3rd ed., 1954, p. 225) mentions it as one of the sources of the international law of succession.

" In so far as the practice of courts and administrative bodies and the position of political authorities is concerned, the German Reichsgericht held in a decision of August 13, 1936,[1] that the Extradition Treaties between France and the German *Länder* had lapsed as from the enactment of the Law of January 30, 1934 (*Juristische Wochenschrift*, 1936, III, p. 3198; *Entscheidungen des Reichsgerichts in Strafsachen*, vol. 70, pp. 286 ff.). A judicial decision of a date later than 1934 concerning the validity of the Treaty here in question is not known to the Federal Tribunal. On the other hand, the Division of Justice of the Federal Department for Justice and Police regarded that Treaty as valid in its decision of January 13, 1948 (*Schweiz. Jahrbuch für internationales Recht*, 1949, p. 252, No. 27). A note by Alexander informs us that the relevant provisions have been considered to be in force in other recent cases. Finally, the Ministry of Justice of Baden-Württemberg states in its Ordinance of May 25, 1954, concerning legal relations with foreign countries:

> ' In the judicial district of Karlsruhe matters of succession are governed by Articles 5 and 6 of the Treaty of December 6, 1856, between Baden and Switzerland.'

On the basis of a comprehensive study, the Federal Departments, whose views on the matter were sought by this Tribunal, accordingly came to the conclusion that the provisions concerning matters of succession contained in the Treaty of 1856 ' are still binding as between Switzerland and Baden-Württemberg, although in the case of the latter presumably only in the territory which was before 1934 part of *Land* Baden '.

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[1] See *Annual Digest*, 1935–1937, Case No. 165 (*sub nom. Extradition* (*Jurisdiction*) *Case*).]

" Müller argues that the provisions concerning private international law of the Treaty of 1856, which was published in Baden and in Switzerland in the proper form, remained in force in the two countries after 1934 as municipal law seeing that conflicting legislation was not enacted subsequently in either of the two countries, and seeing that the provisions in question did not lose their purpose or become impossible of performance. It is not necessary to determine whether this view, which was rejected by the lower Court, is valid or not, if it is found that the provisions in question have remained in force as provisions of international law.

" The appellant no longer relies on the argument that the Law of January 30, 1934, cannot affect the validity of the Treaty of 1856 because the latter is null and void. In fact, she has been unable to refer to any German precedent to that effect.

" The continued validity of the Treaty of 1856 can also not be deduced from the principle of international law that treaties of a regional nature (*i.e.*, treaties which apply to a certain defined area) create rights and obligations for a successor State (see Guggenheim, *Lehrbuch des Völkerrechts*, vol. I, (1948), p. 426). In contrast to such treaties as, for instance, the Agreements between Baden and Switzerland concerning railway lines in the frontier zone, navigation on the Rhine, bird-hunting on frontier waters, etc., the Treaty at issue in this case laid down rules of private international law for the whole territory of the contracting parties and is thus not of a regional nature.

" In these circumstances, it can only be assumed that the Treaty of 1856 retained its international validity beyond the year 1934 if that Treaty has been renewed, expressly or tacitly (through pertinent conduct), in relations between Switzerland, on the one hand, and the German Reich and later the Federal Republic of Germany or *Land* Baden-Württemberg, on the other. This is so even if the view is taken that the *Land* Baden which came into existence in the southern part of the former territory of Baden on the collapse of the German Reich and before the creation of the Federal Republic assumed all the rights and obligations arising out of the treaties of the former *Land* Baden. For the new *Land* Baden ceased to exist as an independent State in 1953 upon the unification of the *Länder* of Baden, Württemberg-Baden and Württemberg-Hohenzollern.

" There has not been since January 30, 1934, any express renewal of the Treaty of 1856, *i.e.*, any exchange of declarations to that effect between the Swiss and German public organs competent to conclude treaties. (The arguments contained in the appeal concerning a list of treaties which Switzerland considers to be in force, compiled by the Embassy of the Federal Republic of Germany in agreement with the Federal Political Department, cannot be taken into consideration as they are new submissions; they would in any case not suffice to prove an express renewal of the contested Treaty.) The only remaining question is whether the Treaty has been tacitly renewed.

" The provisions concerning transfer on death contained in the Treaty of 1856 have their origin, as pointed out by Müller, in the particular economic and personal relations which have always existed between Baden, and more specifically its southern part, and Switzerland. . . . It thus cannot be denied that it is desirable for the treaty provisions in question to remain in force. Furthermore, the change in State competence which takes place in the territory of the component States of a Federal State when that State becomes a unitary State, or when several component States are united, is not as drastic as that which takes place when a territory is incorporated in a foreign State. Accordingly, it may be more readily assumed in the first case than in the second, in otherwise identical circumstances, that there exists an intention to leave the treaties which have hitherto been valid for that territory in force. If either the German Reich or Switzerland had wanted the contested Treaty to cease to be in force after the termination of the independent sovereignty of *Land* Baden in 1934, it would accordingly have had reason for making its intention expressly public. There was no such expression of intention either at that time or after the formation of *Land* Baden-Württemberg, into which the *Land* Baden which came into being after the collapse of Germany was incorporated. On the contrary, the Federal Political Department and the Federal Department for Justice and Police consider the part of the Treaty concerning transfer on death to be still in force, and this view was already expressed by the Division of Justice in 1948 (see above). The Ministry of Justice of Baden-Württemberg has expressed the same view in the above-cited ordinance concerning legal relations with foreign countries. The judicial district of Karlsruhe which is referred to in that ordinance corresponds to the territory of *Land* Baden as it was before 1934, *i.e.*, to the territory for which the Swiss authorities consider the Treaty to be still in force. There is no evidence that the German Federal Government disagreed with the view expressed by the Ministry of Justice of Baden-Württemberg. In these circumstances it can be assumed without question that Articles 5 and 6 of the Treaty of 1856 remain applicable in Switzerland and in the territory of *Land* Baden as it was prior to 1934, where Öhningen is situated, as a result of the tacit renewal of the Treaty. Whether the Federal Republic of Germany or *Land* Baden-Württemberg is considered to be the German contracting party is a question of purely academic interest.

" One difficulty arises from the fact that Article 6 of the Treaty refers to the national law of the deceased while there no longer exists a Baden citizenship. This difficulty can be overcome. The Order concerning German Nationality, of February 5, 1934, which abolished the citizenship of the German *Länder*, provided in paragraph 4:

> ' Where it is relevant under existing legislation of what Land a German national is citizen, the determining factor shall in future be in what Land the German national is domiciled.
>
> ' If he has no domicile in Germany, the determining factors shall be, in order of importance—
>
> 1. former citizenship;
> 2. the last domicile in Germany;
> 3. the former citizenship of ascendants;
> 4. the last domicile of ascendants in Germany.'

On the basis of this provision it has been possible to determine since 1934 whether a German national has Baden citizenship in the meaning of Article 6 of the Treaty. Even if it is considered that reference cannot be made to domicile where the Treaty refers to the national law, there remains the possibility of taking into consideration the former citizenship of the deceased or of his ascendants. In the same way, the question whether a German national possesses Baden citizenship in the meaning of Article 6 of the Treaty can still be answered today. The provision has thus not become impossible of performance."

[Report: *Arrêts du Tribunal Fédéral Suisse*, 81 (1955), II, p. 319.]

State Succession—Effect on Treaties—Incorporation of Austria into German Reich — Subsequent Severance of Austria from Germany—Whether Double Taxation Agreements Concluded by Austria before Incorporation Revived after Reconstitution of Independent Austrian State.

See p. 530 (*Re Nijdam, deceased*).

State Succession—Treaties—German Reich and German Federal Republic—Federal Republic as Party to Geneva Conventions of 1949—Applicability of Conventions to German Nationals on Trial for War Crimes Committed Prior to Establishment of German Federal Republic.

See p. 924 (*Re Oberg and Knochen*).

XIII.—In Matters of Administration. Officials

State Succession—Officials—The Dominion of India—The Indian Civil Service—Indian Independence Act, 1947.

STATE OF MADRAS AND ANOTHER *v.* K. M. RAJAGOPALAN.
India, Supreme Court. September 27, 1955
(Bose, Bhagwati, Jagannadhadas, Sinha and Jafer Imam JJ.)

THE FACTS.—The respondent was recruited to the Indian Civil Service by open competition in 1936 and took up his duties in the former Province of Madras in 1937. In 1947, he received a communication from the Government of India asking him whether he was prepared to continue in Government service after the transfer of power from the British Administration to the new Dominion of India on August 15, 1947. The respondent gave an affirmative reply to this communication. On August 9, 1947, he received a letter from the Madras Government stating that his services would not be retained after August 15, 1947, but would be terminated with effect from the afternoon of August 14, 1947. The respondent filed a suit against the State of Madras and the Union of India asking for a declaration that the order terminating his services was null, void and inoperative and that he should be deemed to continue in service. The High Court of Madras granted the declaration on the ground that the order terminating his services was a violation of the statutory guarantee relating to his service under Section 240 of the Government of India Act, 1935, which remained in force until midnight of August 14, 1947. The State of Madras appealed against this decision to the Supreme Court. The Attorney-General of India, appearing for the appellant, contended, *inter alia,* that the emergence of India on August 15, 1947, as a sovereign State brought about the automatic termination of the contracts of service between the previous Government, *i.e.*, the British Government, and its servants. The respondent maintained, *inter alia,* that the new Government of the Dominion of India was still to function in the name of His Majesty the King of Great Britain and that his services could not be unilaterally terminated by that Government.

Held: that the political changes connected with the withdrawal of British rule from India brought into being the Dominion of India as a new independent sovereign State; this resulted in the automatic termination of the services of the Indian Civil Service, which continued only subject to the decision of the new Government of India. According to the principles of international law, no devolution of the duty to continue the services originating from the employment by the previous sovereign State could be assumed to have taken place.

The Court said: "The plaintiff's claim is based on the contention that the termination of his services by the order dated August 7, 1947, is in violation of the statutory guarantee relating to his service under Section 240 of the Government of India Act, 1935, which continued to be operative until midnight on August 14, 1947, and he relies on *Lall's Case*.[1] To this suit both the State of Madras and the Union of India were impleaded as defendants, and their defence was substantially the same. It is to be found in paragraph 6 of the written statement filed by the State of Madras, which is as follows:

> 'This defendant states that on the transfer of power to the newly constituted Dominion of India in pursuance of the Indian Independence Act as and from the appointed day, *viz.*, 15th August 1947, the tenure of the service of the plaintiff came to an end and he had no legal claim to continue in service thereafter.
>
> 'The plaintiff was holding office only during His Majesty's pleasure. When His Majesty's Government decided to transfer its power to the Dominion of India as and from the 15th August 1947, the career of the plaintiff under covenant with the Secretary of State came to a legal termination as and from the 15th August 1947. It is, therefore, not correct to state that there was any termination by the Government of Madras and that there has been utter lack of legality in the order passed by the said Government. It is further submitted that the alleged termination of the plaintiff's services was only from the 15th August 1947, and that on such date the Province of Madras acting under instructions from the Government of India were competent to decline to accept the offer to continue in service made by the plaintiff.'

"The learned Attorney-General has based his contention as regards automatic termination of . . . services on three grounds: (1) The political change which came into operation on August 15, 1947, resulting in the creation of a new sovereign State of India, and on the creation of such sovereign State the pre-existing contracts of service under the previous Government became automatically terminated. (2) The contract between the Secretary of State for India and the plaintiff being one of service became terminated on the Secretary of State ceasing to have control in respect of the services contemplated under the contract. (3) The statutory changes which came into operation as from August 15, 1947, by themselves brought about a termination of such services, and the protection of Section 240 of the Government of India Act, 1935, was no longer available to a person in the situation of the respondent."

The Court recalled the various events which led up to the political changes resulting in the transfer of power in India and discussed the announcement of the Viceroy of April 30, 1947, relating to the termination of services of civil servants and officers and the Indian Independence Act passed on July 18, 1947. The Court also referred to the Circular Letter of June 18, 1947, issued by the Government of India to the Chief Secretaries of Provincial Governments in the matter of continuation of the services of civil servants after the transfer of power. The Court said that the above announcement of the Viceroy, the Circular Letter as well as individual letters issued to civil servants " were all based on the assumptions clearly stated or indicated therein ", [namely] (1) that transfer of power brings about an automatic premature termination of the services, (2) that on such termination, it would be open to the servant concerned either to decline to continue in the service of the new Government or to offer to continue his services, and (3) that in the event that the individual servant intimated his desire to continue in service, it was open to the Government to accept the offer or not. Thus the *continuance* of service was contemplated only in respect of such of the previous servants who intimated their desire for the continuance of their services *and* whose offer in this respect was accepted. While, therefore, discontinuance of service was to be brought about by the option of either of the parties and on such discontinuance the servant was to become entitled to compensation, the continuance of the service was a matter which would depend upon the mutual consent of both, *viz.*, the individual servant and the Government concerned.

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[1] (1948) F.C.R. 44.

As to the succession of the Dominion of India to British rule, the Court said: " . . . by virtue of the Indian Independence Act a completely independent Dominion of India was set up with a wholly independent Legislature and with a completely independent Government free from any kind of fetters, as regards their functioning, either from the British Parliament or from the British Government. The Government of the Dominion, however, was still to be carried on in the name of His Majesty the King of Great Britain, by the Governor-General of India to be appointed by His Majesty. The learned Attorney-General . . . contended that these changes resulted in the emergence of India as an independent sovereign State and that it followed therefrom, on generally recognized principles of international law, that this brought about automatic termination of the contracts of service between the previous Government and its servants. In support of this principle of international law, the learned Attorney-General cited a number of authorities, including the case of *West Rand Central Gold Mining Co. Ltd.* v. *The King*[1] which was quoted by this Court in *Virendra Singh* v. *State of Uttar Pradesh.*[2] On the other hand, [counsel] for the respondent stressed the fact that however independent the new Dominion Government may be as regards the functioning of its Legislature and of its executive Government, the new Government was still to function in the name of His Majesty the King of Great Britain and that, therefore, the Dominion is not on the same footing as an independent sovereign State which obtains sovereignty over a new country by virtue of conquest or cession. He urged that the principle of international law relied upon would not apply to such a case. In support of his contention he drew our attention to various [other] provisions in the Indian Independence Act and to the various legislative orders passed by the Governor-General by virtue of powers vested in him under Section 9 of the Indian Independence Act, as also to adaptations made in respect of various existing laws. The question whether the Indian Independence Act brought about a full sovereign State for each and every purpose is one of considerable importance and is not free from difficulty. We do not wish to decide that question on the present occasion. It appears to us that the present case has to be decided with reference to the question as to what exactly has been brought about by the Indian Independence Act and the subsidiary legislation which followed thereupon, so far as [these enactments] relate to the tenure of persons in the position of the plaintiff."

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[1] [1905] 2 K.B. 391.

[2] (1955) 1 S.C.R. 415, 427 [see *supra*, p. 131].

As to the position of the Indian Civil Service before and after independence, the Court referred particularly to Section 240 of the Government of India Act, 1935, according to which the service was at the pleasure of His Majesty and under the control of the Secretary of State. The Court said that after independence " the ultimate responsibility for the framing and maintenance of the conditions of service was no longer with the Secretary of State. It is also true that, in respect of such of these civil servants as were retained by the new Dominion Government, the service continued to be under the Crown (as shown by the adaptation of Section 240 of the Government of India Act). But this was only because in theory the new Government of India was still to be carried on in the name of His Majesty. This was no more than a symbol of the continued allegiance to the Crown. The substance of the matter, however, was that while previously the Secretary of State's services were under the Crown in the sense that the ultimate authority and responsibility for these services was in the British Parliament and the British Government, this responsibility and authority vanished completely from and after August 15, 1947, as envisaged in the Viceroy's announcement of April 30, 1947, and as specifically affirmed by section 7 (1) (a) of the Indian Independence Act. Thus the essential structure of the Secretary of State services was altered and the basic foundation of the contractual-cum-statutory tenure of the service disappeared. It follows that the contracts as well as the statutory protection attached thereto came to an automatic and legal termination, as held by the Privy Council and the House of Lords in somewhat analogous situations in *Reilly* v. *The King*[1] and *Nokes* v. *Doncaster Amalgamated Collieries Ltd.*[2]"

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[1] [1934] A.C. 176.

[2] [1940] A.C. 1014.

The Court then discussed the relevant provisions of the Indian Independence Act (Section 10 (2)) and the India (Provisional Constitution) Order (Article 7 (1)) and concluded: " It is clear . . . from the above discussion that, apart from the fact that the Secretary of State and his services disappeared as from August 15, 1947, section 10 (2) of the Indian Independence Act and Article 7 (2) of the India (Provisional Constitution) Order proceeded on a clear and unequivocal recognition of the validity of the various special orders and the individual arrangements made, and amount to an implicit statutory recognition of the principle of automatic termination of the services brought about by the political change. In our opinion, therefore, the services of the plaintiff came to an automatic termination on the emergence of the Indian Dominion."

[Report: 1955 S.C.R. 541.]

State Succession — Officials — German Federal Republic and German Reich.

See p. 943 (*The German Civil Service Case*).

PART III

STATE TERRITORY

A—IN GENERAL

II.—Acquisition of Territorial Sovereignty

v.—Conquest and Annexation

Territory — Annexation of — Non-Recognition of — Purported Annexation of Austria by Germany.

See p. 100 (*Nemec* v. *Établissements L.A.B. and Others*).

V.—Occupation of Foreign Territory in Time of Peace

State Territory—Occupation of Foreign Territory in Time of Peace—Subsequent Establishment of Protectorate by Occupying State—Status of Protectorate of Bohemia-Moravia *vis-à-vis* the German Reich.

Re LARWIN'S CLAIM.

Austria, Administrative Court. May 26, 1955.

THE FACTS.—The applicants were the heirs and dependants of one L., deceased, who had sustained personal injuries as the result of an accident which occurred in 1942, while the deceased, a police officer in the Austrian police force, was inspecting air raid shelters and similar installations in the performance of his duties in the Protectorate of Bohemia-Moravia which had been established by the German Reich before the outbreak of the Second World War. In claiming compensation in respect of the injuries sustained by the deceased, the applicants relied on an Austrian Law which, by reference to a German Law of June 25, 1943, provided that police officers were entitled to compensation for injuries sustained while performing duties for the protection of installations owned by the German Reich in " occupied territories ". On behalf of the applicants it was contended that the Protectorate of Bohemia-Moravia, notwithstanding that it had been regarded as part of the so-called Greater German Reich, had been occupied by the Reich by means of an act of war and had therefore become " occupied territory " within the meaning of the Law here referred to, and that they were accordingly entitled to compensation.

Held: that the claim must be dismissed. (i) The term " occupied territory " was confined to most, though by no means all, of the territories occupied by the German Reich after the outbreak of war on September 1, 1939; and (ii) territory, such as Bohemia-Moravia, which was made a German Protectorate before the outbreak of war was not "occupied territory", and the applicants' claim to compensation must accordingly be dismissed.

The Court said: "A correct legal determination of this case cannot leave out of account the question whether L. was detailed for duties in connection with the protection of occupied territories, and whether the former Protectorate of Bohemia-Moravia was 'occupied territory' within the meaning of the Law here referred to. The applicants contended that, although at the time when the 'Protectorate of Bohemia-Moravia' was established, it was referred to as part of the 'Greater German Reich', it was, according to international law, the territory of a foreign State occupied by means of belligerent action, with the result that the organs of the German police whose duty it was to inspect air raid installations in the 'Protectorate of Bohemia-Moravia' had to be regarded as detailed 'for the protection of occupied territories' within the meaning of the above-quoted Law. This contention disregards the fact that according to section 1 thereof this Law applies to persons who have suffered injury after March 13, 1938 (the date of the incorporation of Austria into the German Reich), without having served as soldiers in the former German army, only in those cases in which such injury is to be regarded, for the purposes of compensation, as an injury sustained in the armed forces. There can be no doubt that, according to the terminology current at the material time, the 'Protectorate of Bohemia-Moravia'—which, as the applicants themselves say, was then regarded as part of the 'Greater German Reich'—did not form part of the 'occupied territories'. According to the terminology then current, 'occupied territories' were only certain territories occupied by the German armed forces after the outbreak of war (September 1, 1939) and belonging to States with which the German Reich was at war. Even in these cases not all the territories occupied by the German armed forces were regarded as occupied territories because some—such as the so-called Government-General, Southern Styria and Krain, Alsace-Lorraine, etc.—were put under special administration and not regarded as 'occupied territories'. The above-quoted Law, which applied only to 'occupied territories', cannot therefore apply to an injury sustained as the result of an accident which occurred in the 'Protectorate of Bohemia-Moravia'."

[Report: *Amtliche Sammlung* No. 3754 (A).]

VI.—International Leases and Grants in Perpetuity

State Territory—International Leases—Bermuda—Leased Territory under a Bases Agreement—Jurisdiction—Foreign Armed Forces—Arrest of Sailor Outside Leased Area—Escape from Custody Aided by Local Citizen—Whether Sailor was in " lawful custody " in Sense of Local Criminal Law.

HANS *v.* THE QUEEN.

British Commonwealth, Judicial Committee of the Privy Council (on appeal from the Supreme Court of Bermuda). March 14, 1955.
(Lord Tucker, Lord Somervell, and Mr. L. M. D. de Silva.)

THE FACTS.—A sailor in the United States Navy, whose leave had expired at midnight, was absent over leave and was arrested shortly after midnight in Hamilton City, Bermuda, by a United States naval shore patrol and placed in custody in the naval patrol wagon, the door of which was secured by a wire hook on the outside. Shortly afterwards, the appellant, a Bermudan civilian, released the sailor by opening the door. The incident took place on territory not included in any area leased to the United States under the United States Bases (Agreement) Act, 1952, and it was not disputed that the arrest of the sailor was lawful under United States law and that it was in respect of a matter concerning discipline within the meaning of s. 9 (1) of the above Act.

The appellant having been convicted of unlawfully aiding the sailor " to escape from lawful custody " contrary to s. 111 of the Criminal Code of Bermuda, he appealed on the ground that, as the sailor was not in custody for any offence cognizable by a Bermudan court, his release was not an offence under s. 111 of the Criminal Code.

The United States Bases (Agreement) Act, 1952, provided in s. 8 (2) and 9 (1):

> " Section 8.—(2) The Government of the United States of America shall have the right to exercise the following jurisdiction in respect of offences committed in these Islands, that is to say—
>
> (a) where the accused person is a member of the United States Forces—(i) if a state of war exists, then exclusive jurisdiction in respect of all offences wherever committed; (ii) if a state of war does not exist, then exclusive jurisdiction in respect of security offences wherever committed and in respect of United States interest offences committed within a leased area, and concurrent jurisdiction in respect of all other offences wherever committed;
>
> " Section 9.—(1) United States service courts and the authorities of the United States of America may exercise within these Islands in relation to members of the United States Forces, in matters concerning discipline and internal administration, all such powers as are conferred upon them by or under the law of the United States of America."

The Bermuda Criminal Code provided in s. 110 that " any person who, being in lawful custody, escapes from such custody," shall be guilty of an offence, and in s. 111 that " any person who aids any other person in escaping or attempting to escape from lawful custody is guilty of a misdemeanour, and is liable to imprisonment for two years."

Held: that the sailor was in " lawful custody " within the meaning of s. 111 of the Criminal Code when he was released, and the conviction must therefore stand.

The judgment of their Lordships was delivered by Lord Tucker, who said: " It is not disputed that the arrest of Ashley was lawful under United States law, and that it was in respect of a matter concerning discipline within the meaning of section 9 (1) of the United States Bases (Agreement) Act, 1952. He was accordingly in custody and the custody was authorized by Bermudan law, but it is contended that he was not in ' lawful custody ' within the meaning of sections 110 and 111 of the Criminal Code, which should be construed as restricted to custody in connexion with criminal proceedings cognizable by the courts of Bermuda, or at any rate to custody authorized by Bermudan law as a preliminary to or a consequence of some order or judgment or process issuing out of a Bermudan court. The context of these sections read with sections 112 and 113 is relied upon.

" It was further contended that there was nothing in the United States Bases (Agreement) Act, 1952, to extend the meaning of sections 110 and 111 of the Code. In this connexion the following matters were put forward in support of the appellant's contention: (1) If Ashley was in lawful custody within the meaning of section 111, he was himself guilty of an offence under section 110 for which he could have been tried by a Bermudan court. (This was accepted on behalf of the Crown.) It was said that only the clearest language would suffice to attribute to the legislature the intention to bring about such a result. (2) That the express words in sections 12, 14 and 18 of the United States Bases (Agreement) Act providing that detention in the circumstances therein provided should be ' deemed to be lawful custody ' and the absence of any such words in relation to section 9 (1) negatived the construction for which the Crown contended. (3) That ambiguous language will not suffice to enlarge the scope of a statute creating criminal offences.

" These submissions merit and have received careful consideration.

" Although the language of the Criminal Code standing alone is clearly designed primarily to deal with cases arising under the Bermudan criminal law, and the words ' lawful custody ' would not include, for example, the custody of an infant by his parent or guardian, their Lordships can see no reason for restricting their meaning in the manner for which the appellant contends. If Bermudan law at any time authorizes arrest for any reason by the military of civilians or service personnel it is difficult to see why the person so arrested and kept in confinement should not be considered as in lawful custody within the meaning of sections 110 and 111, or why the status of the particular person authorized to make the arrest should be the criterion for deciding whether or not it is lawful within the meaning of these sections. With regard to the United States Bases (Agreement) Act, 1952, it is to be observed that section 9 (1) and the proviso thereto, which is the section relied upon by the Crown, covers breaches of United States military discipline which may also constitute offences triable by the Bermudan courts. Such offences may include serious crimes which are also offences against discipline. If the United States authorities are given authority to arrest for such offences outside the leased area it would be natural to suppose that the legislature would intend that such arrests should be effective and that Bermudan citizens should not be able with impunity to release persons whose arrest the legislature has authorized. It would accordingly, in their Lordships' opinion, require express words to negative the consequences which would naturally follow according to the ordinary meaning of section 9 (1) of the United States Bases (Agreement) Act, 1952, read in conjunction with section 111 of the Criminal Code, and the express words in sections 12, 14 and 18, which may have been inserted ex abundanti cautela in relation to cases which would include the detention of Bermudan civilians, are not sufficient to compel a different construction of section 9 (1). It is true that at first sight it would appear surprising that the result of section 9 (1) should be to render the escaping United States soldier or sailor liable to prosecution in the Bermudan courts, but in practice the provisions of section 10, which require the consent of the Attorney-General in writing to any such proceeding, would probably make any such liability more theoretical than real.

" In the result their Lordships have reached the conclusion that there is no real ambiguity in the meaning of the two most relevant sections of the two statutes read together and will accordingly humbly advise Her Majesty that the appeal should be dismissed."

[Report: L.R. [1955] A.C. 378.]

VII.—Sovereignty Over the Air

i.—Air Navigation Conventions

Air Law—International Transportation—Warsaw Convention of 1929—Interpretation of—By Analogy with Municipal Law—Extinguishment of Action by Lapse of Time—Whether a Defence Available to Aviation Service Company—Contributory Negligence—What Constitutes—The Law of the United States of America.

CHUTTER *v.* K.L.M. ROYAL DUTCH AIRLINES AND ALLIED AVIATION SERVICE INTERNATIONAL CORP.

United States, District Court, Southern District, New York.
June 27, 1955.

THE FACTS.—This was an action for damages for personal injuries sustained by the plaintiff as the result of the alleged negligence of the defendants. The plaintiff had purchased a ticket for transportation by air from New York to Athens. After boarding the plane and being escorted to her seat, the plaintiff, disregarding the " fasten seat belt " sign, went to the rear of the aircraft to wave farewell. At that moment the ramp or loading stairs were being pushed away by employees of the defendant Allied Aviation Service International Corp. on a signal from a K.L.M. employee. The plaintiff apparently stepped from the plane into a space between it and the ramp and fell to the ground. Both defendants claimed that the action was governed by the Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw on October 12, 1929 (the " Warsaw Convention ") (49 Stat. 3000, *T.S.* No. 876, 137 *L.N.T.S.* 11) and that the action had not been brought within the period stipulated in Article 29, para. 1, of the Convention.

Held: that the complaint against both defendants must be dismissed. The transport of the plaintiff was governed by the Warsaw Convention, and she had failed to bring the action within the period of two years required by that Treaty. By analogy with the right of a stevedore to avail himself of the limitation of liability of the carrier under the law of the United States, the defendant aviation service company was entitled to claim the benefit of the time limitation in the Warsaw Convention. The plaintiff was in any event contributorily negligent.

The Court said: " Both defendants rely upon Article 29 (1) of the Warsaw Convention which provides that the right to damages shall be extinguished if an action is not brought within two years, and this action was not filed within the two year period. Without embarking upon a detailed analysis of the plaintiff's physical position at the time of her fall, I am satisfied that the accident causing the damage occurred within the terms of Article 17 of the Convention, 'on board the aircraft or in the course of any of the operations of embarking or disembarking.' To hold otherwise would be an unwarranted dissection of minute and almost undefinable areas from the coverage of the Convention. Hence, the suit against the defendant K.L.M. must fail for want of timely commencement.

"Whether Allied, the aviation service company in charge of moving the ramp, can claim the benefit of the time limitation in the Warsaw Convention is not entirely clear, but a close analogy is found in cases involving the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 et seq., 46 U.S.C.A. § 1300 et seq. It has been held by the Court of Appeals for this Circuit that the limitation provisions of the statute inured to the benefit of a stevedore, independently contracted for by the carrier. *United States* v. *The South Star*, 2 Cir., 210 F.2d 44. The case is in accord with a similar view expressed by the Fifth Circuit, *Collins & Co.* v. *Panama R. Co.*, 5 Cir., 197 F.2d 893. The basis for these decisions is that the stevedore is engaged by the carrier to perform a part of the contract of carriage, and it is impractical to distinguish the carrier from the community of persons whose joint activity is the carrier's activity. In selling a ticket to the plaintiff the air carrier obviously assumed the obligation of affording her a means of entrance and egress from the aircraft; in delegating the function of ramp handling to the defendant aviation service company, the carrier made it the agency by which a part of the contract of transportation was to be fulfilled. It seems immaterial whether the service company be regarded technically as an agent or an independent contractor. Therefore, the analogy of the Carriage of Goods by Sea Act is quite persuasive. And it is the more persuasive because the Carriage of Goods by Sea Act merely refers to the liability of the carrier, while the Warsaw Convention, in Article 24, refers to an action for damages (for passenger bodily injury) 'however founded'. Consequently, this action was not timely commenced against the defendant Allied. Cf. *Wanderer* v. *Sabena*, Sup.Ct.N.Y.County, Feb. 10, 1949, No. 6015–1947, 1949 U.S. Aviation Reports 25.

"But in any event, I have found as a fact that the plaintiff was contributorily negligent, and whether her action against the defendant Allied be founded on the Warsaw Convention or on New York law, she cannot recover.

"Accordingly, I make the following findings of fact and conclusions of law. [The findings of fact are omitted in this report.]

"Conclusions of Law

"1. The transportation by air, during the course of which plaintiff sustained her injuries, was being performed under a contract of transportation entered into between plaintiff and defendant, K.L.M. Royal Dutch Airlines, which, according to the contract, was ' international transportation ', as defined in subsection (1) of Article 1 of the Warsaw Convention.

" 2. The rights of plaintiff and defendant, K.L.M. Royal Dutch Airlines, are governed by that contract of transportation and the terms and provisions of the Warsaw Convention.

" 3. Defendant, K.L.M. Royal Dutch Airlines, duly complied with all the requirements of the Warsaw Convention on its part to be performed.

" 4. The conditions and limitations of the Warsaw Convention inure to the benefit of the defendant Allied Aviation Service International Corporation, as the agency whereby the defendant airline was fulfilling a part of its obligation under the contract of transportation.

" 5. Plaintiff's transportation under the contract of transportation entered into between plaintiff and defendant, K.L.M. Royal Dutch Airlines, stopped on November 17, 1950.

" Plaintiff's right to damages was extinguished, as against both K.L.M. Royal Dutch Airlines and Allied Aviation Service International Corporation, by reason of the provisions of Article 29 (1) of the Warsaw Convention, because this action was not brought against these defendants within two years from the date on which plaintiff's transportation stopped, namely, November 17, 1950.

" 7. Defendants K.L.M. Royal Dutch Airlines and Allied Aviation Service International Corporation are not liable to plaintiff for the injuries she sustained because such injuries were caused by or contributed to by the negligence of the plaintiff and such contributory negligence on plaintiff's part bars recovery against these defendants as a matter of law under Article 21 of the Warsaw Convention.

" 8. In so far as the law of New York may be applicable, the plaintiff may not recover against the defendant Allied Aviation Service International Corporation because of her own contributory negligence.

" 9. Defendant, K.L.M. Royal Dutch Airlines, is entitled to judgment dismissing the complaint of plaintiff against it.

" 10. Defendant Allied Aviation Service International Corporation is entitled to a judgment dismissing the complaint of plaintiff against it."

[Reports: 132 F. Supp. 611; 4 Avi. 17,733; 1955 U.S. & C. Av. R. 250.]

Air Law—Meaning of Term "International Transportation"—Warsaw Convention of 1929—Burden of Proof of "Wilful Misconduct" for Purpose of Avoiding Limitation of Liability—What Constitutes "Wilful Misconduct"—Effect of Omission of Particulars from Ticket—Interpretation of Treaties—Interpretation in Accordance with General Intention of the Parties.

GREY *ET AL.* *v.* AMERICAN AIRLINES, INC.

United States, District Court, Southern District, New York.
December 21, 1950, and *February* 21, 1955.

Court of Appeals, Second Circuit. November 7, 1955.

THE FACTS.—The parents of the infant plaintiffs were killed in the crash of an aircraft of the defendant on an international flight from New York to Mexico City. The ticket issued had not listed stopping places at Washington, D.C., and Dallas. The defendant defended on the basis that its liability was limited by the Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw on October 12, 1929 (the "Warsaw Convention") (49 Stat. 3000, *T.S.* No. 876, 137 *L.N.T.S.* 11). The plaintiffs moved for summary judgment, thus challenging the legal sufficiency of the defence based on the Warsaw Convention. The plaintiffs contended that: (a) the flight was not one in international transportation within the purview of the Warsaw Convention; (b) it was not the intention of the parties to consider the flight one in international transportation; and (c) in any event, the defendant had failed to comply with the requirements of the Convention regarding the contents of the passenger ticket.

Held (by the District Court—December 21, 1950): that the motion for summary judgment must be denied. The flight was one in international transportation notwithstanding the fact that, as to passengers destined for Washington and Dallas, the flight was a domestic one. The provisions of the Warsaw Convention applied by the terms of the Treaty and not because the parties had so agreed. The omission of the agreed stopping places from the ticket did not deny the carrier the right to avail itself of limitation of liability, since this consequence was not expressly stipulated, as in the case of baggage and air freight.

The Court said: "a. The particular flight in question, designated Flight 157 by defendant, was one originating at New York, with scheduled stops at Washington, Dallas and Mexico City. It is admitted by both parties that there were passengers on the plane destined for Washington and Dallas. On these facts plaintiffs argue that this flight was not one in international transportation, and so not within the meaning and intention of the Warsaw Convention.

" Article 1 of the Convention provides that the Convention ' shall apply to all international transportation of persons . . .'. Article 1, (2) defines what constitutes ' international transportation ' and reads in part:

> ' (2) For the purposes of this convention the expression " international transportation " shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties . . . '

" The United States of Mexico became a high contracting party to this convention on February 14, 1933. It is undisputed, therefore, that at the time of the carriage herein, the United States and Mexico were adherents to the Warsaw Convention.

" Accordingly, I do not find persuasive plaintiffs' argument that a single plane engaged in a single flight may not be international in respect to some passengers and domestic as to others.

" The language, noted supra, states that the character of the transportation shall be determined according to the contract made by the parties. In this instance the tickets or contracts of passage were for transportation from New York to Mexico City.

" The transportation here was one in which, according to the contract made by the parties, the place of departure and of destination are situated within the territories of two high contracting parties.

" b. Plaintiff contends that it was not the intention of the parties to consider the flight one in international transportation. This contention must obviously fall, for the convention becomes the law of the carriage when the contract of the parties provides for passage between certain designated termini. This being the contract, the terms of the convention apply by its own terms and not because the parties have so agreed. *Ross* v. *Pan American Airways*, 299 N.Y. 88, 97, 85 N.E.2d 880, 13 A.L.R.2d 319. Plaintiffs, in effect, urge that the convention applies only when the parties contract or expressly assent thereto, and I find no basis for so construing the terms of the Convention.

" c. On this point plaintiff relies on the language in Article 3 of the Convention, as follows:

> ' Article 3.
>
> ' (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> ' (a) The place and date of issue;
>
> ' (b) The place of departure and of destination;
>
> ' (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and

> that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> ' (d) The name and address of the carrier or carriers;
>
> ' (e) A statement that the transportation is subject to the rules relating to liability established by this convention.
>
> ' (2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.'

" In particular, plaintiffs argue that the ticket defendant issued in this instance did not set forth the agreed stopping places as provided in Article 3 (1) (c).

" Plaintiff contends that under subsection (2) the carrier is, therefore, not entitled to avail itself of these provisions of the convention which limit its liability. However, subsection (2) merely denies limitation of liability where the carrier accepts a passenger without delivering a ticket to such passenger. Thus the question arises whether Article 3 (2) means that unless a ticket with all the particulars as set forth in Article 3 (1), is delivered, the carrier's liability is unlimited.

" I believe the question can be best resolved by a reference to the terms of the Convention itself. Chapter II of the treaty is entitled ' Transportation Documents ' which consist of Passenger Ticket, Baggage Check and Air Waybill. Article 4 provides for the issuance of a baggage check and sets forth the particulars it shall contain. Articles 5, 6, 7 and 8 provide for the issuance of an Air Waybill and the particular items it shall contain. However, Article 4 (4)[1] and Article 9[2] referring to the Baggage Check and Air Waybill, respectively, (while quite patently drafted to accomplish the same purpose with reference to the carriage of Baggage and Air Freight as Article 3 (2) does in the case of passengers) employs language obviously different than that in Article 3 (2). Article 4 (4) denies a carrier the right to avail itself of limitation or exclusion of liability not only for failing to deliver a baggage check, but also if the check does not expressly set forth the particulars contained in (d), (f) and (h) of Article 4 (3). Article 9, relating to Air Freight, is similar in terms to Article 4 (4), for it also requires, in addition to a delivery of the Air Waybill, the inclusion of certain specified particulars. Article 3 (2) merely requires that the ticket be delivered to the passenger and thus clearly differs from Articles 4 (4) and 9. I must conclude that this omission or difference is most significant. For I cannot agree with plaintiffs' argument that Article 3 (2) intends that the ticket delivered contain the items set forth in Article 3 (1), when those who drafted the treaty were so explicit in this regard in Articles 4 (4) and 9.[1]

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[1] Article 4 (4): " The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

[2] Article 9: " If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8 (a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability."

" Further, while the ticket itself did not set forth the agreed stopping places, the ticket did provide that the ' agreed stopping places ' would be those set forth on the ticket and/or shown in the carrier's time table as scheduled stopping places on the passenger's route." [Reports: 95 F. Supp. 756; 3 Avi. 17,404; 1950 U.S. Av. R. 507.]

Upon a trial before a jury, verdicts were returned for the plaintiffs. The trial Judge had instructed that the limitation of liability provided by the Warsaw Convention should be disregarded if the jury found that there had been " wilful misconduct " on the part of the defendant, and had defined " wilful misconduct ". The damages awarded were $50,000 to one child and $30,000 to the other child for the death of their father and $5,000 to each child for the death of their mother. The defendant moved to set aside the verdicts of the jury and for judgment dismissing the complaint in amounts in excess of $8,300 (the amount to which liability is limited under the Warsaw Convention) or for a new trial on the ground that the verdicts were contrary to the evidence and law and excessive. It maintained that the evidence was insufficient to sustain a finding of wilful misconduct.

Held (by the District Court—February 21, 1955): that the motion to set aside the verdict of the jury must be granted and judgment awarded the plaintiffs in the amount of $8,300 for each parent. The defendant had not been guilty of " wilful misconduct ". [Reports: 4 Avi. 17,572; 1955 U.S. & C.Av.R. 60.]

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. The District Court was correct in concluding in 1950 that the failure of the ticket to make reference to " agreed stopping places " did not make inapplicable the limitation of liability established by the Warsaw Convention. Consistently with the purpose of the Warsaw Convention to prevent excessive claims, the plaintiff had the burden of proof of " wilful misconduct " and had failed to sustain its burden in this case.

The Court said: " While plaintiffs contended that the Warsaw

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[1] Cf. " Anomalies In The Warsaw Convention ", Beaumont in *Journal of Air Law and Commerce*; Vol. 14 # 1, North-western University.

Convention was not applicable, because the passenger tickets issued to decedents did not make reference to the intermediate ‘agreed stopping places’ of Washington, D.C., and Dallas, Texas, motions to strike the usual Warsaw Convention limitation of liability defenses, based upon this technical and wholly unsubstantial alleged omission, were denied before trial by Judge Noonan. We agree with Judge Noonan’s reasoning and see no occasion to elaborate upon his carefully prepared opinion. *Grey* v. *American Airlines*, D.C.S.D.N.Y.1950, 95 F.Supp. 756.”

[The Court then disposed of a procedural objection that the trial Judge was without authority to set aside the verdicts and dispose of the case with finality, subject to appellate review, and continued:] “The plane left La Guardia Airport at 10:30 P.M.; took off from Washington, D.C., for Dallas at 12:54 A.M., and when in the vicinity of Nashville, Tennessee, the outboard engine on the port wing, known as the #1 engine, commenced to backfire, as a result of which it was feathered and shut off. Without further incident Dallas was sighted and the plane was cleared to land on runway 36. We are concerned with what occurred between the time the plane crossed the boundary of the airport at an altitude of 200 feet, until it crashed on top of the hangar of the Dallas Aviation School on the edge of the airport opposite the direction tower. The crew, consisting of the Captain, the First Officer and the Flight Engineer, survived; and their testimony gives us a certain amount of data, together with some flat contradictions and a mass of conflicting possible inferences. Before giving a brief resume of the evidence, it will be well to set forth the applicable law.

“The scheme of the Warsaw Convention is pretty plain on its face. Chapter III is the one which concerns us here. Article 17 imposes an absolute liability upon the carrier for all personal injuries, regardless of fault, ‘if the accident which caused the damage so sustained took place on board the aircraft.’ But this liability is excused by Article 20 (1), if ‘the carrier proves’ that it has ‘taken all necessary measures to avoid the damage or that it was impossible’ for it to take them. As to this it is plain that the burden of proof is upon the carrier. And, in passing, it may be noted that in most if not all serious accidents, whether or not members of the crew survive, the difficulties in avoiding this presumptive liability would seem to be almost if not quite insurmountable.

“Against this background we come to Article 25, which provides that the carrier shall not be entitled to avail itself ‘of the provisions of this convention which exclude or limit’ its liability, if the damage is caused by its ‘wilful misconduct.’ The exclusion refers to Article 20 (1), and the limitation to Article 22 (1), which provides that ‘the liability of the carrier for each passenger shall be limited’ to $8,300. Upon whom is the burden of proving wilful misconduct?

“The trial court here instructed the jury that the burden of proving wilful misconduct rested upon plaintiffs, and plaintiffs acquiesced in this, virtually conceding that it was not incumbent upon defendant to sustain the onus of proving a negative. As will shortly appear, the real cause of the crash still remains in doubt, and we feel that the interest of justice requires that we decide this question, even though the parties have apparently taken the answer for granted.

" We hold that the trial judge ruled correctly when he charged the jury that plaintiffs could recover no more than $8,300 on account of the death of each decedent, unless plaintiffs proved by a fair preponderance of the credible evidence that there was wilful misconduct on the part of defendant's employees, or any of them, which was a ' substantial contributing factor ' to the accident. The specific language of Article 20 (1), above quoted, and the absence of corresponding words in Article 25 would seem to make admissible no other interpretation of the Convention. But perhaps of greater significance is the general purpose of protecting international air carriers from the burden of excessive claims connected with the loss of aircraft under circumstances which make it impossible, or virtually so, to determine the mechanical or human shortcomings which caused the disaster, because of the death of all on board and the destruction of the plane. We find implicit in the terms of the Convention an intention to relieve the carriers of this burden of proof, whilst at the same time giving the injured parties the opportunity to prove wilful misconduct, if they can.

" There is no dispute as to what constitutes wilful misconduct. The instructions required proof of ' a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct.' This was in accordance with precedent. *American Airlines* v. *Ulen*, 1949, 87 U.S.App.D.C. 307, 186 F.2d 529; *Pekelis* v. *Transcontinental & Western Air, Inc.*, 2 Cir., 1951, 187 F.2d 122, 23 A.L.R.2d 1349; *Goepp* v. *American Overseas Airlines*, 1952, 281 App.Div. 105, 117 N.Y.S.2d 276, affirmed 305 N.Y. 830, 114 N.E.2d 37, *certiorari* denied 346 U.S. 874, 74 S.Ct. 124, 98 L.Ed. 382.

" Moreover, as this is a jury case, plaintiffs are entitled to have the evidence viewed in the light most favorable to plaintiffs. All questions of credibility were for the jury. It was within their province to pick and choose, to accept a part or the whole of the testimony of any particular witness, and to reject the rest. Where conflicting inferences were rationally admissible, it was a function of the jury to take those which they considered most consistent with the general pattern of the proofs. And this congeries is summed up in the general verdicts. The trial judge had a right to reject the finding of wilful misconduct only if, on no possible view of the evidence, could reasonable men reach that conclusion. *Binder* v. *Commercial Travelers*, 2 Cir., 1948, 165 F.2d 896; 3 Moore, *Federal Practice* § 50.01 (1938).

" We now return to the evidence of the events which crowded into the brief interval of time between the crossing of the boundary of the airport at a height of 200 feet and the crash.

"The Flight Engineer suddenly reported that the fuel flow gauge on engine #4, the outboard starboard engine, read zero. The Captain at once ordered the fuel booster pump applied, and the Captain testified that he felt that engine ' surge,' which caused the left wing to dip 20° and the plane to swerve to the left and out of line with the runway. Reduction of power on the #3 and #4 engines and increase of power on #2 apparently brought the plane level and she was about 30 or 40 feet above the ground. The Captain says he ordered the landing gear retracted and the flaps raised, with full take-off power on the three operating engines. The First Officer says he did not hear any order but knew from the actions of the Captain that he was attempting to pull up and make another try for the field. That the plane gained altitude is apparent from the fact of where she hit on top of the hangar of the Dallas Aviation School.

" But in the interval, without any order from the Captain, the First Officer feathered the #4 engine, and the Captain claims that this was what caused the crash. The First Officer says the instruments indicated that #4 was ' windmilling,' that the unfeathered propeller without power behind it would operate as a drag, and that he left the flaps as they were because to level them off would, in his opinion, have resulted in an immediate loss of altitude. There was testimony that there was still power in #4 and that the levelling of the flaps would have helped the plane to rise, although this seems improbable in view of her position so close to the ground. In any event, the plane stalled and fell.

" If defendant had the burden of proving that there was no wilful misconduct on the part of any member of the crew, we think a jury would have been warranted in finding on this record that the burden had not been sustained. There are too many gaps and imponderables, to say nothing of the conflicts and inconsistencies, some of which we have not thought it necessary to collate.

" But we cannot discover anything in the case to warrant a finding that there was wilful misconduct. It is said that the Captain was in command and that he was the only one authorized by Civil Air Regulations 61.301, 61.310, to act in an emergency. But we find nothing in the Regulations to justify this conclusion. The plane was *in extremis*; whatever the First Officer did or failed to do was done to save the plane and the lives of all on board including his own.

" True it is that the jury were entitled to disregard the testimony of the First Officer, or any part of it, and to accept the testimony of the Captain in its entirety. But even so the record is still devoid of any evidence of wilful misconduct.

" Much is also said on plaintiffs' behalf of defective instruments and previous backfiring by the engine which was feathered when near Nashville, but it is abundantly plain to us that each and every member of the crew thought the plane airworthy when they left Washington, D.C., for Dallas; and the evidence referred to is of trivial consequence."

[Reports: 227 F.2d 282, 4 Avi. 17,811, 1955 U.S. & C.Av.R. 626; *certiorari* denied, 350 U.S. 989, 100 L.Ed. 855, 76 Sup.Ct. 476 (1956).]

II.—Rivers

iv.—Utilization of Flow of Non-national and International Rivers.

International Rivers—Use of Waters of—Regulation by Treaty—Rights of Individuals—The Rio Grande River—The United States of America and Mexico.

See p. 572 (*Hidalgo County Water Control and Improvement District No. 7 et Al.* v. *Hedrick et Al.*).

PART IV

JURISDICTION

A—IN GENERAL. TERRITORIAL AND PERSONAL

I.—Territorial

i.—Over Territory in General and Persons and Property Situated therein. Territorial Limits of Jurisdiction. Expropriation of Alien Property.

[*See also* Part II, States as International Persons: A, IV, Recognition of Acts of Foreign States and Governments, *and* D, Recognition of States and Governments.]

Jurisdiction—Territorial—Limits of—Extraterritorial Application of Anti-trust Laws—Combination of Foreign and Domestic Companies in Restraint of Trade—Acts Performed in Foreign Territory by Foreign Company—Presence of Foreign Company within State of Forum—Method of Establishment of—Subsidiary and Parent Companies — The Law of the United States of America.

United States *v.* Watchmakers of Switzerland Information Center, Inc., *et al.*

United States, District Court, Southern District, New York.
July 13 and *September* 15, 1955.

The Facts.—This was an action against several Swiss and American organizations for violations of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1 *et seq.*, for allegedly combining and conspiring unreasonably to restrain inter-State and foreign trade and commerce in watches, component parts and repair parts, and also for violations of the Wilson Tariff Act, 28 Stat. 570, as amended, 15 U.S.C. §§ 8 *et seq.* It was in general alleged that Swiss organizations had compelled American companies to restrict the manufacture and export of American-made watches and parts in order to be allowed to obtain Swiss watches and parts.

Two of the defendants were the Fédération Suisse des Associations de Fabricants D'Horlogerie (hereafter referred to as "FH"), an association of substantially all manufacturers and assemblers of jewelled Swiss watches, and Ebauches, S.A., a holding company for eighteen manufacturers of certain watch parts. In 1931, these two organizations and a third executed an agreement, known as the Collective Convention, for the regulation of the production, sale, and export of watches, component parts, and repair parts of the Swiss watch industry. The two organizations maintained a subsidiary, The Watchmakers of Switzerland Information Center, Inc., in the United States. Two of the other defendants, Gruen, S.A., and Wittnauer, S.A., were Swiss manufacturers which were wholly-owned subsidiaries of American corporations which distributed their products in the United States. A fifth defendant was Eterna A.G. Uhrenfabrik (hereafter referred to as " Eterna A.G."), a Swiss watch manufacturer, which distributed in the United States through the Eterna Watch Company of America (hereafter referred to as " Eterna N.Y."). This latter firm had been owned by Eterna A.G. until 1952, at which time it was transferred to two other Swiss firms. Further information about the activities of these organizations is set forth in the body of the opinion.

The five defendants above mentioned moved to dismiss the complaint for lack of jurisdiction over their persons and contended that they were neither found within the United States nor properly served.

Held (July 13, 1955): that the motion to dismiss must be denied. FH and Ebauches were present in the United States through the activities of The Watchmakers of Switzerland Information Center. If a subsidiary was a mere adjunct of its parents and had no independent business of its own, its activities would be regarded as those of its foreign parent corporations. The facts that many of the acts complained of took place in the United States and that the business transacted in the United States was an important part of their total business meant that the defendants would not be inconvenienced in being tried in the United States, notwithstanding the fact that more of the acts complained of took place in Switzerland than in America. Although Gruen and Wittnauer were subsidiaries of American corporations, they exercised important controls over their American parents in the implementation of Swiss restrictive trade practices. Both parent and foreign subsidiary had in fact acted as one corporation, and the subsidiary must accordingly be treated as present in the United States. As to the fifth defendant, Eterna A.G., its distribution agreement with Eterna N.Y. reduced the latter to the status of an agent, so that Eterna A.G. must likewise be regarded as present in the United States. In the cases of Gruen, Wittnauer, and Eterna A.G., no inconvenience would be caused the defendants by trial in the United States in view of the intertwining of their activities with those of their American affiliates and the number of acts which had been performed in the United States.

The Court said: " Section 12 of the Clayton Act, 15 U.S.C.A. § 22 provides as follows:

'§ 22. District in which to sue corporation

'Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is

> an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.'

" The question here is whether the moving defendants were found within this country, and properly served. ' Found ' requires something more than ' transacting business '. *Eastman Kodak Co.* v. *Southern Photo Material Co.*, 273 U.S. 359, 370–374, 47 S.Ct. 400, 71 L.Ed. 684. *United States* v. *Scophony Corporation of America*, 333 U.S. 795, 817, 68 S.Ct. 855, 92 L.Ed. 1091, does not equate ' found ' to ' transacting business ' but it does require that the presence of a corporation within the jurisdiction be determined from a realistic appraisal of its overall business rather than upon the sum of the disassembled parts of that picture.

"A corporation is 'found' within the jurisdiction if it is 'present' there. The question is whether there is proof of continuous local activities and whether under all the circumstances of the case, the forum is not unfairly inconvenient. *Latimer* v. *S/A Industrias Reunidas F. Matarazzo*, 2 Cir., 175 F.2d 184, 186, *certiorari* denied 338 U.S. 867, 70 S.Ct. 141, 94 L.Ed. 531; *Kilpatrick* v. *Texas & P. Ry. Co.*, 2 Cir., 166 F.2d 788, 791; *Hutchinson* v. *Chase & Gilbert*, 2 Cir., 45 F.2d 139.

" For proof of continuous activities within this jurisdiction by FH and Ebauches, the government relies on its claim that their jointly owned subsidiary, Watchmakers of Switzerland Information Center, Inc. (hereafter referred to as Watchmakers), itself a defendant, acts as their agent and upon the activities of Foote, Cone & Belding, another defendant.

" FH is in many ways comparable to an American trade association, but has more power than customarily given such an association. It is a Federation of six regional organizations having a combined membership of over 450 and consisting of substantially all manufacturers and assemblers of jeweled Swiss watches. It conducts negotiations and acts for the industry in matters of great importance. According to its own claims, it was created in 1924 ' in order to attempt to correct chaotic conditions which prevailed at that time in the watch industry '. Its aims are described as follows:

> ' Article 4—The Federation has as its aim to watch over the general interests of Swiss watch manufacturers by:
>
> ' 1. The coordination of the economic policy of its sections;
>
> ' 2. The improvement and the fixing of conditions of manufacture, sale and exportation of watch products;
>
> ' 3. The improvement of industrial conditions by the concluding of agreements with suppliers, their associations, or third parties;
>
> ' 4. The supervision of the labor market and the study of questions relating thereto;

> '5. The examination of all questions of interest to watch manufacturers, including those which are submitted to it by its sections or by the Swiss Watch Chamber.'

Again, according to its counsel, it devotes the greatest portion of its activities to:

> 'studying market conditions as they result from commercial treaties between Switzerland and foreign nations; advising on manufacturing problems including technological advances and labor conditions within Switzerland; and carrying on negotiations with the various associations of parts manufacturers, in order to establish, under Swiss law, the prices of parts purchased by FH members for the final manufacturing and assembling of watches.'

"Ebauches has an equally dominant position over the manufacture of certain watch parts known as ebauches. They include the parts of a jeweled watch movement other than the parts for the escapement and for fitting the watch. Ebauches is a holding company with controlling interest in eighteen principal manufacturers of these items. It represents that segment of the industry in negotiating agreements for the sale of ebauches to assemblers and manufacturers, and with respect to other Swiss industry-wide agreements.

"On April 1, 1931, FH, Ebauches and a third organization not a party here, UBAH (which represents the manufacturers of watch components and repair parts other than ebauches), acting on behalf of themselves and their members, executed an agreement for the regulation of the production, sale and export of watches, component parts and repair parts of the Swiss watch industry, known as the Collective Convention. This Convention is still in effect. It restricts the activities of not only the Swiss firms, but their American affiliates as well. FH, Ebauches and UBAH are empowered to suspend purchases from or sales to any firm charged with its breach and to cancel the Convention membership of any violating firm whether the violation is by the firm itself or its foreign affiliates.

"In 1947 in an effort to increase the sale of Swiss watches to American customers, Ebauches and FH jointly planned and have since then executed a program in the United States having two purposes: (1) to create a favorable public attitude toward Swiss watches; and, (2) to meet the greatest competitive disadvantage of these watches, the lack of easily obtainable repair parts. As a part of this program, FH established a new department known as its marketing department. FH and Ebauches jointly organized a New York corporation originally known as the Swiss Watch Repair Parts Information Bureau, Inc., and then renamed The Watchmakers of Switzerland Information Center, Inc. FH also retained the advertising firm Foote, Cone & Belding, to assist it in this campaign. Ebauches, through Watchmakers and Foote, Cone & Belding, standardized and facilitated the cataloguing and ordering of repair parts.

" Watchmakers, which FH and Ebauches jointly created, is a New York corporation of which fifty percent of the stock is held by FH and fifty percent by Ebauches. It is a small organization having only nine employees and a budget of approximately $70,000 a year. Its General Manager is Paul Tschudin, a former employee of Ebauches. Its budget is submitted at the beginning of each year for the joint approval of FH and Ebauches, and Tschudin reports to these organizations monthly as to his actual expenditures and thus his activities. It performs advertising and promotional work in furtherance of the joint FH-Ebauches program, but claims that this is done on an industry-wide basis, rather than as an adjunct of FH or Ebauches. It also acts as a liaison agency in the servicing of the American market with Ebauches repair parts. It claims, however, that it performs the same function also with respect to parts not manufactured by Ebauches. It also collects trade information and this information is relayed to FH and Ebauches. It also receives information and takes action to protect Ebauches trademarks and parts from misuse.

" Whether or not manufacturers of repair parts other than Ebauches derive advantages from the activities of Tschudin and Watchmakers, its activities have, from the beginning, been undertaken principally for the benefit of Ebauches. When Tschudin first came to the United States in 1946, for the purpose of setting up the repair parts program, he was an employee of Ebauches. In 1948, when Watchmakers was established, the first step in its program was the publication of a two-part catalogue codifying the identification system for all repair parts. The first part of the catalogue, published in 1948, was devoted exclusively to parts manufactured by Ebauches. The second part to contain an identification system for repair parts made by other manufacturers was promised for a year later. Foote, Cone & Belding, in its report to Ebauches on the progress of the repair program, emphasizes the advantages it derived from the activities of Watchmakers. Tschudin's correspondence with importers is concerned to a great extent with problems and transactions arising in connection with Ebauches parts. Finally, even to the extent that Watchmakers activities benefited manufacturers other than Ebauches, its activities were within Ebauches' policy of leadership in this program for the benefit of the industry and the indirect benefit to itself as one principally concerned with the industry's welfare.

" Realistically appraised the Information Center has no business of its own. Its principal purpose was the advancement of the program of FH and Ebauches. The watch repair program it conducted was sponsored by FH and Ebauches directly (See Exhibit B, Hoffman affidavit May 5, 1955). Their officers were in this country when it was formulated and commenced, and almost annually thereafter. The fact that this was a minor rather than major part of their business does not make the activity of Watchmakers any less their own. Undoubtedly Watchmakers did benefit to some extent the entire watchmaking industry but there seems little room for doubt that it only intentionally benefited those who conformed to the policies of FH and Ebauches. Whether the correspondence shows that the Information Center was a 'policing' agency, as claimed by the government, at least it shows that it was dedicated to the policies of FH and Ebauches.

" Relying on *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U.S. 333, 334–337, 45 S.Ct. 250, 69 L.Ed. 634, FH and Ebauches contend that they are not present here because it was there held that a parent's complete commercial and financial domination of its subsidiary did not bring the parent within the jurisdiction as long as the formal separation was scrupulously maintained. As to this rule, there is no dispute. See also *Echeverry* v. *Kellogg Switchboard & Supply Co.*, 2 Cir., 175 F.2d 900, 903; *Spacrab, Inc.*, v. *Automatic Canteen Co. of America*, D.C.S.D.N.Y., 101 F.Supp. 485, 486. On the other hand, where the substance of corporate independence is not preserved and the subsidiary acts as an agent of the parent, this corporate separation has been found without significance. *Bator* v. *Boosey & Hawkes*, D.C.S.D.N.Y., 80 F.Supp. 294, 296. Here the subsidiary has no independent business of its own. It does not buy from the parent and resell. It has no really independent stature. Like I.C.I. in the case of *United States* v. *United States Alkali Export Association, Inc.*, (*I.C.I. case*), Civ. No. 24–464, S.D.N.Y., July 16, 1946 (Unreported Opinion page 6), it is a mere adjunct of its parents and its activities will be regarded as theirs.

" The government also contends, at least as to FH, that it has also been continuously present through the activities of Foote, Cone & Belding. That firm, in addition to carrying on a widespread advertising campaign in this country on behalf of FH, also sent its executives regularly to principal trade conventions and meetings representing the 'advertising agency of FH'. Under direction of FH and with the advice of Ebauches, it participated in the repair parts program. Its activities in this regard are described by its own account executive as follows:

'a. Distribution of a catalog and sale of a dictionary to enable watch repairmen to order their parts according to a standardized system of identification;

'b. Introduction of a new system of distributing repair parts in packages identified according to the standardized nomenclature of the catalog;

'c. Announcement of the program and maintenance of interest in it through advertising and publicity releases in the jewelry and horological trade press;

> ‘ d. Educational work with horological associations so that members of these associations could be informed of the program through their own officers and association publications;
>
> ‘ e. Interesting editors of jewelry and horological trade magazines to publish articles which would enable the retail watch repairman to provide better service in the repair of Swiss jeweled-lever watches; and
>
> ‘ f. Rendering such other assistance as from time to time might seem appropriate.’

Also, through its various local offices, it collected trade information, including deviations from the controlling policies of FH and Ebauches which it relayed back to FH. In this regard the activities of Foote, Cone & Belding contribute proof of the presence here of FH. In its ‘ educational ’ work [and] its participation in conferences and meetings, it was the regularly accepted representative of FH whether it characterized itself as an ‘ advertising agency ’ or some other kind of an agency. In *United States* v. *United States Alkali Export Association, Inc., supra* (Unreported Opinion page 8), Judge Leibell said:

> ‘. . . The agents thus employed by a corporation are not restricted to the class of individuals, but may be partnerships, corporations or other forms of business entities. It would be anomalous to fix jurisdiction upon the acts of an individual agent and refuse to fix jurisdiction upon the same acts of a corporate agent. . . .’

“ It is not necessary to decide whether FH could be found present upon the activities of Foote, Cone & Belding alone. *United States* v. *Scophony Corporation of America*, 333 U.S. 795, 817, 68 S.Ct. 855, 92 L.Ed. 1091, does not favor such a ‘ pulverizing ’ approach and I agree with Judge Leibell in *United States* v. *United States Alkali Export Association, Inc., supra*, . . . that the particular facts of the case must be weighed together as a composite whole and not considered independently to determine whether each fact alone is sufficient to establish presence. It is enough to note that the activities of Foote, Cone & Belding round out the picture of presence based upon the activities of the Information Center.

“ Coming to the question of whether a trial in this forum would subject these two defendants to unfair inconvenience, it appears that there is no forum more convenient than this. As in *Latimer* v. *S/A Industrias Reunidas F. Matarazzo, supra*, defendant’s home office is in a foreign country. Further, in this case, the relief sought could not be obtained there. The laws alleged to be violated are those of this forum. Many of the acts upon which the claim is based occurred here, although probably more occurred in Switzerland. The business transacted here is an important part of defendants’ total business. The problems of proof in a case such as this would be difficult wherever the case was tried. The problem of gathering the evidence for trial here is not so overwhelming that I should conclude that these two defendants should not be tried at all. Taking into account the widespread international trade which these two organizations have undertaken to oversee, they may be expected to meet more easily than most the problems of trial in a distant forum.

"Accordingly, as to these defendants, the motions are denied.

"Two other moving defendants, Gruen, S. A. and Wittnauer, S. A., are Swiss manufacturers which are related by stock ownership to American companies of the same name which distribute their products in this country. Their presence is established only by attributing to them the activities of their American affiliates.

"Gruen, S. A., is a wholly owned subsidiary of Gruen Watch Company, an Ohio corporation (hereafter referred to as Gruen Ohio). Both Gruen companies are defendants. Gruen, S. A. has no property in this country and does not directly carry on activities here. It is the theory of the government that although in form it is a subsidiary in actuality it controls its parent Gruen, Ohio. The record does not support this claim. The principal reliance of the government is upon correspondence between Benjamin Katz, President of Gruen, Ohio, and Henri Thiebaud, Manager of Gruen, S. A. Although Mr. Katz is deferential to Mr. Thiebaud, the correspondence does not establish Mr. Thiebaud's control. The deference is that often found in the person with financial control to the expert who possesses the know-how of the trade but not control. The correspondence does establish, however, the intimacy of the relationship between the two companies and their common concern with the welfare of each and the subordination of their individual actions to a jointly formulated policy.

"Wittnauer Et Cie, S. A. (hereafter referred to as Wittnauer), is a wholly owned Swiss subsidiary of the Longines-Wittnauer Watch Company (hereafter referred to as Longines), a New York corporation. Wittnauer assembles watches and sells them in Switzerland to distributors for resale. Longines is the exclusive distributor for the United States. Wittnauer has no property in the United States and does not directly carry on any activities here. It is the government's contention, however, that it controls Longines. The government's claim of control is based upon the Collective Convention to which Wittnauer is a signatory and which binds its foreign affiliates, and upon a letter from Wittnauer to Longines emphasizing that Longines must conform to the Collective Convention. The latter shows concern but not control.

"As to both Gruen and Wittnauer, however, if the cause of action alleged is proved, the court has jurisdiction. Although in each case the American parent has financial control of the Swiss subsidiary, the complaint alleges that it has voluntarily subjected itself as an affiliate to the restrictive dominance of the Swiss industry. Granted the Swiss affiliate did not and could not compel the submission of the American parent, the American parent has submitted itself to important policy controls by its subsidiary by permitting the subsidiary to bind it to the Collective Convention and by permitting the subsidiary to participate as a member of FH. The American parent may have bought the Swiss company but the Swiss company through its know-how and its collective Swiss relationship determines what watches the American parent shall sell and at what price and terms and the American company has committed itself to acquiesce. Also, it has in a sense pledged its subsidiary to the controlling Swiss forces as an earnest for its own conduct in the United States. The Swiss affiliate may be fined or penalized for action by the American parent here. It is unrealistic to speak in terms of corporate separation when both have agreed that acts by one corporation visit penalties upon the other and that one as a member and in its dealings through FH sets the conditions for the actions of the other. To that extent the two affiliates do not deal with each other as independents and it is a sufficient dissolution of the corporate barrier to make the acts of one the acts of the other in determining 'presence'. Heeding *United States* v. *Scophony Corporation of America*, *supra*, taking an overall look at the Longines-Wittnauer relationships, they are a corporate partnership with a single program. Sanctions imposed in Switzerland upon Wittnauer coerce action by Longines. Restrictive trade practices in the United States market by Longines serve Wittnauer. Their commitments in Switzerland are that they will deal as one here. If the facts alleged in the complaint are true, the corporations have in fact dealt as one. See *Giusti* v. *Pyrotechnic Industries*, 9 Cir., 156 F.2d 351, 354. These conclusions are equally applicable to Gruen.

" For the purposes of a pre-trial motion the substantive allegations of the complaint are taken as true, even so far as they bear on jurisdiction over the person. *Reese* v. *American Red Ball Transit Co.*, D.C.W.D.Pa., 107 F.Supp. 549, 550; *McGuire* v. *Parker*, D.C.W.D.Mo., 78 F.Supp. 199. Otherwise we would have to try out the entire complaint charged. Where the absence from the forum of a foreign corporation is determinable from factors apart from the nature of the cause of action (such as the absence of ownership of property, bank accounts, offices, etc.) and proof of the substantive allegations of the complaint would do nothing itself to establish its presence in the forum, a defendant's motion to dismiss can profitably be determined at a hearing in advance of trial. In such a case, regardless of how it is decided it will narrow the issues to be tried, whereas here there would be no saving at best, and a complete duplication at worst. The whole tenor of F.R.C.P. 12(b), 28 U.S.C.A., points to the conclusion that a plaintiff is not to be put to the proof of the substantive allegations of his complaint on a pre-trial motion. In addition to the *Reese* and *McGuire* cases cited, *supra*, see also the analogous cases, *Melanson* v. *Bay Store Dredging & Contracting Co.*, D.C.Mass., 62 F.Supp. 482, 485, in which the court refused to try out the question of maritime jurisdiction in advance of trial and *Bagby* v. *Cleveland Wrecking Co.*, D.C.W.D.Ky., 29 F. Supp. 271, 272, in which the court refused in advance of trial to determine whether the transaction in question was interstate commerce and that it thus had jurisdiction of the subject matter.

"*Cannon Manufacturing Co.* v. *Cudahy Packing Co., supra,* distinguished cases like the one at bar. Justice Brandeis said:

> '. . . There is here no attempt to hold the defendant liable for an act or omission of its subsidiary or to enforce as against the latter a liability of the defendant. . . . 267 U.S. at page 337, 45 S.Ct. at page 251.

"He cited cases where on the question of substantive liability corporate independence was disregarded, a tax case, a patent infringement case and two cases relating to railroad regulation. It is a fair implication from the opinion that if corporate entities may be disregarded to establish liability they may also be disregarded in establishing jurisdiction over the person insofar as it depends upon the acts upon which the substantive liability was based. Antitrust violations are analogous to the subject matter of the cases Justice Brandeis distinguished.

"Here there is a further distinction, jurisdiction over the parent is not being sought through a subsidiary but jurisdiction of the subsidiary is being sought through the parent. We are free of the danger that a corporation may be drawn into litigation in a strange forum by the acts of someone relatively unfamiliar with its major policies and unimportant in its corporate hierarchy. Here, the court already has jurisdiction over the parental policy making body which gave its deliberate assent to the alleged unlawful enterprise. It is not too violent an act to extend jurisdiction to the subsidiary through which the policy in question, lawful or unlawful, was in a large measure to be carried out.

"As to the possibility of unfair inconvenience in compelling the two Swiss companies to stand trial here, we have the counterbalancing factors that there is no other more convenient forum in which they may be tried. As to the very subject matter of this action, if the complaint be true, they have so intertwined their action with that of their American affiliates that it would be unwise to attempt to force separate trials even if they could be had. Such a severance of defendants might well emasculate the proof of the plaintiff as well as prevent its obtaining the complete injunctive relief to which it would be entitled. Further, the long and intimate relationship between Swiss and American affiliates and the complete lack of conflicting financial interests between them assures that the facilities of the parental home office will provide the Swiss affiliate with a well equipped and hospitable base from which to pursue its litigation in this forum. Balancing the inconveniences to the two Swiss companies Gruen and Wittnauer against the inconveniences to the plaintiff if their cases were severed and dismissed, it is my conclusion that it is not unfair to compel them to stand trial here.

" Accordingly, Gruen, S. A. and Wittnauer Et Cie, S. A. were properly found here and served and their motions must be denied without prejudice, of course, to any motion based upon the proof actually adduced at the trial.

" The fifth moving defendant is Eterna A. G. Uhrenfabrik (hereafter referred to as Eterna A. G.). It is a Swiss corporation manufacturing watches under the name ' Eterna '. Its sole United States distributor is Eterna Watch Company of America (hereafter referred to as Eterna N. Y.), a New York corporation, also a defendant in this action. Eterna N. Y., although once a wholly owned subsidiary of Eterna A. G., is no longer so held. It was transferred to two other Swiss firms on January 1, 1952. Eterna states that Eterna N. Y. was originally an independent distributor of Eterna watches. On March 16, 1939 Eterna A. G. bought its entire capital stock. In 1952 it decided to sell it, however, because of difficulties in supervising and distribution at such a distance from its principal place of business. There consideration recited for the transfer was one dollar. Eterna N. Y., however, agreed in consideration for its designation as sole distributor of Eterna products, that it would not handle competing products; that it would have a sales policy which would protect the name ' Eterna ', that it would not re-export Eterna products; that it would employ a sales manager whose exclusive work would be the sale of Eterna products; that it would conduct its organization so as to ensure that ' Eterna ' at all times would ' legally be an autonomous business enterprise in the United States '. It was also part of the understanding that the then staff of Eterna N. Y., would be continued. It also agreed to discuss in advance proposed advertising and publicity as to Eterna products. The agreement required continuance of the then corporate office except upon Eterna A. G.'s approval of change. Eterna A. G. held title to the furniture until the distribution agreement ran five years. The contract is subject to termination by either party on six months' notice. The agreement between Eterna A. G. and the parents of Eterna, N. Y. provide that in the event of termination of the distribution agreement, Eterna A. G. has the option to compel them to reconvey the corporate stock of Eterna N. Y. for a nominal consideration. The distribution agreement also gives Eterna A. G. the option to require Eterna N. Y. to drop ' Eterna ' from its name if the distribution agreement is terminated. Eterna claims that these provisions are simply to protect its name, that the agreement for recovery of the stock for a nominal consideration anticipated a reconveyance of the shell of the corporation stripped of the assets and liabilities.

" Correspondence between Eterna A. G. and Eterna N. Y. shows that the former maintained a vigilant observation upon the latter's sales policy and called upon both Eterna N. Y. and its Swiss parents to account for certain objectionable sales tactics. Nevertheless, it also appears that Eterna N. Y. persisted in some of these practices which Eterna A. G. found objectionable.

"The first question is whether the independence of Eterna N. Y. is so reduced that its activities become the activities of Eterna A. G. The absence of corporate affiliation is not controlling. If Eterna N. Y. is merely the local agent of Eterna A. G. rather than one who independently buys from it for resale, its activities may be attributed to its principal. The arrangement between the two organizations seems to be that Eterna N. Y. may operate independently only as long as it does as Eterna A. G. wishes on major matters. If it fails to acquiesce on a matter of major importance, Eterna A. G. has power not only to cease doing business with Eterna N. Y., but to resume control of the corporation and operate it itself. Again it is unrealistic to think that the employees and officers of Eterna N. Y., with such a possibility before them, feel free to deal independently with Eterna A. G. The distribution agreement under these circumstances reduces Eterna N. Y. to the status of agent. See *Bach* v. *Friden Calculating Mach. Co.*, 6 Cir., 167 F.2d 679; *Clover Leaf Freight Lines* v. *Pacific Coast Wholesalers Ass'n*, 7 Cir., 166 F.2d 626; *Carroll Electric Co.* v. *Freed-Eisemann Radio Corp.*, 60 App.D.C. 228, 50 F.2d 993.

"As in the cases of the other moving defendants, to require Eterna A. G. to stand trial here would not subject it to unfair inconvenience. There is no alternative forum. The cause of action arose here. Many of the acts in question are alleged to have occurred here. The volume of its business with Eterna N. Y. and its long standing relationship with its personnel should enable it to minimize the disadvantage of a trial away from its home office."

[Report: 133 F. Supp. 40.]

The defendants Wittnauer and Eterna A. G. sought reargument of the denial of their motion to dismiss.

Held (September 15, 1955): that the motions for reargument must be denied. On the assumption that the allegations made by the United States were true, Wittnauer had worked closely with its American affiliate to effect a common design of preventing the free manufacture, sale, and export by others of Swiss and American watches and watch parts and must therefore be regarded as present in the United States.

The Court said: "Wittnauer, a Swiss corporation, contends that the bare fact of its affiliation with defendant Longines, a New York corporation, does not bring it within the jurisdiction of this court. *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U.S. 333, 334–337, 45 S.Ct. 250, 69 L.Ed. 634. Its second contention is that even though the substantive allegations of the complaint be accepted as true for the purpose of this motion, they do not allege any specific act by Longines as agent or affiliate for Wittnauer, and that the allegations that Longines committed numerous acts in this district in furtherance of a conspiracy with Wittnauer and the other defendants, even if true, do not establish the 'presence' here of Wittnauer.

"The factors to be considered in asserting jurisdiction over a foreign corporation are those specified and explained in three opinions of Chief Judge Learned Hand. *Latimer* v. *S/A Industrias Reunidas F. Matarazzo*, 2 Cir., 175 F.2d 184, 186, *certiorari* denied 338 U.S. 867, 70 S.Ct. 141, 94 L.Ed. 531; *Kilpatrick* v. *Texas & P. Ry. Co.*, 2 Cir., 166 F.2d 788, 791; *Hutchinson* v. *Chase & Gilbert*, 2 Cir., 45 F.2d 139. They require continuous local activity within the jurisdictional limits of the court and satisfaction that the forum would be not unfairly inconvenient to the defendant. This view expressed in the original opinion is not here challenged by defendants.

"The acts charged to Longines, Wittnauer and the other defendants in the substantive allegations of the complaint have been assumed to be true for the purpose of this pretrial motion. Although Wittnauer has reserved the right to challenge this proposition, it does not do so here and agrees that the immediate application be considered upon the assumption that these substantive allegations are true.

"Within this framework, it seems to me that the application for reargument must be denied. Here there was no holding nor even any claim that this court had jurisdiction over Wittnauer simply because it was an affiliate of Longines. There is therefore no conflict with *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, *supra*. This does not mean, however, that the fact of affiliation must be ignored and not taken into consideration along with the undisputed fact that the Collective Convention was executed by Wittnauer and the assumed facts as charged in the substantive allegations of the complaint.

"Concededly, Longines, a New York corporation, owns all of the stock of Wittnauer which manufactures watches for it to sell. In addition, it is alleged and here undisputed that Wittnauer has signed the Collective Convention by which it agrees that it, in Switzerland, and Longines, in New York, would conform to the practices therein specified and that trade reprisals might be visited upon one for deviation by the other.[1] Further, the other facts in the complaint alleged and assumed to be true for the purpose of this motion show that Wittnauer and Longines and several others have conspired to restrain American trade in Swiss watches and the manufacture and export of American watches. In this connection Longines and other American defendants are alleged to have committed numerous acts as mutual agents for one another and for the Swiss defendants. Many of these acts are alleged to have been committed by Longines within the jurisdiction of this court.[1] Longines having acted for Wittnauer as well as the others in this regard, its acts may be regarded as those of Wittnauer. Accordingly, it is unnecessary to pursue generalizations as to the power of the court under the *Cannon* case over *any* affiliate of Longines, or the power of the court over a foreign affiliate which merely manufactured watches and sold them to Longines. Such inquiries are academic here. The question is the power of this court over the manufacturing affiliate of Longines which has joined with it in an endeavor far broader than the manufacture and sale of watches—a joint effort to prevent the free manufacture, sale and export by others of Swiss and American watches and watch parts. Where two corporations under common ownership are used as interlocking facilities to execute a common design, the self-serving niceties of inter-corporate housekeeping are of minor significance.[2] Of course, the possibility that the acts by Longines may be illegal does not make them any less a continuous activity on behalf of Wittnauer. *Giusti* v. *Pyrotechnic Industries*, 9 Cir., 156 F.2d 351, 353–354.

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[1] Complaint paragraph 24.

"Although it is true as contended by Wittnauer that in no allegation does the complaint allege that Longines acted as an affiliate or agent of Wittnauer, the complaint is replete with allegations of activities by Longines in this district pursuant to its conspiratorial agreement with Wittnauer and the other defendants.[3] At least when coupled with corporate affiliation, the agency the law finds between members of a conspiracy is just as effective for purposes of jurisdiction as agency derived in any other form.[4] We need not in this case speculate about the problems of basing jurisdiction upon such alleged agency in the case of completely independent corporations where there might be uncertainty as to notice and unfair inconvenience as to place of trial.

"Defendant Eterna, A. G. reiterates its previous argument that Eterna, N. Y. is an independent distributor of its product rather than its local agent. It offers no additional proof and urges only that its relationship to Eterna N. Y. more closely resembles precedents it relies upon than those cited in the original opinion. All of these precedents had been called to the court's attention before, and their rereading does not change the conclusion initially reached."

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[1] See paragraphs 28, 29, 31, 32, 33, 34, 35, 36 alleging acts by Longines here pursuant to agreements alleged in paragraphs 25, 27. Paragraph 27 expressly alleges:

"27. Pursuant to the aforesaid combination, conspiracy and concert of action, and in furtherance thereof, defendants and the co-conspirators, among other things, have entered into, adhered to, or effectuated the Collective Convention described in paragraph 24 above and have done the acts and carried into execution the agreements complained of in paragraphs 28 to 39 hereinafter."

See also paragraph 24 (c) and (d) as to commitments under the Collective Agreement.

[2] See *Anderson* v. *Abbott*, 321 U.S. 349, 363, 64 S.Ct. 531, 88 L.Ed. 793.

[3] See footnote 1, *supra*.

[4] ". . . When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime.' . . ." *Van Riper* v. *United States*, 2 Cir., 13 F.2d 961, 967.

[Report: 134 F. Supp. 710.]

Jurisdiction—Territorial—Limits of—Acts Performed in Foreign Territory—Acts Affecting Foreign Commerce—Extraterritorial Application of Anti-trust Laws—The Law of the United States of America.

SANIB CORP. *v.* UNITED FRUIT CO.

United States, District Court, Southern District, New York.

November 22, 1955.

THE FACTS.—This was an action for treble damages of $3,111,000 under the anti-trust laws, brought by Sanib Corporation, a New York corporation which, until its voluntary dissolution in 1954, had carried on the business of manufacturing, distributing and selling in inter-state and foreign commerce dehydrated banana powder and other banana products.

The complaint alleged as follows: United Fruit Company, a New Jersey corporation, was the largest importer of bananas in the United States and owned extensive properties in each of the principal banana growing countries in Central and South America, including Honduras. The western zone of the north coastal region of Honduras was dominated by United through ownership and control of banana growing plantations and of rail, shipping, port, power and other facilities on which Sanib depended. In 1937 Sanib arranged to purchase from United " reject bananas " which were unsuitable for export, and erected a dehydration plant in the principal port of the region of Honduras dominated by United. Until 1946, when United erected a dehydration plant of its own and began manufacture of competing banana products, United fulfilled all of Sanib's requirements, thus permitting Sanib to build up a profitable and expanding market for its products. From 1946 onwards United, except for isolated shipments, completely cut off Sanib's supply of rejects, although United had ample stores available. In 1950 Sanib began negotiations to purchase rejects from independent growers and to operate a plantation of its own. These plans were dropped when United resumed shipments in January. When United in May again ceased selling to Sanib, the latter, having no source of supply, could not fill its orders.

The defendant moved to dismiss the complaint on the merits for failure to state a claim on which relief could be granted, because, as it contended, the complaint showed on its face that the unlawful conspiracy and monopoly charged were effectuated by acts which are not even alleged to be unlawful in Honduras, where they were performed, and were in any event beyond reach of the United States anti-trust laws. It was urged that the decision in *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 29 Sup.Ct. 511, 53 L.Ed. 826 (1909) required dismissal.

Held: that the motion must be denied. Although the acts effectuating the conspiracy were performed partly in a foreign country, that did not put the conspiracy beyond the reach of the United States anti-trust laws, since the conspiracy was intended to affect, and did in fact affect, the inter-state and foreign commerce of the United States.

The Court said: " The foregoing and many similar acts were done pursuant to a conspiracy and combination between United and its subsidiaries, particularly Tela Railroad Company, a Delaware corporation operating in Honduras. The conspiracy and the acts in furtherance of it ' were conceived, carried out and made effective ' partly in the United States and partly in Honduras, with the result that United monopolized or attempted to monopolize interstate and foreign trade in banana products and eliminated Sanib as a competitor therein to the latter's damage.

" On this motion to dismiss, the allegations just summarized must be accepted as true. Moreover the language of the complaint must be construed to give the plaintiff ' the benefit of reasonable intendments in his allegations '.[1] Read in the light of these canons, it is clear that the complaint alleges agreements between United and at least its subsidiary Tela which if made and executed wholly within the United States, would certainly violate our antitrust laws. The common ownership of United and Tela does not insulate these corporations from the antitrust laws' sanctions.[2] That the acts effectuating the conspiracy were performed partly in Honduras does not put the conspiracy beyond reach of those laws, since the agreement in the execution of which these were done, obviously was intended to, and in fact did, affect the interstate and foreign commerce of the United States.[3] The *American Banana Co.* decision is not contrary. There the complaint was viewed as claiming damage not from the alleged monopoly as such, but from seizure of the plaintiff's property by a foreign government at the defendant's urging. The Supreme Court agreed with the District Court and the

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[1] *Dioguardi* v. *Durning*, 2 Cir., 139 F. 2d 774, 775; *Virgin Islands Corpn.* v. *W. A. Taylor & Co.*, 2 Cir., 202 F.2d 61.

[2] *United States* v. *Yellow Cab Co.*, 332 U.S. 218–227, 67 S.Ct. 1560, 91 L.Ed. 2010; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593–598, 71 S. Ct. 971, 95 L.Ed. 1199.

[3] See *United States* v. *Aluminum Co.*, etc., 2 Cir., 148 F.2d 416—444 and cases there cited.

Circuit Court of Appeals that a sovereign state's acts within its own jurisdiction were never intended by Congress to come within the prohibition of its enactments.[1] The facts here alleged distinguish this complaint from that of the *American Banana Co.* This one falls, rather, within the decisions in *Thomsen* v. *Cayser*[2] and *United States* v. *Sisal Sales Corporation.*"[3]

[Report: 135 F. Supp. 764.]

Jurisdiction—Territorial—Territorial Limits of Jurisdiction—Compelling Production of Records in Foreign State—Production of Records as Violation of Law of Foreign State—Conflict of Jurisdictions—Trading with the Enemy—Protection of Neutral Interests.

SOCIÉTÉ INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A. *v.* BROWNELL, ATTORNEY-GENERAL, *ET AL.*

United States, District Court, District of Columbia. February 19, 1953.

Court of Appeals, District of Columbia Circuit.
June 30, 1955, and *April* 11, 1957.

THE FACTS.—This was an action by I. G. Chemie[4] against the Attorney-General of the United States, as successor to the Alien Property Custodian, and the Treasurer of the United States under section 9 (a) of the Trading with the Enemy Act, 40 Stat. 419, as amended, 50 U.S.C. App. § 9 (a), to recover properties allegedly valued at more than $100,000,000, which the Custodian had vested under the Act as the property of foreign nationals or of German interests. The property vested was over 90% of the stock of General Aniline & Film Corporation, of Delaware, and some $1,800,000 in various bank accounts and securities.

I. G. Chemie, a Swiss holding corporation having its domicile in Basle, claimed ownership of the vested property. Contending that it was not an enemy within the meaning of the Trading with the Enemy Act, it filed an administrative claim for the return of the property, which was denied. It thereupon sued in a federal District Court for the return of the property. The Alien Property Custodian denied that the property was owned by I. G. Chemie and disputed the claimant's allegation that it was not an enemy.

On July 5, 1949, the District Court ordered both I. G. Chemie and the Alien Property Custodian to produce certain documents (9 F.R.D. 263 (D.D.C. 1949)). Among those ordered to be produced by I. G. Chemie were records of H. Sturzenegger & Cie., a Swiss banking concern domiciled in Basle. Before the documents could be produced the Swiss Federal Attorney took constructive possession of them on June 21, 1950. The order of the Federal Attorney recited that production of the documents would constitute prohibited economic espionage under Article 273 of the Swiss Penal Code and would also violate bank secrecy under Article 47 of the Swiss Bank Law, " which offense the Federal Authorities have to prevent in order to maintain the public security and order on the basis of their preventive police power." I. G. Chemie thereupon moved to be relieved of that portion of the order of the United States District Court of July 5, 1949, which required it to produce the Sturzenegger records.

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[1] See *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 73 S.Ct. 252, 97 L.Ed. 252.

[2] 243 U.S. 66–88, 37 S.Ct. 353, 61 L. Ed. 597.

[3] 274 U.S. 268-275, 276, 47 S.Ct. 592, 71 L.Ed. 1042 [*Annual Digest*, 1927–1928, p. 182].

[4] A short title for the plaintiff, which is also known as " Interhandel."

In October 1950, the Custodian moved to dismiss on the basis of the failure of I. G. Chemie to produce the papers. A Special Master, appointed by the Court, reported in 1952 that there was no evidence of collusion between I. G. Chemie and the Swiss Government, that the order of the Swiss Federal Attorney was legally supportable under Swiss law, and that I. G. Chemie had demonstrated good faith in its efforts to secure production of the Sturzenegger papers. The Custodian contended that the suit must be dismissed because the plaintiff had not complied with essential procedures established for the trial of cases in the courts of the United States.

Held (by the District Court): that the defendants' motion to dismiss must be granted effective three months after the granting of the motion in order that the plaintiff might have a further opportunity to produce the documents. The law of Switzerland could not be permitted to obstruct the investigation and discovery of facts in a case in a court of the United States. [Report: 111 F.Supp. 435.]

The Court by various orders extended the time for compliance to the month of October 1953. Between the issuance of the original order for production of the documents and October 1953, I. G. Chemie made unsuccessful attempts to secure release of the documents. Waivers were obtained from a substantial number of persons, and 63,000 documents were cleared by the Swiss Federal Attorney and tendered to the Custodian on October 15, 1953. No account books of H. Sturzenegger & Cie. were tendered, although I. G. Chemie advised the Custodian of a plan for photostating parts of the books the entire contents of which were not cleared, with the matter declared secret blacked out. By October 20, 1953, I. G. Chemie was unable to assure the Court that full compliance with the order would be had, even if more time were granted. The District Court dismissed the complaint with prejudice on December 21, 1953. The plaintiff appealed.

Held (by the Court of Appeals—June 30, 1955): that the judgment of the Court below must be affirmed, subject to the modification that the dismissal with prejudice would not become effective until six months after the receipt by the District Court of the mandate of the Court of Appeals, and not then if within such period discovery were to be made as ordered. If an alien plaintiff was precluded by the act of his Government from producing evidence which was relevant to the determination of his case, the burden of being handicapped or exposed to risk in the outcome of the litigation must not be placed upon the defendant. If a foreign State took action of this nature for the benefit of itself and of its nationals, the disadvantage caused to one of its nationals in litigation abroad could fairly be left where the law of the forum placed it.

The Court said: " Rule 37 (b) (2) [of the Federal Rules of Civil Procedure], which deals with the consequences of failure to comply with a Rule 34 order to produce, provides that the court may

> ' make such orders in regard to the refusal as are just, and among others the following: '. . . (iii) An order . . . dismissing the action . . .'[1]

In addition, Rule 41 (b), Fed.R.Civ.P., provides that

> ' For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.'

In determining whether a dismissal is just under Rule 37 for non-compliance with an order to produce under Rule 34, the provisions of Rule 37 dealing specially with that problem, not Rule 41, should govern. No contrary view was expressed by the court below. Nevertheless, Rule 41 does add its influence in any consideration of the power of the District Court to dismiss a complaint otherwise than by reason of Rule 37.

" Confining the discussion for the time being to Rule 37, read with Rule 34, we accept the express conclusions of Chief Judge Laws, unless a different finding is required by the action of the Swiss government, that the papers of H. Sturzenegger & Cie. are in the possession, custody or control of Chemie, see 111 F. Supp. at page 442, and the basic finding implicit in his opinion that they are also within the scope of examination permitted by Rule 26 (b) and not privileged.[2] Chemie vigorously contests the conclusions of the District Court as to possession, custody or control; but we accept them. They are set forth clearly and with sufficient fullness in the opinion of Chief Judge Laws of February 19, 1953, 111 F.Supp. 435, in view of which it seems unnecessary for us to elaborate again the factual details. We will, however, discuss the effect of the laws and actions of Switzerland on these subjects. Before doing so we point out that the narration in Chief Judge Laws' opinion of the relation of Hans Sturzenegger to I. G. Chemie, his dominant position with respect to H. Sturzenegger & Cie., which is the successor to Ed. Greutert & Cie., the relation of the three companies to one another and to other companies, including, on information now available, I. G. Farben and other German interests, cannot be said by us to be erroneous. After thorough acquaintance with the case in its various stages over a period of years Chief Judge Laws said he ' definitely concluded that the Sturzenegger papers were and are in the possession, custody or control of plaintiff and that except for their confiscation by the Swiss Federal Attorney, plaintiff would be able to produce them.' 111 F.Supp. at page 442. This finding rests upon a discussion of the evidence which traces the history of the close connection between I. G. Chemie and H. Sturzenegger & Cie. For any purpose relevant to Rules 34 and 37 the findings are sufficient in form and definiteness; and, for purposes of our favorable review, find adequate support in the record. We accept also the further finding and conclusion of the District Court that the Sturzenegger papers are relevant to the issues raised by the complaint of Chemie. We do not understand Chemie to urge the contrary. A number of grounds are set forth in the opinion of the court, 111 F.Supp. at page 442, as representing the Government's position with respect to relevancy, followed by the court's recognition that ' banking records of the transactions of a corporation are among the best possible indicia of its ownership and control.' The court there also said:

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[1] Subparagraph (iii) reads in full as follows:

" (iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; "

[2] No contention is made in this court that they are privileged.

' The records of H. Sturzenegger & Cie. are conceded by plaintiff to be relevant to the issues. Counsel for plaintiff avers he is even more interested and concerned than are defendants in their production, that they are important to him in the presentation of his proof and to meet and refute the allegations of German interest and control made by the Government.'

" As we have indicated, the papers in question are relevant, are not privileged, and, except for the laws and actions of the Swiss government, are in Chemie's possession, custody or control for the purposes of Rule 34. It does not follow, however, that Chemie's failure to produce them necessarily requires dismissal of its complaint with prejudice, under Rule 37 (b) (2) (iii). We consider first, however, whether the action of the Swiss government, and Chemie's good faith, bar such dismissal.

" As previously set forth, the Swiss Federal Attorney's order of June 15, 1950, recited that production of the papers would constitute the fact of prohibited economic espionage under Article 273 of the Swiss Penal Code and would also violate bank secrecy under Article 47 of the Swiss Bank Law, ' which offense the Federal Authorities have to prevent in order to maintain the public security and order on the basis of their preventive police power '. Pursuant to the order he constructively took possession of the papers, or, as we have also said, he seized or confiscated them. Chemie contends that this removed the papers from its ' control ' within the meaning of Rule 34, even if otherwise they were within such control. This contention no doubt centers upon ' control ', rather than ' possession ' or ' custody ', because physically the papers remained in the possession or custody of Chemie, though subject to the control exercised by the Federal Attorney. Since his constructive seizure of the records was subsequent to the District Court's order requiring their production, his action bears upon the validity of the dismissal rather than upon the validity of the District Court's order when made.

" Rule 37 (b) (2), as we have seen, provides that when a party refuses to obey an order to produce under Rule 34 the court may make such order as is just, including one dismissing the action. See subparagraph (iii). Did Chemie refuse to obey? Or, on the contrary, has it merely been unable to obey? If the latter, does its inability, though involuntary, nevertheless constitute a refusal under the Rule? The District Court thought it did. Pointing out that Chemie had the Sturzenegger papers in its actual possession but declined to exhibit them as ordered, the court said,

> '. . . That plaintiff may have had good reason for its refusal would make the act nonetheless a refusal.' 111 F.Supp. at page 446.

The court then referred to the Advisory Committee Note of 1937 to Rule 37, to the effect that the provisions of the Rule authorizing judgment of dismissal for refusal to make discovery accords with *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530, which, the Note continues, distinguishes between the justifiable use of such a measure to compel production of evidence and its unjustifiable use as punishment for contempt, condemned in *Hovey* v. *Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215. *Hammond Packing Co.* v. *Arkansas* [212 U.S. 322, 29 S.Ct. 380] involved a refusal to produce which the Court termed a ' failure by the defendant to produce what we must assume was material evidence in its possession,' and which defendant had the power to produce. It followed, the Supreme Court said, that the entry of a default judgment against defendant found its sanction,

> '. . . in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause.' 212 U.S. at pages 350–351, 29 S.Ct. at page 380.

In the case at bar our concurrence in the District Court's adoption of the Special Master's report precludes consideration of whether Chemie's efforts to secure the documents were in bad faith, or of whether Chemie could have produced them without violating the Swiss secrecy laws. *Hammond Packing Co.* v. *Arkansas* accordingly seems inapplicable.

" Nevertheless, we think it unnecessary to decide whether Chemie's 'failure' to produce in the circumstances was such a 'refusal' within the meaning of Rule 37 as warranted dismissal of its complaint with prejudice. For it is not a condition to the exercise of the power to dismiss that Chemie's inability to produce be construed as a 'refusal'. Specification in the Rule of remedial action available to a District Court upon a party's refusal to obey a Rule 34 order does not exhaust the court's powers. This is especially so where the action of a foreign sovereign, though a friendly one, has given rise to the problem, creating a situation hardly contemplated by the framers of Rule 37. Yet we cannot think they intended that a District Court would be powerless to solve the problem in a just manner, consistently with due process of law. We agree with Chief Judge Laws that the power to dismiss is not dependent upon the terms of Rule 37; that is to say, we think it unnecessary to find a refusal within the meaning of that Rule. As he said:

'. . . apart from dismissal by authority of specific rule of court or statute, a court has inherent power to dismiss a suit, stay a trial or impose other limitations on the right to proceed with trial when it is established a party plaintiff has failed to comply with order of the court issued pursuant to its rules. See *Refior* v. *Lansing Drop Forge Co.*, 6 Cir., 1942, 124 F.2d 440, certiorari denied 1942, 316 U.S. 671, 62 S.Ct. 1047, 86 L.Ed. 1746; Note, 4 A.L. R.2d 348. If this were not so, a court would be powerless to enforce its rules and a litigant might ignore them with abandon. . . .' (111 F.Supp. at page 447.)

" Rule 37 apart, Rule 41 (b) would permit dismissal for 'failure' of the plaintiff to comply with an order of the court, thus reflecting the power thought by the Rule framers to reside in the court aside from the specific confines of Rule 37.

" In the end the question turns upon whether the particular exercise of the power to dismiss with prejudice is consistent with due process of law. We advert now to factors which lead us to conclude that the power as exercised in the present case meets this constitutional test. The property of Chemie, a corporate national of Switzerland, had been vested under the Trading with the Enemy Act. See *Kaufman* v. *Société Internationale*, 343 U.S. 156, 159, 72 S.Ct. 611, 612, 96 L.Ed. 853.[1] There, in referring to *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 68 S.Ct. 174, 92 L.Ed. 88,[2] the Court said:

'. . . We there held that the 1941 amendment [to the Trading with the Enemy Act] authorized the Custodian to seize and vest in himself all property of any foreign country or national, even that of friendly or neutral nations. At the same time we refused to hold that the 1941 amendment deprived friendly or neutral nations or nationals of a right to have their

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[[1] *International Law Reports*, 1951, p. 516.]

[[2] *Annual Digest*, 1947, p. 192.]

assets returned if they could prove that they were free of any open or concealed enemy taint. . . .'

These cases demonstrate that Congress intended by Section 9 (a) of the Act to permit any corporation of a neutral or friendly state to recover property vested under Section 5 (b) if ' not an enemy or ally of enemy ' or, as said in *Kaufman* v. *Société Internationale, supra,* 343 U.S. at page 159, 72 S.Ct. at page 612, ' if they could prove that they were free of any open or concealed enemy taint.' Chemie having filed its action under Section 9 (a) to recover property vested under Section 5 (b) the principal issue on the merits is whether it was enemy tainted within the principles of *Clark* v. *Uebersee Finanz-Korp., supra.* As we have set forth, and as is more fully detailed in the opinion of Chief Judge Laws, the Sturzenegger papers are material on this issue. They were ordered produced. If the Swiss authorities had not then intervened, and if Chemie had wilfully refused to comply with the order, dismissal of its complaint with prejudice, based on such refusal, would not have been an unconstitutional deprivation of property, *Hammond Packing Co.* v. *Arkansas, supra,* 212 U.S. at page 351, 29 S.Ct. 370. Except for the action of the Swiss Federal Attorney, explicitly designed to prevent their production in this case,[1] the documents could have been produced. For the District Court to hear and decide the case without them might give plaintiff a decisive advantage, leading to recovery of extremely valuable property notwithstanding, were the papers produced, Chemie might be shown to be enemy tainted, in which case the property would be withheld by the United States under existing legislation. True, there is no certainty about this. Uncertainty as to the part the undisclosed papers would play creates the difficulty. But, in view of the findings of the District Court, we think due process of law does not require the Custodian to sustain with certainty prior to trial the proposition that the undisclosed papers would defeat Chemie, or the proposition that Chemie's claim can be defeated without them. Where, as here, adequate basis underlies the District Court's findings of relevancy and materiality, and of possession, custody or control, except for the Swiss Federal Attorney's order, so that the indicated relationship between Chemie and H. Sturzenegger & Cie. leads reasonably to the conclusion that the records are important in resolving the issue of

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[1] This is illustrated by an order of the Swiss Federal Attorney of June 25, 1951, denying Chemie's request to countermand the seizure order and permit Sturzenegger to produce its books and records. In denying the request, the Swiss authority stated: " The said order [seizing constructively the books and records] applies exclusively to the firm Sturzenegger & Co. . . . and against the order of the American court in respect of this banking firm for the production of its business records to the United States District Court . . . ." " The fact that the American authorities wish to inspect the records . . . is exactly what gave rise at that time to the issue of the order . . . ." The order itself had expressly described the documents thereby confiscated as " the business records or books of the banking firm . . . ordered to be produced by the American judge ".

Chemie's enemy taint, due process of law is not violated by requiring their production as a condition of trial. In other words it is not fundamentally unfair or arbitrary to require Chemie to comply with an order that is designed, in accepted legal fashion, to elicit the truth or, failing compliance, to dismiss its action, when the requirement is shown to have a very real relationship to the means of arriving at the truth of the substantive issues in the litigation.

" Due process in the circumstances of the case does not insist that Chemie be allowed to go to trial in a manner inconsistent with accepted procedures, now embodied in the Rules but which long antedate them in development. Handicap in the conduct, and risk in the outcome, of litigation, due to the absence of evidence reasonably determined on the basis of available information to be relevant and material, need not be cast upon a defendant when a plaintiff by action of its own government is disabled from complying with discovery rules applicable generally to litigants under the law of the forum. Switzerland in her own wisdom, upon consideration no doubt of many factors, has rendered her national, Chemie, unable to comply with a valid order of the trial court in an important matter respecting the evidence. The order itself is not inconsistent with due process of law. *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541, 28 S.Ct. 178, 52 L.Ed. 327. To require compliance as a condition to Chemie's further prosecution of its claim is to insist that if the trial is to go forward it shall do so in accordance with accepted procedures for developing the truth about contested factual issues raised by Chemie, the ultimate objective of the trial. This too is not a denial of due process of law, since, to borrow the test applied to legislation, 'the means selected . . . have a real and substantial relation to the object sought to be attained.' *Nebbia* v. *New York*, 291 U.S. 502, 525, 527, 54 S.Ct. 505, 511, 78 L.Ed. 940.[1] *Lapides* v. *Clark*, 85 U.S.App.D.C. 101, 102, 176 F.2d 619, 620, *certiorari* denied 338 U.S. 860, 70 S.Ct. 101, 94 L.Ed. 527.[2] See, also, *Minder* v. *Georgia*, 183 U.S. 559, 562, 22 S.Ct. 224, 46 L.Ed. 328; *Davidson* v. *New Orleans*, 96 U.S. 97, 107-108, 24 L.Ed. 616, separate opinion of Mr. Justice Bradley; *Missouri Pacific Railway Co.* v. *Humes*, 115 U.S. 512, 519, 520, 6 S.Ct. 110, 29 L.Ed. 463; *Ballard* v. *Hunter*, 204 U.S. 241, 255, 27 S.Ct. 261, 51 L.Ed. 461;

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[1] In *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 708, 4 S.Ct. 663, 667, 28 L.Ed. 569, the Supreme Court said:

" . . . It is sufficient to observe here, that by ' due process ' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause . . . means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights . . . "

[[2] *Annual Digest*, 1949, p. 194.]

Endicott-Johnson Corp. v. *Encyclopedia Press*, 266 U.S. 285, 288, 45 S.Ct. 61, 69 L.Ed. 288; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584-585, 57 S.Ct. 883, 81 L.Ed. 1279; *Carolene Products Co.* v. *United States*, 323 U.S. 18, 31-32, 65 S.Ct. 1, 89 L.Ed. 15.

" It will be seen from the foregoing discussion that our view, like that of the court below, does not lean heavily upon the theory of a factual presumption adverse to the one who fails to produce the papers ordered, as in *Hammond Packing Co.* v. *Arkansas*, *supra*, nor upon the theory of punishment, discredited in *Hovey* v. *Elliott*, *supra*. Though there may be some element of adverse factual presumption, we rely chiefly on the necessity for discovery as an aid in the development of facts. This is particularly important in such a case as this, where the intricacies of relationships are so difficult to unfold and their geographical local is centered so close to the former enemy, and where the secrecy laws which Switzerland deems wise prevent discovery which on adequate showing is deemed material to the case.

" What we have here said is fortified by established legal principles. It is settled that ' the fullest possible knowledge of the issues and facts before trial ' is intended by the rules governing discovery. *Hickman* v. *Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 389, 91 L.Ed. 451.[1] ' Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.' *Ibid.*, 329 U.S. at page 507, 67 S.Ct. at page 392. In *Dixon's Ex'rs.* v. *Ramsay*, 3 Cranch 319, 7 U.S. 319, 324, 2 L.Ed. 453, involving the authority of an executor appointed in a foreign country to sue in the courts of this country, Chief Justice Marshall said:

> ' No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country.'
>
> ' [S]ubstantive matters are governed by the foreign law, and . . . procedural matters, or, as it is more usually expressed, matters relating to the remedy are governed by the law of the forum.'

3 Beale, *Conflict of Laws* (1935) 1600. *Don* v. *Lippman*, 5 Cl. & Fin. 1, 7 Eng. Rep. 303, 307 (H.L. 1837). In a footnote to the opinion of the Court in *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, at page 134, 58 S.Ct. 785, 82 L.Ed. 1224,[2] it is said that a foreign sovereign suing as a plaintiff must give discovery, citing *Rothschild* v. *Queen of Portugal*, 3 Y. & C.Ex. 594, 596; *United States* v. *Wagner*, L.R. 2 Ch.App. 582, 592, 595; *Prioleau* v. *United States*, L.R. 2 Eq. 659. See, also, *King of Spain* v. *Hullett*, 7 Bligh N.S. 359, 392-3 (H.L. 1833). A foreign national is in no better position.

" The *Prize Cases*, now to be considered, are also enlightening as to the force which the courts have recognized as residing in rules or court orders requiring discovery. Discovery has been insisted

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[[1] *Annual Digest*, 1947, p. 56.]

[[2] *Ibid.*, 1938–1940, p. 184.]

upon notwithstanding it was forbidden by the law of the sovereign of the claimant; and failure on his part to make discovery has at times resulted in dismissal of his claim.

" In *The Consul Corfitzon* [1917] App.Cas. 550, Swedish claimants to cargo seized on the high seas appealed from an order of the Admiralty Division requiring them to produce certain books of account and other documents. They had declined on the grounds they might become liable to penalties under Swedish law. In affirming the discovery order the Privy Council stated that

'a Court of Prize cannot properly be deterred from making . . . the appropriate order because a neutral claimant would, if he obeyed the order, be guilty of a breach of his own municipal law', *ibid.*, p. 555,

adding that the

'practice and procedure [of the forum] are governed by the municipal law of the State from which it derives its jurisdiction'.

" In *Steamship 'Antilla' and Other Vessels*, 7 Lloyd's Prize Cases 401, broad discovery orders of the *Consul Corfitzon* variety had been made relating to claimants' business books, but had been complied with only partially. Claimants, being unable to promise full compliance, requested permission to try the case on the evidence available. The court denied the request and struck the claims, stating:

'. . . that when orders are made by this Court, and are not appealed from, they must be taken to be valid orders, and they must be obeyed. If they are not obeyed, those claimants upon whom they are made will be in contempt and their claims will be liable to be struck out. . . ., (*Ibid.*, p. 405).

" *The Baron Stjernblad* [1918] App. Cas. 173, 178, reiterated the Prize Court's policy of refusing 'to accept the dictates of any municipal law as to what discovery ought or ought not to be insisted on either generally or in any particular case.' The Privy Council recognized [that] the foreign claimant was put in the anomalous position of either losing his case or incurring penalties in his own country, but pointed out that 'the anomaly is certainly not due to any defect in the practice of the Prize Court or in the law which it administers.' *Ibid.*, p. 179.

" There is a reference to *Kronprinsessan Margareta* in 6 Lloyd's Prize Cases 105n. The Privy Council is said to have denied leave to appeal from the dismissal of a claim when the Swedish claimant declined to answer some of the interrogatories administered to it on the court's authorization because permission to answer had been requested and denied by the Swedish government. It was said this refusal made no difference in the Prize Court.

" In *The Kronprinzessin Victoria* [1919] App.Cas. 261, a trial had taken place, at which the claimants declined to produce their books in court because of Swedish laws. Holding that the court properly refused to let the Swedish secrecy law affect its weighing of the evidence in deciding against claimants the Privy Council pointed out, at p. 267, that

> ' if the evidence by which their case might have been cogently supported was required for their other business in Sweden, it was for them to choose whether they would conduct their case or their business to the better advantage.'

" *In re Von Kantzow's Patent* [1944] Ch. 318, 321, was a non-prize case where applicants sought extension of certain British patent rights in order to recoup revenue losses allegedly suffered during the war. Due to Swedish secrecy laws they were unable to furnish evidence that they had not made countervailing profits abroad during the war. Consistently with the prize-case principle of maintaining discovery orders over contrary foreign law, the court said:

> '. . . It appears to me that this court, having placed on it the delicate task of determining whether its discretionary jurisdiction should be exercised in favour of an applicant in a matter in which the public interest also is concerned, must be told all the relevant facts. If an applicant is the subject of a foreign State and is precluded by his municipal law from giving the necessary information to the court, that is his misfortune.'

" Chemie might have some remedy at the hands of its own government for any loss it can place at her door, but this of course is beyond our help. We merely note that when Switzerland takes action of the character here involved, which she deems beneficial to herself and her nationals as a whole, the disadvantage caused a particular national in litigation abroad is fairly left where the law of the forum places it.

" We have considered an alternative solution; that is, to permit the case to go to trial without the unproduced papers, as was requested and denied in *Steamship ' Antilla ' and Other Vessels, supra*, with possible action, because of failure to produce, to await eventualities. If Chemie were unable to show the absence of enemy taint, or failed in other respects to prove its case, judgment would be rendered for the Custodian on the merits. And if Chemie did make out its case but in the court's view the unproduced documents might if available lead to a different result, the court could then dismiss if the failure to produce persisted. But we think the District Court was not required to adopt this alternative. Since dismissal was within its powers we should not without strong reasons disapprove the manner in which it exercised control over litigation of which it bears the heaviest burden. Years have been consumed in preliminaries and in efforts to obtain full discovery as ordered. The District Court has become thoroughly acquainted with the factors which led to its decision. We cannot say it has abused its discretion or acted unjustly, or that its failure to adopt some other possible course constitutes reversible error. We add in this connection that not only production, but production before trial, is important; for the Custodian should have the benefit of discovery for cross-examination and preparation.[1] Moreover, the alternative suggested, with no definite conclusion in sight, would be a very unsatisfactory way of proceeding with a long trial.

"One modification, however, we deem advisable, namely, that dismissal of the complaint with prejudice shall not become effective until six months after the receipt by the District Court of the mandate of this court in this case, and not then if within such period discovery is made as ordered.[2] This will afford another opportunity to bring the case on for a trial and decision on the merits."

[Reports: 96 App. D.C. 232, 225 F. 2d 532; *certiorari* denied, 350 U.S. 937, 100 L.Ed. 818, 76 Sup. Ct. 302 (1956).]

The mandate of the Court of Appeals was received by the District Court on January 24, 1956, and by July 24 I. G. Chemie had obtained and assembled in Washington many thousands of Sturzenegger records. The plaintiff sought an extension of time and submitted a proposed plan for discovery which had been approved by the Swiss Government. It was contemplated that full discovery was to be achieved by permitting an independent investigator, a neutral, to inspect the Sturzenegger files to ascertain which of certain unknown remaining records were relevant. The District Court declined further relief, and on August 3, 1956, the plaintiff's complaint was dismissed with prejudice.

The plaintiff appealed again.

Held (by the Court of Appeals—April 11, 1957): that the judgment of the District Court must be affirmed. If the plaintiff were to be allowed to go forward with its case, it would be necessary that there be a complete release of the papers by the Government of Switzerland. The law of the United States provided no procedure by which a neutral could decide as to the relevancy of documents.

The Court said (*per curiam*): "That plaintiff and its counsel patiently and diligently sought to achieve compliance with the District Court's discovery order is not to be doubted. There is no question of lack of diligence, indeed plaintiff is quite right in its suggestion that delays in the disposition of the case were 'inherent in its nature.' Basically, however, the problem was summed up adequately by Chief Judge Laws, thus:

"'At the end of more than seven years now, I just find no assurance whatever that these papers that we have ordered to be produced will be produced. I don't see how the plaintiff is going to be able to comply with that order so long as the Government of Switzerland continues its confiscation of the papers.

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[1] This would be so even were the court to refer the matter to a Special Master in order to save some of its own time.

[2] We speak of discovery in general terms, since there is no reason to think that the District Court will require actual production in the United States if other arrangements, such as for inspection or copying in Switzerland, can reasonably be made.

" ' Now, under the laws of the United States, there is no provision whatever for a neutral to decide what papers are relevant or what are not, in reference to this case, and under the applicable rules of the United States courts, there is no requirement that any party to a case should be forced to proceed by way of letters rogatory to obtain documents in custody of one of the parties. I think it very well may be unfortunate that the plaintiff must be deprived of its trial by reason of the laws of another nation and the acts of its representatives. I must confess I have quite a little sympathy for counsel for plaintiff, because I know that counsel have worked extremely hard to comply with the order, and I have made a formal finding that they acted in good faith, including the plaintiff. But the procedural laws of the United States, as well as the substantive laws, may not be relaxed upon its courts because of difficulties a party may have with a different sovereign power.

" ' In my view, nothing short of a complete release of the papers by the Government of Switzerland, leaving this court or its representative in a position to decide what is relevant or what is to be produced, will comply with our laws. I simply don't see how I would have any right whatever to permit a neutral to come in there to take the place of this court or its special master. If I did that, I think that would write something new into the rules of the court; and that is as far as we have gotten, at the end of now seven years.'

" No more need be said. Plaintiff's American assets were seized in the United States as enemy owned property and title, pursuant to law, was vested in the Alien Property Custodian and his successor, the Attorney General. Plaintiff sought recovery of the vested assets on the premise that it is not and was not an enemy or an ally of an enemy. In the course of the ascertainment of the plaintiff's right, resort having been had to our courts, the papers in question became relevant. We concluded that they are not privileged, and except for the laws and actions of the Swiss Government, there is no doubt they could and would have been amenable to the discovery which our courts ordered under rules deemed essential and conducive to the proper and orderly administration of justice in a court of the United States. Since we have held that it was not fundamentally unfair or arbitrary to require the plaintiff to comply with an order designed to elicit the truth, or, failing compliance, to dismiss the action, the District Court's orders were within its powers. There is no error."

[Report: — App. D.C. —, 243 F.2d 254.]

NOTE.—In a Note of August 9, 1956, Switzerland requested that the matter of the claim of I. G. Chemie to the stock of the General Aniline &

Film Corporation and other vested property be submitted to arbitration or conciliation under Article V of the Treaty of Arbitration and Conciliation between the United States of America and Switzerland, signed at Washington on February 16, 1931, 47 Stat. 1983, T.S. No. 844, 129 L.N.T.S. 465. The United States, in a Note dated January 11, 1957, rejected the Swiss request for arbitration on the ground that the matter was one within its " domestic jurisdiction " under Article VI of the Treaty, which provided that the arbitration provision was not to be invoked in respect of any difference the subject matter of which is within the domestic jurisdiction of either of the parties. The United States also denied that it was under any obligation to arbitrate this dispute under the arbitral provisions of the Exchange of Notes between the Allied Governments and Switzerland on German holdings in Switzerland, May 25, 1946 (the " Washington Accord "), *Department of State Bulletin*, 14 (1946), p. 1121. The text of the Notes and of a memorandum of law prepared by the United States Government is set forth in *Department of State Bulletin*, 36 (1957), p. 350 (see Briggs, " Towards the Rule of Law ? ; United States Refusal to Submit to Arbitration or Conciliation the *Interhandel Case* ", in *A.J.*, 51 (1957), p. 517).

On October 1, 1957, the Swiss Government, in reliance upon the acceptance by the United States of America and Switzerland of the Optional Clause of Article 36 of the Statute of the International Court of Justice, brought before the Court a claim asking for the restoration of the assets of the Company or, in the alternative, for a declaration that the dispute was covered by the provisions relating to arbitration, judicial settlement or conciliation as provided in the Treaties between the United States of America and Switzerland.

The above case (in the District Court) is noted in *American Journal of Comparative Law*, 2 (1953), p. 536; *Harvard Law Review*, 66 (1953), p. 1316; and *Yale Law Journal*, 62 (1953), p. 1248.

Jurisdiction—Territorial—Action Involving Immovable Property Situated in Foreign Territory at Time of Bringing of Action—Subsequent Cession of Territory—Indo-French Treaty of 1951 relating to Chandernagore.

DEBENDRA NATH BHATTACHARCHEE *v.* AMARENDRA NATH BHATTACHARCHEE.

India, High Court of Calcutta. August 25, 1955.

(Das Gupta and Debabrata Mookerjee JJ.)

THE FACTS (as stated in the report).—" The petitioner is one of the defendants in a suit for partition which was instituted on June 1, 1951, by the first opposite party in the Court of the . . . Subordinate Judge . . . at Alipore. . . . The schedule of the properties of which partition was sought included land and buildings in the town of Chandernagore which was not, on June 1, 1951, comprised within the territory of India. The defendant pleaded, *inter alia*, that the

Court had no jurisdiction to try the suit as some of the properties were in Chandernagore. An issue was framed on this question and taken up for decision first. The . . . Subordinate Judge held that as the Code of Civil Procedure became applicable to Chandernagore from May 2, 1951, his Court had jurisdiction to try the suit. It is contended before [the High Court] that this decision was wrong inasmuch as, on the date the suit was filed, Chandernagore was foreign territory."

Held: that the petition must be discharged. The recognized rule of international law, which the courts in India, in common with other countries, observe, was that they did not exercise jurisdiction in suits directly involving the question of a right to immovable property situated in a foreign country.

The Court said: " The question remains whether the Court had jurisdiction to try the suit as regards the properties in Chandernagore. That Chandernagore was in law foreign territory on that date is not disputed. This appears to be clear on a consideration of the circumstances in which Chandernagore became Indian territory. From the Notification that was published in an extraordinary issue of the *Gazette of India* on August 19, 1952, we find that a Treaty was signed at Paris on February 2, 1951, by the representatives of the President of India and the President of the French Republic which in its first Article provides: ' France transfers to India, in full sovereignty, the territory of the Free Town of Chandernagore.' Article XII of the Treaty provides that this Treaty shall come into force on ratification by the Governments concerned, the instruments of ratification being exchanged in Paris. We also find from this Notification in the *Gazette of India* that the President of India ratified the Treaty on May 30, 1952.

" From a Notification in the extraordinary issue of the *Chandernagore Gazette* published on July 16, 1952, we further find that the instruments of ratification of the Treaty of Cession of Chandernagore were exchanged in Paris on Monday, June 9, 1952. In law, therefore, Chandernagore was foreign territory as far as India was concerned up to June 8, 1952. The recognized rule of international law which the courts in India, in common with other countries, observe is that they do not exercise jurisdiction in suits directly involving the question of a right to immovable property situated in foreign countries. Consequently, the Subordinate Judge's Court could not exercise jurisdiction in the partition suit, as regards the Chandernagore properties, on the date the suit was instituted—unless there are any special circumstances which make the rule of international law mentioned above inapplicable.

" The contention on behalf of the plaintiff—which appears to have found favour with the learned Subordinate Judge—is that as the Chandernagore (Application of Laws) Order, 1950, which was promulgated by the Government of India on May 1, 1950, made the Code of Civil Procedure applicable to the Chandernagore Courts from May 2, 1950, the Courts in Chandernagore were ' Civil Courts ' within the meaning of s. 17 of the Code of Civil Procedure; therefore the Court of the . . . Subordinate Judge . . . could try a suit for partition of properties part of which was situate within his territory or jurisdiction and part within the jurisdiction of Chandernagore. The real question, however, is whether the provisions of s. 17 of the Code in the circumstances of this case entitle this Court to ignore the rule of international law mentioned above.

" In *Ramabhadra Raju* v. *Maharaja of Jeypore* (A.I.R. 1919 P.C. 150), the Privy Council observed that, as regards the interpretation of [the word] ' Courts ' in s. 17 of the Code of Civil Procedure, ' Their Lordships think that " Courts " here must be held as meaning Courts to which the Code applies . . . ' In A.I.R. 1930 P.C. 188, the Privy Council again considered this question and took the same view but gave some detailed reasons in these words:

> ' The question remains whether the words " situate within the jurisdiction of different Courts " does not limit the operation of the Section to suits to obtain relief respecting immovable property situate within the jurisdiction of different Courts within British India '.

The Privy Council gave a positive answer to this question.

" After the amendment of the Code of Civil Procedure by the Civil Procedure Code (Amendment) Act, 1951, sub-s. 3 of s. 1 now reads thus: ' It extends to the whole of India . . . ' [There are a few exceptions such as the State of Jammu and Kashmir, etc.]. The necessary consequences of this provision as regards the application of the Code on the reasoning which was accepted by the Privy Council in *Ramabhadra's Case* and in *Nilkanth's Case* is that [the expression] ' within the jurisdiction of different Courts ' must mean ' within the jurisdiction of different Courts in India except the areas mentioned '. It is, therefore, proper in my judgement to hold that the land within the jurisdiction of the Court in Chandernagore would not be ' within the jurisdiction of a Court ' within the meaning of s. 17.

" The fact that the Chandernagore (Application of Laws) Order, 1950, made the Code of Civil Procedure applicable to Chandernagore, did not, in my opinion, change this position. In spite of this Order, Chandernagore continued to be foreign territory, and, in my opinion, it would be arbitrary to hold that the Chandernagore (Application of Laws) Order made by the Government of India in exercise of its powers under the Foreign Jurisdiction Act could have the effect of making the ordinary rule of international law—that the courts of a country will not try suits directly involving the question of right in or title to immovable property situated in foreign countries—inapplicable. My conclusion, therefore, is that on June 1, 1951, the Subordinate Judge had no jurisdiction to try the suit as regards the Chandernagore properties."

[Report: A.I.R. 1955 Calcutta 159.]

NOTE.—As to the Indo-French Treaty of Cession of Chandernagore of February 2, 1951, see also *Union of India* v. *M. Jain* (A.I.R. 1954 Calcutta 615; *International Law Reports*, 1954, p. 256). In this as well as in the present case the Court took the view that Chandernagore remained foreign territory until the date of exchange of instruments of ratification of the Treaty, *i.e.*, June 9, 1951.

Jurisdiction—Territorial Limits of—Amenability of Permanent Residents of Foreign States to Jurisdiction of Local Courts—The Law of the Philippines.

DAMES AND LOYOLA *v.* HONORABLE CARMELINO G. ALVENDIA (PRESIDING JUDGE OF BRANCH XVI, COURT OF FIRST INSTANCE OF MANILA) AND CASIANIO S. DE PAZ.

Philippines, Court of Appeals. January 15, 1955.

THE FACTS.—The plaintiff, De Paz, brought an action in the Court of First Instance of Manila to recover a deficiency claim from the third-party defendants. The third-party defendants answered, denying certain allegations of the plaintiff and raising a defence of lack of jurisdiction over their persons. An amended answer, containing a certificate signed by the Vice-Consul of the Philippines at Guam and stating that the defendants were permanent residents of the United States, was subsequently filed. The third-party defendants sought a preliminary hearing on the issue of jurisdiction. The plaintiff argued that the third-party defendants, by their answer, had submitted to the jurisdiction of the court. The Court of First Instance denied the motion for a preliminary hearing and ordered trial on the merits. The third-party defendants then brought this action in the Court of Appeals to set aside the order of the Court of First Instance.

Held: that the order setting the case for trial on the merits must be set aside, and a preliminary hearing held on the question of jurisdiction.

The Court said: "It is contended that the petitioners [*i.e.*, the third-party defendants] submitted themselves to the jurisdiction of the court when they voluntarily entered their appearance in the case and, subsequently, filed their answer. But both in the original and in the amended answer the special defense of want of jurisdiction over their persons was alleged and this is permitted by the Rules of Court instead of filing a motion to dismiss. There could not, therefore, have been a waiver on their part to challenge the jurisdiction of the court, their voluntary appearance notwithstanding. With such appearance they undoubtedly intended to raise the matter of want of jurisdiction. In the case of *Idonah Slade Perkins, petitioner* v. *Arsenio P. Dizon, Judge of the Court of First Instance of Manila, Eugene Arthur Perkins and Benguet Consolidated Mining Company, respondents* (G. R. No. No. 46631, November 16, 1939), the Supreme Court said . . . :

" '. . . Although this argument is obviously erroneous, as neither jurisdiction over the subject-matter nor *res-adjudicata* nor *lis pendens* has anything to do with the question of jurisdiction over her person, we believe and so held that the petitioner has not, by such erroneous argument, submitted herself to the jurisdiction of the court. Voluntary appearance cannot be implied from either a mistaken or superfluous reasoning but from the nature of the relief prayed for.' (p. 69, *Lawyers' Journal*, January 31, 1940).

" But granting that by the appearance of the petitioners, the Court acquired jurisdiction over their persons still any judgment which may be rendered in the case cannot be enforced against them for the obvious reason that they are non-residents and the power of our courts cannot reach beyond our territorial limits.

" In this connection, section 17 of Rule 7 of the Rules of Court provides as follows:

> " ' *Extraterritorial service.*—When the defendant does not reside and is not found in the Philippines and the action affects the personal status of the plaintiff or relates to, or the subject of which is, property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent, or in which the relief demanded consists, wholly or in part, in excluding the defendant from any interest therein, or the property of the defendant has been attached within the Philippines, service may, by leave of court, be effected out of the Philippines by personal service as under section 7; or by registered mail; or by publication in such places and for such time as the court may order, in which case a copy of the summons and order of the court shall be sent by ordinary mail to the last known address of the defendant; or to any other known address of the defendant; or in any other manner the court may deem sufficient. Any order granting such leave shall specify a reasonable time, which shall not be less than sixty days after notice, within which the defendant must answer.'

Interpreting similar provisions of the old Civil Procedure the Supreme Court in the case above cited said :

' The reason for the rule that Philippine Courts cannot acquire jurisdiction over the person of a non resident, as laid down by the Supreme Court of the United States in *Pennoyer* v. *Neff*, [*infra*], may be found in a recognized principle of public law to the effect that " no State can exercise direct jurisdiction and authority over persons or property without its territory." Story, *Confl. L.*, Ch. 2; Wheat, *Int. L.*, pt. 2, ch. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit" says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunal." Story, *Confl. L.*, sec. 539. (*Pennoyer* v. *Neff*, 95 U. S. 714; 24 L. ed. 565, 568, 569.)

'When, however, the action relates to property located in the Philippines, the Philippine Courts may validly try the case, upon the principle that a State through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into the non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident have no property in the State, there is nothing upon which the tribunals can adjudicate.' (P. 63, *Lawyers' Journal*.)"

[Report: *Official Gazette*, 51 (1955), p. 3469.]

Jurisdiction—Territorial Limits of—Foreign Confiscatory Legislation—The Law of France.

See p. 13 (*Bauer Marchal et Cie* v. *Pioton and Others*).

Jurisdiction—Territorial Limits of—Expropriation of Company—Effect of Expropriation on Property of Company in Country of Forum—Patents Registered in Country of Forum—Situs of Patents.

See p. 14 (*Expropriation of Eastern Zone Company* (*Germany*) *Case*).

Jurisdiction—Territorial—Regulation of Currency and International Exchange—Limits of—Articles of Agreement of International Monetary Fund.

See p. 734 (*National Bank of Belgium* v. *Bank of the Belgian Congo and National Committee of the Kivu*).

Jurisdiction—Territorial—Regulation of Currency and International Exchange—Limits of—Articles of Agreement of International Monetary Fund.

See p. 732 (*Simonaer* v. *Community of Jette-Saint-Pierre*).

ii.—Criminal and Other Jurisdiction over Foreigners

Jurisdiction—Territorial—Criminal Jurisdiction over Foreigners —Act Committed Abroad—Falsification and Concealment in Connection with Immigration—The Law of the United States of America.

UNITED STATES *v.* BAKER.

United States, District Court, Southern District, New York.

December 22, 1955.

THE FACTS.—The defendant, an alien, was charged with the offence of having, while in Canada, " unlawfully, wilfully and knowingly " falsified and concealed " a material fact in a matter within the jurisdiction of the Immigration and Naturalization Service of the United States Department of Justice " in violation of 18 U.S.C. § 1001. She was also charged on another count with having imported an alien, an infant, for the " immoral purpose " of selling it. On defendant's motion to dismiss,

Held: that the motion to dismiss must be granted as to both counts. A State has no jurisdiction over the acts of aliens committed outside its territory. The importation of a child for the purpose of selling it was not an " immoral purpose " within the meaning of a statute referring to " the purpose of prostitution or any other immoral purpose ".

The Court said: " . . . It does not appear in the indictment, although it is conceded by the U.S. Attorney, that the defendant is an alien. This raises the perplexing issue of whether or not the United States may indict and try an alien for a crime committed abroad. The precise question seems not to have been litigated before but we think the government does not possess such power.

" It is a general rule of criminal law that the crime must be committed within the territorial jurisdiction of the sovereignty seeking to try the offense in order to give that sovereign jurisdiction. *Yenkichi Ito* v. *United States*, 9 Cir., 1933, 64 F.2d 73, 75. Certain exceptions have been made to the general rule. While crimes against private individuals must still take place within the territory of the sovereign before the latter can properly assume jurisdiction, certain crimes directed towards the sovereign itself may be tried within the jurisdiction even though committed without. *United States* v. *Bowman*, 1922, 260 U.S. 94, 43 S.Ct. 39, 67 L.Ed. 149.[1] *Cf. American Banana Co.* v. *United Fruit Co.*, 1909, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826; *Blackmer* v. *United States*, 1932, 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 516;[2] and *Steele* v. *Bulova Watch Co.*,

[[1] *Annual Digest*, 1919–1922, p. 159.]
[[2] *Ibid.*, 1931–1932, p. 177.]

1952, 344 U.S. 280, 73 S.Ct. 252, 97 L.Ed. 252. Jurisdiction in this latter situation is predicated upon the citizenship of the offender rather than the locus of the crime. Thus, an American citizen is subject to the laws of the United States wherever he may be. *United States* v. *Bowman, supra.* But an alien outside the territory of the sovereign is not so accountable. The problem was raised in the *Bowman* case but not decided since the alien defendant had not been apprehended.

" The question . . .

'. . . whether States have a right to jurisdiction over acts of foreigners committed in foreign countries . . . ought to be answered in the negative. For at the time such criminal acts are committed the perpetrators are neither under the territorial nor under the personal supremacy of the States concerned. And a State can only require respect for its laws from such aliens as are permanently or transiently within its territory. No right for a State to extend its jurisdiction over acts of foreigners committed in foreign countries can be said to have grown up according to the Law of Nations, and the right of protection over citizens abroad held by every State would justify it in an intervention in case one of its citizens abroad should be required to stand his trial before the courts of another State for criminal acts which he did not commit during the time he was under the territorial supremacy of such State.' Oppenheim, *International Law*, sec. 147 (3rd ed. 1920).

"The Supreme Court, *per* Mr. Justice Story, seems to have adopted a similar view.

'The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens . . . And however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons upon whom the legislature have authority and jurisdiction.' *The Apollon*, 1824, 9 Wheat. 362, 22 U.S. 362, 6 L.Ed. 111. See also Wheaton, *International Law*, p. 269 (6th ed. 1929).

" In only one instance has an alien been held accountable by the United States for a crime committed abroad. In *United States ex rel. Majka* v. *Palmer*, 7 Cir., 1933, 67 F.2d 146, the alien was ordered deported for having made false statements under oath to an American Consul abroad when applying for a passport. But deporting an alien for perjury is far different from indicting and trying him for a crime committed abroad.

" There is a line of decisions which might, on first reading, be thought to constitute authority for the government's position in this case. In *Commonwealth* v. *Macloon*, 1869, 101 Mass. 1, a British subject was convicted of manslaughter in Massachusetts when the crime occurred on a British vessel on the high seas. But in that case, although the injuries were inflicted outside the jurisdiction, the victim ultimately died within the sovereign's territory. Thus, jurisdiction was based on the fact that since the deceased actually died within the state, the crime occurred there. The court, however, was careful to point out that Massachusetts did not pretend to punish foreigners for crimes committed elsewhere.

" A similar result was achieved by the Supreme Court in *Strassheim* v. *Daily*, 1911, 221 U.S. 280, 31 S.Ct. 558, 55 L.Ed. 735, wherein it was said that

'acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he [the defendant] had been present at the effect, if the state should succeed in getting him within its power.'

221 U.S. at page 285, 31 S.Ct. at page 560. But this type of case is materially different from the one at bar. Here the defendant's crime was complete the moment she made the false statement; no further acts within the United States were necessary to complete the offense.

" Article 3, § 2 of the Constitution and 18 U.S.C. § 3238 do not, by their express terms, give the government authority to try an alien for a crime committed abroad. These provisions, along with the Sixth Amendment refer solely to venue and not to jurisdiction. They give no indication of any intent to enlarge the scope of the United States' judicial authority. This becomes abundantly clear when considered in the light of the United States' refusal to accept jurisdiction over aliens for crimes committed abroad, see Hackworth, *Digest of International Law*, sec. 135 (1941), and its strenuous objection when foreign countries have presumed to assert jurisdiction over American citizens for crimes committed here. Moore, *International Law Digest*, sec. 201 (1906).

" Defendant's motion directed to the first count of the indictment is accordingly granted."

(The Court then dealt with the second count of the indictment.)

[Report: 136 F. Supp. 546.]

NOTE.—The above case is noted in *California Law Review*, 45 (1957), p. 199.

Jurisdiction—Criminal Jurisdiction over Alien in respect of Crime Committed Abroad—Extended Jurisdiction as Emergency Measure to Protect Allied Countries in Time of War—Treasonable Activities of Belgian National in Belgium during War—Whether French Courts Entitled to Exercise Jurisdiction after War—The Law of France.

Re VAN DEN PLAS.

France, Court of Cassation. April 28, 1955.

THE FACTS.—The accused, a Belgian national, was charged with having engaged in treasonable activities against the Belgian State during the Second World War. Two French decrees (enacted, respectively, in 1939 and 1940) provided that the provisions of

French criminal law governing crimes against the external security of the (French) State were to apply to similar crimes against any State allied to France during the Second World War. Article 7 of the French Code of Criminal Procedure provided that any foreign national guilty of a crime against the security of the French State was subject to French law and to the jurisdiction of the French courts. Van den Plas was arrested in France, and the *Chambre des mises en accusation* of the Court of Appeal of Paris, in pursuance of the enactments referred to above, decided that the French court competent to try the accused was the Permanent Military Tribunal of Paris. The latter, however, took the view that as the war had ended it was no longer competent, and it accordingly refused to exercise jurisdiction.

Held: that as the offence was alleged to have been committed during the war, the Permanent Military Tribunal was under a duty to try the accused. The fact that the war had ended before the present proceedings were instituted was immaterial.

The Court said: " A decision of the *Chambre des mises en accusation* of October 28, 1954, ordered Joseph van den Plas, a Belgian national who has taken refuge in France, to be tried by the Permanent Military Tribunal of Paris on a charge that in July and August 1944—in time of war—he was guilty of intelligence with a foreign Power, with the object of furthering the ends of that Power against Belgium, a country allied and friendly to France. These proceedings were instituted in France on June 5, 1953, the charge having been officially laid by the Belgian Government. The proceedings are based, on the one hand, on the provisions of the decrees of September 26, 1939, and May 20, 1940, according to which the provisions governing crimes against the external security of the State are applicable, during the present war, to acts envisaged by these provisions when such acts have been committed to the prejudice of States friendly or allied to France, and on the other hand on Article 7 of the Code of Criminal Procedure according to which any alien who, outside French territory, has committed an offence against the security of the State can be prosecuted in accordance with French law if he has been arrested in France. The Military Tribunal of Paris, by judgment dated January 21, 1955, held that it lacked jurisdiction to deal with this charge, on the ground that ' Article 1 of the decree of September 26, 1939, as extended by the decree of May 20, 1940, is only a Law governing procedure which is designed to simplify prosecutions during the course of hostilities, and that, having regard to the words *during the present war*, this Law cannot be extended so as to apply to prosecutions instituted after the cessation of hostilities, an event which occurred on June 1, 1946.'

" A reasonable reading of the decree of September 26, 1939, as extended by the decree of May 20, 1940, shows that this provision is not a law dealing with procedure designed to simplify prosecutions while hostilities are still in progress. Article 86 (3) of the Criminal Code enables the Government to extend, even in time of peace, the whole or part of the provisions concerning crimes against the external security of the State to acts committed against Powers friendly or allied to France. Its object, therefore, is to punish, in the higher interest of a cause common to several countries, acts which would otherwise remain unpunished, having regard to the fact that extradition is not granted for political offences. Although the aforementioned decrees were limited to the ' duration of the present war ', this only means that acts committed after the end of a state of war, if committed against States friendly or allied to France, cease to be punishable under French law. It does not mean, however, that acts committed before that date, if they had the same object, ceased to be subject to prosecution and punishment. It follows that treason committed in Belgium while hostilities were in progress, to the prejudice of the Belgian State, a Power friendly and allied to France, remains subject to the jurisdiction of the French courts notwithstanding the cessation of hostilities, where, as in the present case, the person concerned, a Belgian subject, has been arrested in France. The proceedings preferred on October 28, 1954, by the *Chambre des mises en accusation* of Paris against [van den Plas] will accordingly be referred to the Permanent Military Tribunal of Paris."

[Reports: *Bulletin de la Cour de Cassation*, 1955, p. 387; *Juris-classeur périodique*, 1956, II, 8748.]

Jurisdiction—Over Aliens—In Respect of Crimes Committed Abroad—Locality of Effect of Crime—The Law of Belgium.

BERTSCHMANN *v.* SOCIÉTÉ ANONYME DES CHARBONNAGES D'ARGENTEAU.

Belgium, Court of Cassation. March 7, 1955.

THE FACTS.—The appellant, an alien, was charged with being an accomplice of one Maere, a Belgian national, who was charged with the commission of acts of forgery and the utterance of forgeries in Namur, Flawinne and Heer-Agimont (Belgium). He contested the jurisdiction of the Belgian courts on the ground that the acts complained of were committed abroad. The Court of Appeal of Liége, by a decision of June 30, 1954, held that the appellant could be prosecuted in Belgium under Article 11 of the Code of Criminal Procedure (Introductory Part), which provides that alien principals or accessories in a crime committed by a Belgian abroad may be prosecuted in Belgium together with the accused Belgian national or after the conviction of the latter.

This was an appeal against that decision. It was contended on behalf of the appellant that Article 11 of the Code of Criminal Procedure did not apply to his case since it referred to a crime committed by a Belgian abroad, whereas in this case the Belgian national was charged with having committed his crime in Belgium.

Held: that the appeal must be dismissed. The appellant could be prosecuted in Belgium in virtue of Article 3 of the Penal Code, which provides for the punishment according to Belgian law of crimes committed by aliens in Belgium, seeing that the main offence was committed in Belgium, and all other acts relating thereto must be considered to have been constructively committed in Belgium also.

The Court said: "Even if the abetting was done abroad—which is not determined by the decision of the lower Court—by the appellant, an alien, his acts must be deemed to have been committed in Belgium where, according to the findings of fact of the Court of first instance, the main offence was committed.

"The rules laid down in Article 11 of the Code of Criminal Procedure (Introductory Part) are not applicable to the case, but the appellant is subject to the jurisdiction of the Belgian courts in virtue of Article 3 of the Penal Code. In these circumstances, even if the contentions of the appellant are well-founded, they do not constitute a valid ground of appeal since the operative part of the decision of the lower Court is in conformity with the law."

[Report: *Pasicrisie Belge*, 1955, I, p. 746.]

NOTE.—With respect to the jurisdiction of Belgian courts over nationals in respect of crimes committed abroad see *In re Coenrads, Labeau and Fontaine*, decided by the Court of Cassation on September 26, 1955 (*Pasicrisie Belge*, 1956, I, p. 47). It was there *held* that Belgian Military Courts were competent to hear charges of forgery arising out of acts committed by the appellants in Germany while they were subject to military law, even though the German authorities did not bring the matter to the attention of the Belgian authorities and no alien injured by these acts had laid any complaint against the appellants.

Jurisdiction—Territorial—Criminal Jurisdiction over Foreigners —Members of Foreign Armed Forces Attacking Territory of State in Time of Peace—Plea of Superior Orders.

In re B.P.Z.S. AND OTHERS.

Netherlands New Guinea, Court of Justice. March 9, 1955.

THE FACTS.—In May 1953 a party of armed soldiers who belonged to the armed forces of the Republic of Indonesia proceeded in a prahu (a small sailing vessel) from an island in the Indonesian Goram group of islands to the coast of Netherlands New Guinea. They landed on that coast and built a strongpoint from which they fired at a Netherlands military patrol. They were apprehended and prosecuted under criminal law. The prosecution contended that it had been the intention of the landing party to bring the territory of New Guinea partly or as a whole under foreign domination and that Article 93 of the Criminal Code of Netherlands New Guinea was applicable. That Article makes punishable any violation of the territorial sovereignty over Netherlands New Guinea with the intent of bringing that territory, partly or as a whole, under foreign domination. The soldiers pleaded that they had acted under orders of their commanding officer, and they therefore invoked Article 51 of the said Criminal Code which provides that no one is punishable for the commission of an act in execution of a superior order issued by the competent authority.

Held: that the plea of superior orders must be dismissed.

The Court said: "Whether the authority issuing the superior order is competent to do so must be judged on the basis of the written or unwritten laws of Netherlands New Guinea or on the basis of rules of international law which are directly binding on all persons subject to the laws of Netherlands New Guinea. None of these rules can be interpreted in the sense of attributing competence to an Indonesian commander to issue orders to any person subject to the laws of Netherlands New Guinea to perform an act which is punishable under the laws of Netherlands New Guinea. It is of no consequence that Article 51 has been enacted with a view to orders issued by the competent authorities of Netherlands New Guinea. The defendants cannot have believed in good faith that an Indonesian commander could be competent to issue orders for an attack with the intent of bringing Netherlands New Guinea under Indonesian domination. Neither could they have believed that such an order could belong to the normal kind of orders that an Indonesian commander is competent to issue. The defendants could reasonably be supposed to have understood that such an order was unlawful."

[Report: *N.J.*, 1955, No. 256.]

NOTE.—*Cf.* with the above reasoning the statement of reasons given by the Netherlands Special Court of Cassation in *In re Rauter* (*Annual Digest*, 1949, Case No. 193, *sub* VII, at p. 543).

Jurisdiction—Territorial — Criminal Jurisdiction over Aliens—Crime Committed by Alien on Ship on High Seas—Jurisdiction of Courts of Flag State.

See p. 295 (*The People* v. *Robert J. Thomas*).

vii.—Continental Shelf

[*See also* PART III, STATE TERRITORY: B, V, Continental Shelf.]

Jurisdiction—Continental Shelf—High Seas Above the Continental Shelf—Protection of Fisheries and National Resources.

See p. 278 (*The Olympic Victor and Other Vessels*).

viii.—Exemptions from and Restrictions upon Territorial Jurisdiction

(a)—FOREIGN STATES

[*See also* PART II, STATES AS INTERNATIONAL PERSONS: A, II, Sovereignty and Independence: iii, Conduct of Foreign Relations. Conclusiveness of Statements of the Executive.]

Jurisdiction—Exemptions from—Foreign States—Counterclaim—Counterclaim Not Amounting to Request for Affirmative Relief—Denial of Immunity with Respect to Such Counterclaim—Whether Counterclaim Based on Subject Matter of Suit by Foreign Sovereign—Immateriality of.

NATIONAL CITY BANK OF NEW YORK *v.* REPUBLIC OF CHINA *ET AL.*

United States, District Court, Southern District, New York. December 22, 1952.

Court of Appeals, Second Circuit. December 8, 1953.

Supreme Court. March 7, 1955.

(Warren C.J.; Black, Reed, Frankfurter, Burton, Clark, Minton, Harlan JJ.)

THE FACTS.—The Shanghai-Nanking Railway Administration, an official agency of the Republic of China, established a $200,000 deposit account in 1948 with the New York head office of the defendant Bank. Subsequently, the Republic of China sought to withdraw the funds, but the defendant refused to pay. The Republic of China brought suit in a Federal District Court. In addition to various defences, the defendant interposed two counterclaims seeking an affirmative judgment for $1,634,432 on defaulted Treasury Notes of the Republic of China owned by the defendant. The plaintiff moved to dismiss the counterclaims on the basis of the sovereign immunity of the Republic of China.

Held (by the District Court): that the motion to dismiss the counterclaim must be granted. A counterclaim could not be asserted against a friendly foreign sovereign unless it was based on the same subject matter as the suit. [Report: 108 F. Supp. 766.]

The defendant appealed. While the appeal was pending, it sought leave to amend the counterclaims by denominating them set-offs and by including additional data, but the District Court denied leave (14 F.R.D. 186 (1953)).[1] On appeal,

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[1] At the outset respondent argues that since petitioner on certiorari has dropped its demand for affirmative relief, the case is not properly before us. It is conceded that dismissal of independent counterclaims would ordinarily contain the requisite finality on which to base our jurisdiction, but respondent contends that when petitioner reduced its counterclaims to mere demands for setoff, the claims became defenses and, as such, nonreviewable until the respondent's suit had been concluded below. We reject this view. A counterclaim does not dwindle to a defense solely because it is confined—as a result of the accepted jurisprudence of sovereign immunity, see *United States* v. *Shaw*, 309 U.S. 495—to reducing the sovereign's recovery. The District Court's judgment, as affirmed by the Court of Appeals, terminated a separable and distinct segment of the litigation.

Held (by the Court of Appeals): that the decision of the District Court must be affirmed. [Report: 208 F.2d, 627.]

The defendant bank petitioned for *certiorari*, and the writ was granted (347 U.S. 951, 98 L.Ed. 1097, 74 Sup. Ct. 676 (1954)).

Held (by the Supreme Court): that the judgment of the Court of Appeals must be reversed and the case sent back to the District Court with directions to reinstate the counterclaims and for further proceedings. A defendant sued by a foreign State could set off claims unrelated to the subject matter of the original action, provided no affirmative relief was sought. Both the United States and the Republic of China could be sued in their own courts by nationals of either State. There was no reason to grant a broader immunity to counterclaims against the Republic of China in the courts of the United States than was accorded to affirmative suits brought against either State in its own courts. The limitation of " based on the subject matter" was too indeterminate and capricious to mark the bounds of limitations on the doctrine of sovereign immunity.

The Court said (*per* Frankfurter J.): " The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court. Accordingly, we start with the fact that the Republic and its governmental agencies enjoy a foreign sovereign's immunities to the same extent as any other country duly recognized by the United States. See *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 137-138.[1]

" The freedom of a foreign sovereign from being haled into court as a defendant has impressive title-deeds. Very early in our history this immunity was recognized, *De Moitez* v. *The South Carolina*, Bee 422, 17 Fed. Cas. 574, No. 9,697 (Admiralty Court of Pa., 1781, Francis Hopkinson, J.), and it has since become part of the fabric of our law. It has become such solely through adjudications of this Court. Unlike the special position accorded our States as party defendants by the Eleventh Amendment, the privileged position of a foreign state is not an explicit command of the Constitution. It rests on considerations of policy given legal sanction by this Court. To be sure, the nonsuability of the United States without its consent is likewise derived from considerations of policy. But these are of a different order from those that give a foreign nation such immunity. It is idle to repeat or rehearse the different considerations set forth in Mr. Chief Justice Marshall's classic opinion in *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116.

" But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict

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[[1] *Annual Digest*, 1938–1940, p. 184.]

with the growing subjection of governmental action to the moral judgment. A reflection of this steady shift in attitude toward the American sovereign's immunity is found in such observations in unanimous opinions of this Court as ' Public opinion as to the peculiar rights and preferences due to the sovereign has changed,' *Davis* v. *Pringle*, 268 U.S. 315, 318; ' There is no doubt an intermittent tendency on the part of governments to be a little less grasping than they have been in the past . . . ,' *White* v. *Mechanics Securities Corp.*, 269 U.S. 283, 301;[1] '. . . the present climate of opinion . . . has brought governmental immunity from suit into disfavor . . . ,' *Keifer & Keifer* v. *Reconstruction Finance Corpn.*, 306 U.S. 381, 391. This chilly feeling against sovereign immunity began to reflect itself in federal legislation in 1797.[2] At that early day Congress decided that when the United States sues an individual, the individual can set off all debts properly due him from the sovereign. And because of the objections to *ad hoc* legislative allowance of private claims, Congress a hundred years ago created the Court of Claims,[3] where the United States, like any other obligor, may affirmatively be held to its undertakings. This amenability to suit has become a commonplace in regard to the various agencies which carry out ' the enlarged scope of government in economic affairs,' *Keifer & Keifer* v. *Reconstruction Finance Corp.*, *supra*, at 390. The substantive sweep of amenability to judicial process has likewise grown apace.[4]

" The outlook and feeling thus reflected are not merely relevant to our problem. They are important. The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in lawmaking by courts. Legislation and adjudication are interacting influences in the development of law. A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process. See James M. Landis, ' Statutes and the Sources of Law ', in *Harvard Legal Essays* (1934), p. 213 *et seq.*; Harlan F. Stone, ' The Common Law in the United States ', 50 *Harv. L. Rev* 4, 13–16.

" More immediately touching the evolution of legal doctrines regarding a foreign sovereign's immunity is the restrictive policy that our State Department has taken toward the claim of such immunity. As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular

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[[1] *Annual Digest*, 1925–1926, p. 180.]

[2] Act of Mar. 3, 1797, §§ 3, 4, 1 Stat. 514–515. The present version appears in 28 U.S.C. § 2406.

[3] Act of Feb. 24, 1855, 10 Stat. 612, as amended, 12 Stat. 765, 14 Stat. 9; see *United States* v. *Jones*, 119 U. S. 477.

[4] The most recent development is the subjection of the Government to tort liability. Act of Aug. 2, 1946, now 28 U. S. C. § 1346 (b).

suit. *Ex parte Republic of Peru*, 318 U.S. 578, 581.[1] Its failure or refusal to suggest such immunity has been accorded significant weight by this Court. See *Compania Espanola de Navigacion Maritima, S.A.* v. *The Navemar*, 303 U.S. 68;[2] *Republic of Mexico* v. *Hoffman*, 324 U.S. 30.[3] And this for the reason that a major consideration for the rule enunciated in *The Schooner Exchange* is the embarrassing consequences which judicial rejection of a claim of sovereign immunity may have on diplomatic relations. Recently the State Department has pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government, 26 Dept. State Bull. 984 (1952), despite the fact that this Court thirty years earlier rejected the weighty opinion of Judge Mack in *The Pesaro*, 277 F. 473[4] (see, also, his opinion in *The Gloria*, 286 F. 188[5]), for differentiating between commercial and war vessels of governments. *Berizzi Bros. Co.* v. *Steamship Pesaro*, 271 U.S. 562.[6]

"And so we come to the immediate situation before us. The short of the matter is that we are not dealing with an attempt to bring a recognized foreign government into one of our courts as a defendant and subject it to the rule of law to which nongovernmental obligors must bow. We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery.[7] It wants our law, like any other litigant, but it wants

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[[1] *Annual Digest*, 1941–1942, p. 199.]

[[2] *Ibid.*, 1938–1940, p. 176.]

[[3] *Ibid.*, 1943–1945, p. 143.]

[[4] *Ibid.*, 1919–1922, p. 139.]

[[5] *Ibid.*, 1923–1924, p. 117.]

[[6] *Ibid.*, 1925–1926, p. 186.]

[7] Those cases that have dealt with the problem include: *Republic of China* v. *American Express Co.*, 195 F. 2d 230 (C. A. 2d Cir.) [*International Law Reports*, 1952, p. 192]; *United States* v. *National City Bank of New York*, 83 F. 2d 236 (C. A. 2d Cir.) [*Annual Digest*, 1935–1937, p. 218]; *In re Patterson-MacDonald Shipbuilding Co.*, 293 F. 192 (C. A. 9th Cir.) [*Annual Digest*, 1923–1924, p. 119]; *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 F. 341 (C. A. 2d Cir.); *Hungarian People's Republic* v. *Cecil Associates, Inc.*, 118 F.Supp. 954 (D. C. S. D. N. Y.) [*International Law Reports*, 1953, p. 176]; *Republic of China* v. *Pang-Tsu Mow*, 105 F. Supp. 411 (D. C. D. C.) [*International Law Reports*, 1952, p. 195]; *United States* v. *National City Bank of New York*, 90 F. Supp. 448 (D. C. S. D. N. Y.) [*International Law Reports*, 1950, p. 65]; *United States* v. *New York Trust Co.*, 75 F. Supp. 583 (D. C. S. D. N. Y.) [*Annual Digest*, 1946, p. 29]; *Kingdom of Norway* v. *Federal Sugar Refining Co.*, 286 F. 188 (D. C. S. D. N. Y., Mack, J.) [*Annual Digest*, 1923–1924, p. 117]; *French Republic* v. *Inland Nav. Co.*, 263 F. 410 (D. C. E. D. Mo.) [*Annual Digest*, 1919–1922, p. 132]; *Union of Soviet Republics* v. *Belaiew*, 42 T. L. R. 21 (K. B. Div.) [*Annual Digest*, 1925-1926, p. 172]; *South African Republic* v. *La Compagnie Franco-Belge*, [1898] 1 Ch. 190; cf. *Guaranty Trust Co.* v. *United States*, 304 U. S. 126 [*Annual Digest*, 1938–1940, p. 184]; *Dexter & Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen*, 43 F. 2d 705 (C. A. 2d Cir.) [*Annual Digest*, 1929–1930, p. 109]; *Strousberg* v. *Republic of Costa Rica*, 44 L. T. R. (N. S.) 199 (C. A.); *Claim of the Russian Volunteer Fleet against the British Admiralty*, *Annual Digest of Public International Law Cases* 1925–1926, p. 210 (British Admiralty Transport Arbitration Board; affirmed by Court of Appeal).

Of the cited American decisions, only two district court cases directly involved the dismissal of counterclaims not based on the subject matter of the sovereign's suit and not seeking affirmative judgment: *Republic of China* v. *Pang-Tsu Mow*, *supra*, and *United States* v. *New York Trust Co.*, *supra*.

our law free from the claims of justice. It becomes vital, therefore, to examine the extent to which the considerations which led this Court to bar a suit against a sovereign in *The Schooner Exchange* are applicable here to foreclose a court from determining, according to prevailing law, whether the Republic of China's claim against the National City Bank would be unjustly enforced by disregarding legitimate claims against the Republic of China. As expounded in *The Schooner Exchange*, the doctrine is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign.[1]

"(a) The Court of Claims is available to foreign nationals (or their governments) on a simple condition: that the foreign national's government can be sued in its courts on claims by our citizens.[2] An American or a Chinese[3] could sue in the Court of Claims for default on a United States bond, 28 U. S. C. § 1491 (4), or could counterclaim—to the extent of the Government's claim—in a suit by the United States in any court, 28 U. S. C. § 2406; see *United States* v. *Wilkins*, 6 Wheat. 135; cf. *United States* v. *Bank of the Metropolis*, 15 Pet. 377; *United States* v. *United States F. & G. Co.*, 309 U. S. 506, 511. Thus it seems only fair to subject a foreign sovereign, coming into our courts by its own choice, to a liability substantially less than our own Government long ago willingly assumed.

"(b) The Republic of China is apparently suable on contract claims in its own courts,[4] and Americans have the same rights as Chinese in those courts.[5] No parochial bias is manifest in our courts which would make it an affront to the 'power and dignity' of the Republic of China for us to subject it to counterclaims in our courts when it entertains affirmative suits in its own. Decisions of the Chinese courts which seem to grant absolute immunity from direct suit to foreign sovereigns[1] are inapposite in this context and in light of our State Department's reluctance to raise the defense of sovereign immunity in foreign courts, see 26 Dept. State Bull. 984, 985 (1952); cf. 41 Stat. 527, 46 U. S. C. § 747.

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[1] 7 Cranch, at 136–137, 143–144. For a comprehensive critique of the doctrine as it has subsequently been applied, see Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," [in] 28 *Brit. Y. B. Int'l L.* 220.

The Privy Council recently rejected the view of Lord Justice Scrutton in *The Jupiter* [1924] P. 236 (C. A.) [*Annual Digest*, 1925–1926, p. 136], that the mere assertion of a claim by a foreign government to property the subject of an action by a private party compels the court to stay the action and decline jurisdiction. *Juan Ysmael & Co.* v. *Republic of Indonesia*, [1954] 3 W. L. R. 531 [*International Law Reports*, 1954, p. 95]. Earl Jowitt reviewed the decisions and indicated some of the subtleties into which the doctrine has led the English courts. Cf. *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 38–42 (concurring opinion) [*Annual Digest*, 1943–1945, p. 143, 147].

[2] 28 U. S. C. § 2502. The earliest version of this statute appears in 15 Stat. 243 (Act of July 27, 1868); see *United States* v. *O'Keefe*, 11 Wall, 178; cf. 43 Stat. 1113, 46 U. S. C. § 785; *Westfal-Larsen & Co.* v. *United States*, 41 F. 2d 550 (D. C. N. D. Calif.) [*Annual Digest*, 1929–1930, p. 112]. That an American citizen can sue the Chinese Government in Chinese courts, see Judicial Yuan Interpretation No. 6 (Feb. 16, 1929).

[3] See Treaty of Nov. 4, 1946, Art. VI, § 4, 63 Stat. 1305.

[4] Judicial Yuan Interpretation No. 373 (Dec. 15, 1930); Supreme Court Uniform Interpretation No. 1933 (Peking, June 22, 1925), 3 China L. Rev., No. 2, p. 84; cf. Judicial Yuan Interpretation No. 6 (Feb. 16, 1929); Constitution of the Republic of China, Art. 24 (1947).

[5] Treaty of Nov. 4, 1946, Art. VI, § 4, 63 Stat. 1305.

"(c) Respondent urges that fiscal management falls within the category of immune operations of a foreign government as defined by the State Department's 1952 pronouncement. This is not to be denied, but it is beside the point. A sovereign has freely come as a suitor into our courts; our State Department neither has been asked nor has it given the slightest intimation that in its judgment allowance of counterclaims in such a situation would embarrass friendly relations with the Republic of China.

"(d) It is recognized that a counterclaim based on the subject matter of a sovereign's suit is allowed to cut into the doctrine of immunity.[2] This is proof positive that the doctrine is not absolute, and that considerations of fair play must be taken into account in its application. But the limitation of 'based on the subject matter' is too indeterminate, indeed too capricious, to mark the bounds of the limitations on the doctrine of sovereign immunity. There is great diversity among courts on what is and what is not a claim 'based on the subject matter of the suit' or 'growing out of the same transaction'. See Clark, *Code Pleading* (2d ed.), 653–660; cf. *United States* v. *National City Bank of New York*, 83 F.2d 236 (C.A. 2d Cir.)[3]. No doubt the present counterclaims cannot fairly be deemed to be related to the Railway Agency's deposit of funds except insofar as the transactions between the Republic of China and the petitioner may be regarded as aspects of a continuous business relationship. The point is that the ultimate thrust of the consideration of fair dealing which allows a setoff or counterclaim based on the same subject matter reaches the present situation. The considerations found controlling in *The Schooner Exchange* are not here present, and no consent to immunity can properly be implied. This conclusion was anticipated by Mr. Justice Washington on circuit four years after he had been of the Court which decided *The Schooner Exchange*."[4]

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[1] See *Rizaeff Frères* v. *The Soviet Mercantile Fleet*, 3 China L. Rev., No. 6, p. 14 (Provisional Court of Shanghai 1927).

[2] *E. g., Hungarian People's Republic* v. *Cecil Associates, Inc.*, 118 F. Supp. 954 (D. C. S. D. N. Y.); *French Republic* v. *Inland Nav. Co.*, 263 F. 410 (D. C. E. D. Mo.); cf. *Republic of China* v. *American Express Co.*, 195 F. 2d 230 (C. A. 2d Cir.).

[[3] *Annual Digest*, 1935–1937, p. 218.]

[4] The case is *King of Spain* v. *Oliver*, 1 Pet. C. C. 276, 14 Fed. Cas. 572, No. 7,813 (C. C. D. Pa.). The King of Spain had sued two Americans for duties he alleged they owed him on shipments of goods they had made to the Spanish American colonies under royal licenses. The defendants replied that they had obtained the licenses from

Reed J., with whom Burton and Clark JJ. joined, dissented on the ground that there was no basis for the Court's restricting the immunity of a foreign sovereign in the absence of legislative or executive action. In his dissenting opinion, he said:

"Some data must be premised if discussion is to be confined to a reasonable space. We start with the postulate that the sovereign is released from the jurisdiction of its own courts except as it may specifically submit itself to their power.[1]

"That does not create a situation of irresponsibility. Satisfaction of sovereign liability may be had through the legislative organ which recognizes a moral obligation to pay the creditors of the government and to compensate those injured by it.

"A sovereign's freedom from judicial control does not arise from or depend upon the will of the courts. As was said in *The Schooner Exchange* in speaking of the immunity of a foreign government, it depends upon 'the will of the sovereign of the territory.' '... all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign ...' 7 Cranch 116, 138, 143. The immunity rests on the ground that no enforceable right exists 'against the authority that makes the law on which the right depends.'[2]

"The reason for the sovereign's consent to the exclusion of foreign sovereignties from the general jurisdiction of its courts was said by Chief Justice Marshall to rest on this proposition:

> 'The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns

and paid the duties to Hope & Co., a Dutch concern which had a commercial concession from the King in return for which it had promised *inter alia*, to pay duties on shipments to the colonies. Hope had also negotiated a loan for the King in what appears to have been a unrelated transaction, and the King had pledged all his public revenues to repay the loan. Instead of handing over the duties received from defendants to the King, Hope applied them to reduce the debt due from the King on the loan.

Mr. Justice Washington directed a verdict for the defendants. First he held that there was no privity of contract between the defendants and the King, so that payment to Hope discharged them. But assuming that there was privity he ruled that the duties had been properly applied by Hope to reduce the King's debt to it. "Let it be, as was argued, that the consent of the Spanish government, under the administration of Joseph [Bonaparte, who had, while in power, agreed that the duties be applied to reduce the debt], was invalid and of no obligation upon Ferdinand; still, Ferdinand, as the *successor of his father* [Charles IV, to whom the loan had been made], and the nation, were and are bound to pay the debt due in Holland; and if it has been in part discharged, out of funds charged with the payment of it [because they were public revenues], in the hands of Hope and Co., the payments of the duties, have in effect been made to the plaintiff, because he owes, of the debt due in Holland, less than what was originally due, by the amount of duties which were applied to its discharge by Hope and Co. After such an application, which I repeat it, Hope and Co. were authorised to make, under all the circumstances of the case, this action cannot be supported, to recover the amount of the duties so appropriated." 1 Pet. C. C., at 289–290, 14 Fed. Cas., at 577.

[1] *United States* v. *Clarke*, 8 Pet. 436, 444; *Kansas* v. *United States*, 204 U. S. 331, 341; *Larson* v. *Domestic & Foreign Com. Corp.*, 337 U. S. 682, 703.

[2] *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353; *United States* v. *Shaw*, 309 U. S. 495, 501. Cf. *Duff Development Co.* v. *Government of Kelantan*, [1924] A. C. 797 [*Annual Digest*, 1923–1924, p. 124].

> have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.
>
> 'This consent may, in some instances, be tested by common usage, and by common opinion growing out of that usage.' 7 Cranch, at 136.

It might be summarized by the word 'comity'.[1] The local sovereign may, of course, withdraw such consent.

> 'Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.' *Id.*, at 146.[2]

"An ancillary principle of law is that, in determining whether a defendant is a sovereign, the courts follow the guidance of the political branch.[3] In this case the sovereignty of the Republic of China is not questioned. Furthermore, the Chinese Government Treasury Note and its 36th Year Short Term Treasury Notes upon which the City Bank's counterclaims rest are sovereign obligations, *jure imperii* in form, of the highest public character. Consequently, the attitude of the Department of State as to the desirability of relaxing the strict rule of immunity as to acts of commerce, *jure gestionis*, is inapplicable. See 26 Dept. State Bull. 984 (1952), referred to in the Court's opinion, p. 361.

"If the foregoing statements of law are sound, the Republic of China as a foreign sovereign is free from direct suits in our courts on the notes here in question unless the Congress of the United States has enacted a statute that restricts its immunity. This it has not done. The question in this case thus comes down to whether the Republic of China, by bringing this suit for the recovery of a bank deposit, waived its immunity and subjected itself to a counterclaim under the Fed. Rules Civ. Proc., Rule 13. Under the words of § (c) of that Rule, judgment over against the Republic of China would seem to be authorized if the counterclaim were for more than plaintiff's claim. But there would be no jurisdiction to render such judgment in an American court. It would violate the immunity of a foreign sovereign to do so.[4] In the present case, the Court evidently feels that, since the counterclaim is limited to the amount of the Republic of China's claim, there is jurisdiction to allow a setoff to that extent. But the mere fact that a judgment over is not sought should not be relied upon to avoid the jurisdictional immunity of a foreign sovereign. I find no justification for the Court's restricting that immunity in the absence of legislative or executive action.[1]

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[1] *Compania Naviera Vascongado* v. *S. S. Cristina*, [1938] A. C. 485, 498 [*Annual Digest*, 1938–1940, p. 250].

[2] See *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U. S. 562, 571 *et seq.* [*Annual Digest*, 1925–1926, p. 186].

[3] *Ex parte Peru*, 318 U. S. 578, 588 [*Annual Digest*, 1941–1942, p. 199]; *Mexico* v. *Hoffman*, 324 U. S. 30, 35 [*Annual Digest*, 1943–1945, p. 173]. Cf. *Duff Development Co.* v. *Government of Kelantan*, *supra*, at 815.

[4] Cf. *United States* v. *Shaw*, 309 U. S. 495, 502. In *South African Republic* v. *La Compagnie Franco-Belge*, [1898] 1 Ch. 190, 198, a foreign sovereign sued to enjoin the use of deposited funds. On a counterclaim not connected with the issue concerning the funds, Mr. Justice North held the foreign government could not be sued, citing *Duke of Brunswick* v. *King of Hanover*, 6 Beav. 68, and *Strousberg* v. *Republic of Costa Rica*, 29 Weekly Reporter 125, 44 L. T. R. (N. S.) 199.

" Affirmative legislative action was necessary to allow such a limited setoff against the United States.[2] Action of a similar nature should be require to authorize this setoff. The comity that gave the foreign sovereign full immunity from process was, as *The Schooner Exchange* pointed out, p. 146, only to be withdrawn 'in a manner not to be misunderstood'. That is by legislation.[3] The judicial creation of such jurisdiction over the property of a friendly nation might well merit the stricture of Chief Justice Marshall:

> 'A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.' 7 Cranch, at 137.

" International relations are pre-eminently a matter of public policy. Judicial views of supposed public interests are not the touchstone whereby to determine the law.[4] The change from a generous to a parsimonious application of the principle of sovereign immunity should come from Congress or the Executive. Our courts possess great powers and have solemn obligations. Our country allots power to the judiciary in the confidence that, in view of the separation of powers, judicial authority will not undertake determinations which are the primary concern of other branches of our Government. Differences of view exist as to the desirable scope of sovereign immunity and the necessity for nonjudical determinations.[1] But surely it is better that the decisions be left to those organs of Government that have the responsibility for determining public policy in carrying out foreign affairs. The establishment of political or economic policies is not for the courts. Such action would be an abuse of judicial power. It is only by a conscious and determined purpose to keep the functions of the various branches of government separate that the courts can most effectively carry out their duties. I would leave this question of the jurisdictional immunity of foreign sovereigns to the other branches.

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[1] Probably because it is obvious that there is no tenable distinction between the setoff of an unrelated claim, a proceeding for a judgment over on a counterclaim, and a direct suit against a foreign sovereign, few cases have dealt with this phase of the immunity of a foreign sovereign from claims. None that have discussed the issue have reached the result which the Court takes today. In addition to the two cases cited in note 6 [see *supra*, p. 213, n. 7] of the majority opinion, the same issue here presented was considered and decided in accord with my position in the only foreign case discussing the issue that has come to my attention. In *The State of Belgium* v. *E. A. G. de Badts*, Nederlandsche Jurisprudentie, 1923, p. 618, Ann. Dig. of Pub. Int'l Law Cases 1919–1922, p. 129, the Belgian Government, a foreign sovereign, brought suit in the Dutch courts for an account of the sale of a certain cargo of wheat. The defendant sought to set off an entirely unrelated claim which he had against the Belgian Government. The court held:

" That the Court had no jurisdiction to take cognisance of the counter-claim against the Belgian State. A State which is entitled to claim immunity from foreign jurisdiction does not lose this right by the fact that it submits to that jurisdiction in another suit. The correctness of this statement is not impaired by the circumstance that the two actions are, for the sake of convenience, joined in the same proceedings, since the counter-claim does not lose, in consequence thereof, its independent character. This is so particularly in cases in which the plaintiff Government bases its claim on a private law title, but in counter-claim is sued for acts performed in its sovereign capacity."

Nor can the majority derive much support from *King of Spain* v. *Oliver*, 1 Pet. C. C. 276, cited on p. 365, n. 14, of the Court's opinion. The question of sovereign immunity was not considered or even mentioned in that case, since no setoff or counterclaim was asserted against the foreign sovereign. The court simply held that payment, in the manner and under the circumstances there presented, was a good defense to a suit on a debt.

[2] See *United States* v. *Shaw*, 309 U. S. 495, 501.

[3] See Lauterpacht, " The Problem of Jurisdictional Immunities of Foreign States," in " *British Year Book of International Law*, 1951, vol. XXVIII, at pp. 239, 269; *Mexico* v. *Hoffman*, 324 U. S. 30, 38; *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U. S. 562, 573, 576.

[4] *Vidal* v. *Philadelphia*, 2 How. 127, 197–198; *Muschany* v. *United States*, 324 U. S. 49, 66.

" The Court determines, however, that the question of changing the limitation of the immunity of foreign sovereigns pertains to its functions. Even on the assumption that such is a proper matter for judicial concern, I would reach a different conclusion than does the Court. If a direct suit cannot be brought against a foreign sovereign (as is conceded), why should we allow the same claim to be used as an offset to destroy the sovereign's right to recover ? Why should the City Bank be able to assert its notes against the Republic of China, even defensively, when other noteholders not obligated to the sovereign are prevented from collecting their notes ? Here we have an entirely disconnected claim on overdue national notes brought forward as a defense to an action to recover a bank deposit. The Court recognizes that the counterclaim is not related to China's cause of action against the City Bank. It says:

> ' The point is that the ultimate thrust of the consideration of fair dealing which allows a setoff or counterclaim based on the same subject matter reaches the present situation.'

The counterclaim here is of much the same character as a suit against a foreign sovereign. Deposits may be the lifeblood necessary for national existence. It is not wise for us to tell the nations of the world that any assets they may have in the United States, now or in the future, upon which suit must be brought, are subject to every counterclaim their debtors can acquire against them at par or at a discount. It is unfair to our foreign friends and detrimental to our own financial and mercantile interests. For fairness we need not go beyond the allowance of counterclaims arising out of transactions foreign sovereigns seek to enforce in our courts. It seems to me that the Court sanctions a circuitous evasion of the well-established rule prohibiting direct suits against foreign sovereigns.

" I would affirm."

[Reports: 348 U.S. 356, 99 L.Ed. 389, 75 Sup. Ct. 423; rehearing denied, 349 U.S. 913, 99 L.Ed. 1247, 75 Sup. Ct. 598 (1955).]

NOTE.—The above case is noted in *Georgia Bar Journal*, 17 (1954), p. 143; *Georgetown Law Journal*, 44 (1955), p. 151; *Harvard Law Review*, 69 (1955), p. 151; *International and Comparative Law Quarterly*, 2 (1953), p. 480; *Iowa Law Review*, 41 (1956), p. 310; *Law Quarterly Review*, 71 (1955), p. 305; *Minnesota Law Review*, 40 (1956), p. 174;

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[1] Dissents in *Great Northern Ins. Co.* v. *Read*, 322 U. S. 47, 57, and *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 723; concurring opinion in *Mexico* v. *Hoffman*, 324 U. S. 30, 40.

Modern Law Review, 18 (1955), p. 417; *Notre Dame Lawyer*, 31 (1955), p. 73; *St. John's Law Review*, 29 (1955), p. 301; *Sydney Law Review*, 2 (1957), p. 327; and *University of Pennsylvania Law Review*, 103 (1955), p. 980.

Jurisdiction—Exemptions from—Foreign States—Immunity of Funds of Foreign State from Attachment—Immunity from Suit Distinguished—Suggestion of Immunity by Secretary of State—The Law of the United States of America.

NEW YORK AND CUBA MAIL STEAMSHIP CO. *v.* REPUBLIC OF KOREA.

United States, District Court, Southern District, New York.

July 13, 1955.

THE FACTS.—The libel in this suit in admiralty alleged that the libellant's ship, which had unloaded a cargo of rice at Pusan, Korea, had been damaged by the respondent's lighter which had assisted in the unloading operation. The respondent alleged that the cargo had not been acquired by it for sale, resale, barter, or exchange, but for free distribution to the civilian population and military personnel in Korea.

The respondent's funds in New York banks were attached. The Korean Ambassador thereupon made formal representations to the Secretary of State requesting his assistance in establishing the immunity of the Republic of Korea from suit and of its funds from attachment. The United States Attorney for the Southern District of New York, acting under the direction of the Attorney-General, filed a "Suggestion" with the Court, the substance of which is reproduced in the opinion of the Court. The Suggestion stated that the Department of State agreed that the property of the Republic of Korea was not subject to attachment in the United States but had not requested that a Suggestion of immunity from suit be filed. The libellant contended that the Suggestion constituted a rejection of the claim of immunity and that effect should not be given to the statement therein that the property of the Republic of Korea was not subject to attachment. The Republic of Korea maintained that its funds were immune from attachment, that it might not be sued without its consent, and that the activity out of which the cause of action arose was of a public and governmental character. On motion to vacate the attachment,

Held: that the motion must be granted. The Department of State had declared that the property of the Republic of Korea was immune from attachment, and the Court must give conclusive effect to this determination by the political arm of the Government. It would therefore not be necessary to determine whether the Republic of Korea would be immune from suit under the restrictive theory of sovereign immunity adopted by the United States.

The Court said: "Libellant commenced an earlier suit on the same claim and effected personal service of process on respondent's Consul General in New York. A motion to dismiss the prior suit was made based upon the affidavit of the Consul General who, though asserting sovereign immunity on behalf of his government, also stated that in any event he was not authorized to accept service of process on its behalf. The libellant appeared but did not oppose the motion and accordingly the suit was dismissed. It is obvious that this disposition in nowise determined the claim of sovereign immunity and the respondent's contention that the dismissal is *res judicata* is without merit. . . .

" Since the suggestion filed with the Court restates the State Department position in practically the same language as that contained in its letter to the Attorney General, the following quotation therefrom is appropriate for consideration of the issue posed on this application:

" ' The letter from the Secretary of State of the United States to the Attorney General of the United States recognizes that under international law property of a foreign government is immune from attachment and seizure, and that the principle is not affected by a letter dated May 19, 1952, from the Acting Legal Adviser to the Department of State to the Acting Attorney General of the United States, in which the Department of State indicated its intention to be governed by the restrictive theory of sovereign immunity in disposing of requests from foreign governments that immunity from suit be suggested in individual cases. The Department of State accordingly has requested that a copy of the note of the Ambassador of Korea be presented to the Court and that the Court be informed of the Department of State's agreement with the contention of the Ambassador that property of the Republic of Korea is not subject to attachment in the United States.

" ' The Department of State, however, has not requested that an appropriate suggestion of immunity be filed, inasmuch as the particular acts out of which the cause of action arose are not shown to be of purely governmental character.'

" Thus the State Department has taken a direct and unequivocal position with respect to the Republic of Korea's claim that its funds are immune from attachment, but has declined to make the requested suggestion of immunity from suit, asserting that upon the facts as presented it does not appear the claim rests upon acts of a purely governmental character.

" It is therefore not surprising that the parties are in sharp disagreement as to the effect which the Court should give to the suggestion. The libellant insists that the suggestion is an outright rejection of the claim of immunity and that the statement in it that the property of a foreign sovereign is not subject to attachment and seizure is not only gratuitous but an intrusion on the judicial function. The respondent, on the other hand, argues that the funds are immune from attachment generally, and specifically so because they were used and required by it in the United States for public and governmental purposes; further that it may not be sued in our courts without its consent; and finally it urges that even under the new policy of the State Department whereby the rule of absolute sovereign immunity was relaxed in favor of the newer or restrictive theory of sovereign immunity with respect to private acts or commercial transactions,[1] it is still entitled to exemption from suit since the acts on which the libellant founds its claims were public and governmental —that the distribution of rice during the war period to its military and civilian personnel was a governmental function involving the safety and preservation of the nation and the well-being of its people.

" It must be recognized that primarily the claim by a foreign sovereign of immunity from suit or process presents a political rather than a judicial question. This is necessarily so, for dealings between our own and a friendly foreign government are carried on through diplomatic channels by those officials to whom the matters are committed. Lest an untoward incident disturb amicable relations between the two sovereigns, it has long been established that the Court's proper function is to enforce the political decisions of our Department of State on such matters. This course entails no abrogation of judicial power; it is a self-imposed restraint to avoid embarrassment of the executive in the conduct of foreign affairs.[2]

" The suggestion before me states explicitly that the principle of the immunity of a foreign government's property from attachment and seizure is not affected by the State Department's favorable attitude towards the restrictive theory of sovereign immunity, and that the Department is in agreement with the respondent's contention that its property ' is not subject to attachment in the United States.' Thus by its own interpretation of its liberal policy against unrestricted immunity, the Department of State declares in unmistakable language that it adheres to the doctrine that the property of a foreign government is immune from attachment.[3] Indeed the principle is so well established that but for the letter of May 19, 1952 its applicability here could hardly be open to doubt. To borrow a phrase, ' Deposits may be the life-blood necessary for national existence.'[4] Any vestige of doubt is dispelled by the State Department's suggestion filed with the Court ' as a matter of comity between the Government of the United States and the Government of the Republic of Korea.' Under the circumstances, the Court's indicated course is succinctly stated by Mr. Chief Justice Stone: '[C]ourts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations . . . Upon recognition and allowance of the claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libellant to the relief obtainable through diplomatic negotiations. . . . The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations. Upon the submission of this certification to the district court, it became the court's duty, in conformity to established principles, to release the vessel and to proceed no further in the cause.'[1]

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[1] 26 Dept.St.Bull. 984, June 23, 1952.

[2] *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 35, 65 S.Ct. 530, 89 L.Ed. 729; [*Annual Digest*, 1943–1945, p. 173]; *Ex parte Republic of Peru*, 318 U.S. 578, 588, 63 S.Ct. 793, 87 L.Ed. 1014 [*Annual Digest*, 1941–1942, p. 199]; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 62 L.Ed. 726; *Doe ex dem. Clark* v. *Braden*, 16 How. 635, 657, 14 L.Ed. 1090.

[3] *Ex parte Republic of Peru*, [*supra*]; *Berizzi Brothers Company* v. *Steamship Pesaro*, 271 U.S. 562, 46 S.Ct. 611, 70 L.Ed. 1088 [*Annual Digest*, 1925–1926, p. 186].

[4] Dissenting opinion, Mr. Justice Reed, *National City Bank of New York* v. *Republic of China*, 348 U.S. 356, 372, 75 S.Ct. 423, 433 [see *supra*, pp. 216–219].

" Accordingly there is no alternative to the vacatur of the attachment.[2] I find nothing in *Sullivan* v. *State of San Paulo*, 2 Cir., 122 F.2d 355,[3] relied upon by libellant which requires the Court to uphold the attachment in the face of the unambiguous position of the Department of State on the issue of immunity from attachment. On the contrary, it reaffirms the general principles by which the Court has reached its conclusion.

" Since jurisdiction here rests on the seizure under the writ of attachment, the lifting of the attachment makes it unnecessary for the Court to decide the interesting question of whether the Republic of Korea would otherwise be entitled to immunity from suit even under the restrictive theory. Likewise, I do not pass upon the libellant's contention that since the State Department declined to

[1] *Ex parte Republic of Peru*, [*supra*].

[2] It may be urged that the restrictive theory of sovereign immunity is illusory since in many instances jurisdiction can only be acquired by attachment of funds or property on the filing of suit. Indeed, libellant urges there is a manifest contradiction in the State Department's position that the Republic of Korea's funds are immune from attachment although not immune from suit.

The short answer is that even in those instances where jurisdiction is obtained other than by attachment there is no assurance of the collection of any judgment that may be obtained against the foreign state. See Brandon, " Sovereign Immunity of Government-Owned Corporations and Ships," [in] 39 *Cornell L.Q.* 425 (1954); *Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen*, 2 Cir., 43 F.2d 705 [*Annual Digest* 1929–1930, p. 109]. Whether in the light of the relaxation of the absolute theory of sovereign immunity a distinction should now be made between seizure of property necessary to vest jurisdiction and seizure of property under execution to enforce collection of a judgment, where jurisdiction has been previously acquired without attachment or seizure, need not be decided at this time. A distinction might be urged on the ground that in the instance where attachment is necessary to vest jurisdiction, the basic issues are still unresolved, whereas in the instance of jurisdiction already acquired the Court has passed on all issues including whether or not the claim rests upon acts of a private rather than a public character.

[[3] *Annual Digest*, 1941–1942, p. 178.]

suggest immunity from suit following representations made by the Korean Ambassador, the respondent may not now be heard to contest before the Court the Department's ruling on this issue."

[Report: 132 F. Supp. 684.]

NOTE.—The above case is noted in *George Washington Law Review*, 24 (1956), p. 344, and in *Michigan Law Review*, 54 (1956), p. 1008.

Jurisdiction—Exemptions from—Foreign States—Foreign State Sued as Purchaser of Goods—Goods Intended for Use of Armed Forces of Foreign State—Whether Action against Foreign State for Breach of Contract Subject to Jurisdiction of Courts of Forum—Legal Status of Vietnam—The Law of France.

GUGENHEIM *v.* STATE OF VIETNAM.

France, Court of Appeal of Paris. January 7, 1955.

THE FACTS.—In the present action the plaintiff claimed the right to enforce a contract entered into with the Government of the State of Vietnam whereby the latter had agreed to purchase a large quantity of cigarettes. When the contract was made the plaintiff was aware that the cigarettes were intended for the use of the armed forces of the State of Vietnam. The plaintiff contended that the State of Vietnam was not an independent sovereign State entitled to claim immunity from the jurisdiction of the French courts and that, in any event, a foreign State could not claim immunity in cases where it was being sued as a purchaser of goods. The Court of first instance rejected these contentions and refused to exercise jurisdiction against the State of Vietnam. The plaintiff now appealed.

Held: that the appeal must be dismissed. The State of Vietnam was an independent sovereign State. In purchasing cigarettes for the use of its armed forces the State of Vietnam had acted in its sovereign capacity, and the French courts were not entitled to exercise jurisdiction in the matter.

The Court said: " By a Joint Declaration signed on June 5, 1948, France officially recognized the independence of Vietnam, which was subject only to such limitations as were required by Vietnam's membership of the French Union. Letters exchanged on March 8, 1949, between the President of the French Republic, acting also as President of the French Union, and His Majesty Bao Dai, provided expressly that the Government of Vietnam would exercise all the rights and prerogatives implicit in its internal sovereignty, that its courts would exercise unfettered jurisdiction over the whole of its territory, that it would have a national army, and that it was entitled to take an active part in international relations and to become an active Member of the United Nations. These instruments, which defined the relationship between the

Associated State of Vietnam and France, were approved by the Law of February 2, 1950, in conformity with Articles 61 and 75 of the Constitutional Law of October 27, 1946, and published in the *Official Journal* of March 14, 1953. Article 14 of the Civil Code, which gives a French citizen the right to sue in the French courts a foreign national who has entered into a contract with him, is concerned only with private undertakings between citizens of different nationalities and does not derogate from the principle of the mutual independence of States. The plaintiff contends that he is entitled to bring this action against the State of Vietnam in the French courts because the Secretary of State responsible for relations with the Associated States expressed the view, in a letter dated March 16, 1954, that according to the treaties then concluded between France and Vietnam the latter country was not entitled to immunity from jurisdiction. This view is entirely contrary to the official interpretation and application of the above instruments by the French Government. Ordinance No. 5 of the Government of Vietnam, dated October 18, 1949, established a Supreme Court in that country, and the French courts were abolished by various Decrees.

[The Court then described the judicial organization of Vietnam and continued:] " The full independence and sovereignty of Vietnam and the assocation of France and Vietnam within the French Union were confirmed by a Joint Declaration of April 28, 1954, and by two Treaties dated June 4, 1954. These agreements did not in any way limit the scope of the above-mentioned instruments of June 5, 1948, and March 8, 1949. Moreover, Article 4 of the letters exchanged on September 16, 1954, provides that each of the two States shall be entitled, in the courts of the other, to the immunity from jurisdiction traditionally accorded to sovereign States. In these circumstances, the appellant cannot seriously contest the independence and sovereignty of the State of Vietnam, nor the immunity of the latter from the jurisdiction of the French courts which results therefrom.

" Finally, the subject of the contract or projected contract here in issue was the supply of cigarettes for the national army of Vietnam. We are not therefore concerned with a commercial matter, which is completely foreign to the principle of the sovereignty of States. The judgment under appeal was right in holding that this was an act of public authority concerned with the direct requirements of the public services of the contracting State. The appellant who negotiated with a Vietnamese officer after the recognition of the sovereignty of Vietnam must have been aware that such transactions of an independent administration could not be made subject to the control of the French courts, and that the French courts would have no jurisdiction in the matter."

[Report: *Clunet*, 84 (1957), p. 408.]

Jurisdiction—Exemptions from—Foreign States—Loan Issued by Foreign State in Country of Forum—Whether Courts of Forum Competent to Exercise Jurisdiction—The Law of France.

MONTEFIORE *v.* THE BELGIAN CONGO.

France, Tribunal Civil de la Seine. February 16, 1955.

THE FACTS.—The plaintiff was the holder of Government bonds issued in 1901 in France by the then independent State of the Congo. He brought an action against the Belgian Congo for payment of interest on the bonds on the basis of their equivalent value in gold. It was contended on his behalf that by the Treaty of November 28, 1907, between the Kingdom of Belgium and the Congo the country became a Belgian colony, and that accordingly the Kingdom of Belgium was liable on the bonds. The Belgian Minister for the Colonies contended on behalf of the Belgian Congo (nominal defendants herein) that, notwithstanding that the Congo had become a Belgian colony in 1907, the rights and liabilities vested in the Congo on that date had remained distinct from those of the Kingdom of Belgium, and that the Belgian Congo was, in any event, exempt from the jurisdiction of the French courts.

Held: that the action was properly brought against the Belgian Congo, and that the claim of the Belgian Minister for the Colonies to exemption of the Belgian Congo from the jurisdiction must be rejected on the ground that a loan raised by a foreign State in France was not a transaction of a sovereign character and was therefore subject to the jurisdiction of the French courts.

The Court said: " The Belgian Congo raises a plea to the jurisdiction in this case. This plea is based on the immunity from jurisdiction to which foreign States are entitled. This Court must therefore determine whether the Belgian Congo is a foreign State or, as the plaintiff contends, merely a part of the Belgian State which —as it does not enjoy sovereignty—can be sued in France by virtue of Article 14 of the Civil Code. The African Conference of Berlin, on February 23, 1885, recognized the Congo as a sovereign and independent State. At first its Head was King Leopold II of Belgium. The Congo was placed under a régime of personal union with Belgium, but the Treaty of November 28, 1907, between the independent State of the Congo and Belgium made the former a colony under the sovereignty of the Belgian State. While having a legal personality distinct from that of Belgium, the Congo, from the international point of view, forms an integral part of the Belgian State. In accordance with Article 4 of the said Treaty a royal decree of November 8, 1908, laid down the date from which Belgium would exercise her right of sovereignty over the territories constituting the independent State of the Congo. Articles 27 and 28 of the Belgian Law of

October 18, 1908, known as the Law of Government of the Belgian Congo or the Colonial Charter, reserved to the Belgian authorities the conduct of foreign relations with regard to the territories of the Congo, and from then onwards foreign States have dealt with Belgium in all matters concerning the African territories of that country. The Law of Government expresses the desire of the Belgian Parliament not to impose upon Belgium, as a result of the provision made for the Congo, any fresh liability. In fact, it expressly provided for the separation of the assets of Belgium and the colony and vested in the latter the assets and liabilities of the independent State of the Congo. There is no need to consider the question whether the creditors of the colony, in the event of the latter not honouring its obligations, could rely upon the guarantee of the Belgian State, because there is no doubt that the creditors of the independent State must initially make their claim against the Belgian colony of the Congo. The principle of immunity from the jurisdiction is primarily based on the rule that a State cannot be made subject to the jurisdiction of another State in respect of liabilities which it has incurred. This immunity cannot be claimed by a State which has ceased to exist as such. In jurisprudence and doctrine there is evidence of a tendency not only to take into account the person of the defendant, but also the nature of the transaction. From that point of view a loan issued in France by a foreign State does not constitute an act of authority which is free from the control of the French courts, because a State which disputes the existence or extent of the rights of bondholders conducts itself like an ordinary litigant. It follows that the plea to the jurisdiction which has been raised on behalf of the Belgian Congo by the Belgian Minister for the Colonies is ill-founded from every point of view and must accordingly be overruled. The case will be heard on the merits."

[Report: *Gazette du Palais*, May 21–24, 1955.]

Jurisdiction—Exemptions from—Bank Established in Foreign State with Foreign State Capital—Bank Clothed with Separate Legal Personality—Mortgage Bank of Norway—Bond Issue by Bank—Action by Bondholders—Whether Bank Subject to Local Jurisdiction—The Law of France.

PASSELAIGUES *v.* MORTGAGE BANK OF NORWAY.

France, Tribunal Civil de la Seine. June 16, 1955.

THE FACTS.—The plaintiff was the holder of bonds issued by the Mortgage Bank of the Kingdom of Norway in 1902, 1905, 1907 and 1909. The bonds contained a gold clause, and capital and interest were payable, at the choice of bondholders, in various countries, including France. A Norwegian Law of December 15, 1923, suspended the gold clause and provided that the obligations of the Bank could be discharged by payment of the nominal amounts inscribed in the bonds. The plaintiff demanded payment on the basis of the gold clause and brought an action against the Mortgage Bank of Norway for payment of 6,225 gold francs or the equivalent thereof in paper francs at the rate of exchange into gold obtaining on the date of payment. The Mortgage Bank claimed immunity from the jurisdiction of the French courts.

Held: that the legal personality of the defendant Bank was distinct from that of the Norwegian State and that accordingly the Bank was not entitled to claim immunity from the jurisdiction of the French courts, notwithstanding that the capital of the Bank had been supplied by the Norwegian State and that the appointment of directors of the Bank was within the competence of the Norwegian Government.

The Court said: " The Mortgage Bank of the Kingdom of Norway contends that this Court is precluded from exercising jurisdiction, on the ground that the Bank, as an organ of the State entrusted with a public service of the Kingdom of Norway, is entitled to the benefit of immunity from the jurisdiction. The plaintiff contends that the defendant Bank is not entitled to the benefit of immunity from the jurisdiction. The Mortgage Bank of the Kingdom of Norway was established by a Law dated September 18, 1851, as subsequently amended by Laws dated, respectively, June 28, 1887, June 26, 1889, July 6, 1892, July 23, 1894, and December 1901. The purpose of the Bank is to enable owners of real property to borrow on the security of such property. Its capital is earmarked as a guarantee for the liabilities it incurs, and the foundation capital belongs to the State. The latter, however, is not entitled to demand the repayment of the capital until such time as the Bank has ceased to exist and all its liabilities have been met. The Bank pays to the Norwegian State interest at the rate of 4 per cent. per annum on the foundation capital. The Bank is entitled to issue bearer bonds which are stated to be payable in gold, and the interest is fixed by the management of the Bank. The management consists of three members, of whom two are appointed by the *Storthing* (the Norwegian Parliament) and one by His Majesty the King. This third member, however, is not appointed to a regular post. The accounts of the Bank are submitted to the Ministry of Finance and embodied in a report which is presented to the King and Parliament. In accordance with the Law here referred to and in pursuance of authority granted by the Ministry of Finance of the Kingdom of Norway, the Bank in 1902 issued bonds at 3½ per cent. redeemable in 60 years, each having a nominal value of 360 Kroner, 500 Francs or 405 Reichsmark, one Kilogramme of fine gold being rated at 2,460 Kroner or 2,790 Reichsmark. Payment of capital and interest can be had in various places and at various banks in Norway, Sweden, Denmark, Germany and France; in Paris at the Crédit Lyonnais and the Banque de Paris et des Pays-Bas. The French translation of the terms of the constitution of the Bank is set out in the bonds themselves, and the photocopy thereof submitted at the hearing is not in dispute. Similar bond issues were made in 1905, 1907 and 1909.

" The plaintiff is the holder of 3 bonds of the 1902-issue, 2 bonds of the 1905-issue, 2 bonds of the 1907-issue and 3 bonds of the 1909-issue, *viz.*, a total of 10 bonds. The Bank called in all its issues for prior redemption on January 1, 1947. The question before the Court is whether the plaintiff is entitled, as he claims, to demand redemption and payment of interest in gold or its equivalent, as stipulated, or whether the Mortgage Bank of the Kingdom of Norway is entitled to discharge its liability by payment of Norwegian banknotes of nominal amount, as provided in the Norwegian Law of December 15, 1923, relating to debts payable in gold. In the present phase of the proceedings this question need not be determined. All that has to be determined is the question whether this Court is entitled to deal with this matter.

" The privilege of immunity from the jurisdiction whereby a State cannot be made subject to the jurisdiction of the courts of another State is based on a traditional custom of international law. The benefit of this immunity is confined to sovereign States and to those of their organs which do not possess a personality distinct from their own, or which, even though they possess such distinct personality, exercise sovereign functions by delegation. It appears from an examination of the constitution of the Mortgage Bank of Norway, as set out above, that the Bank possesses a personality distinct from that of the sovereign State of the Kingdom of Norway. This personality can be deduced more particularly from the fact that the Bank has to pay annual interest to the Norwegian State on the capital supplied by the latter, and that mutual liabilities have been undertaken with regard to the supply and ultimate repayment of such capital. The holders of bonds issued by the Bank have no rights against the Kingdom of Norway, except for the undertaking of the Bank not to repay to the State of Norway the capital of 17,500,000 Kroner prior to the discharge of all its liabilities to the bondholders. This privilege granted to the bondholders in preference to the Norwegian State does not constitute the bondholders creditors of the State. The wording of the certificates states, in the names of the directors of the Bank and their successors, that the bondholders have an irrevocable claim against all the assets of the Bank. This statement would be meaningless if the personality of the Mortgage Bank were fused with that of the Norwegian State. These findings are in no way invalidated by the method of appointment of the directors of the Bank, nor by the control which is exercised over its activities by various organs of the Kingdom of Norway. The administrative control which is exercised does not cause the entities subject to such control to be deprived of a personality distinct from that of the organs exercising control. Although certain benefits have been conferred on the Mortgage Bank of the Kingdom of Norway in the performance of its duties it does not, for that reason, exercise its sovereignty by way of delegation from the State. According to French conceptions of law, the lending of money on mortgage and the issuing of bonds in order to raise funds for that purpose are not in themselves acts of sovereignty. Nor is it contended that these activities stem from the royal prerogative under Norwegian constitutional law. If the Norwegian State was entitled, in accordance with international custom and in the exercise of its sovereign powers, to make provision for a compulsory rate for notes issued by the Bank of Norway, only the latter Bank would partake of the sovereignty of the Norwegian State in the monetary operations which are contemplated. The Mortgage Bank, the defendant herein, is in the same position, on the international plane, as any Norwegian debtor domiciled in Norway who has incurred liabilities to foreign nationals which are stated to be enforceable in another country. Accordingly, any court which is competent in accordance with general rules of procedure is entitled to determine a lawsuit between bondholders and the Mortgage Bank of the Kingdom of Norway which has issued the bonds. It follows that the defendant's plea to the jurisdiction must be overruled . . ." (The case was adjourned for hearing on the merits at a later date.)

[Report: *Gazette du Palais*, July 23–26, 1955.]

Jurisdiction—Exemptions from—Foreign States—Real Property Owned by Foreign State—Property Not Used as Residence of Envoy or for Diplomatic Business—Whether Property Subject to Local Jurisdiction—Diplomatic Representative of State Incorporated into Another State—Non-Recognition of Incorporation—Government-in-Exile Recognized in Country of Forum—*Locus Standi* of Government-in-Exile in Judicial Proceedings.

REPUBLIC OF LATVIA CASE.

German Federal Republic, Higher Court of Appeal (Kammergericht) of Berlin.

February 25, 1955.

The facts of this case and the judgment of the court of first instance are set out in the *International Law Reports* for 1953, at p. 180. The Higher Court of Appeal of Berlin confirmed the judgment of the Court of first instance and made the following observations on (1) the immunity of foreign States from local jurisdiction, and

(2) the non-recognition of the annexation of a State by another State.

As to (1): " With regard to the exterritoriality of foreign States and their status *vis-à-vis* the courts of the forum, two doctrines are current in international law: the doctrine of absolute immunity and the doctrine of limited immunity. While, according to the former, foreign States are, as a general rule, exempt from the jurisdiction of the local courts, such exemption does not exist, according to the latter, where a foreign State has entered the sphere of private law. The (former) Supreme Court followed the doctrine of absolute immunity (*cf. RGZ*, vol. 62, p. 165, and *ibid.*, vol. 103, p. 274). There is a growing tendency, however, to adopt the doctrine of limited immunity. This has become necessary because States increasingly exercise activities in the realm of private law, and especially in trade. The judgment of the Austrian Supreme Court of May 10, 1950,[1] has broken new ground in securing the acceptance of the doctrine of limited immunity. This judgment considers in great detail the application of the latter doctrine in the practice of different courts and concludes that it has been adopted not only by Austrian courts but also by the courts of Italy, Switzerland, Belgium, Greece, Roumania, Brazil, and partly also by the courts of France. Furthermore, the judgment states that the decisions of the former Mixed Tribunals of Alexandria and Cairo were similarly based on this doctrine. Finally, the Austrian Supreme Court, after close and detailed investigation, arrived at the following conclusion:

> ' 1. By international law foreign States are exempt from the jurisdiction of the (Austrian) courts only in so far as concerns acts undertaken by them in the exercise of their sovereign powers.
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> ' 2. Similarly, by municipal law, foreign States are subject to the jurisdiction of the (Austrian) courts in relation to all contentious matters arising out of legal relations pertaining to the realm of private law.'[2]

" There is also nowadays a tendency, on the part of German courts, to adopt the doctrine of restricted immunity. Thus, the District Court of Kiel, in a judgment of March 19, 1953,[3] and the Court of Appeal of Hamm[4] have both adopted this doctrine. We are therefore entitled to follow the Austrian Supreme Court when, in its judgment of May 10, 1950, it concludes that the classical doctrine of immunity has now lost its meaning and can no longer be regarded as valid in international law. The rule that foreign States acting in a private capacity are subject to the local jurisdiction is confirmed in section 20 of the Law relating to the Constitution of the Courts and in section 24 of the Code of Civil Procedure.[1] By acquiring immovable property a foreign State enters into the sphere of private law. Premises used for the purpose of diplomatic representation and the private residences of diplomatic representatives are not foreign but German territory. There is only a rule that such premises must not, as a general rule, be entered against the wishes of the persons concerned, in order that their diplomatic activities may not be obstructed. This rule, however, applies only to those parts of the premises which are in fact being used by exterritorial [*sic*] persons. The mere acquisition of a building for the purpose of diplomatic representation does not result in exterritoriality so long as the building has not been put to actual use for that purpose. In the present case the building on the piece of land which is the subject of the dispute was [at one time] used by the Latvian ambassador as a flat, and also for diplomatic purposes. It served this purpose, however, for less than a year. After the occupation of Latvia the building was used by the Soviet Union, and after the outbreak of war between Germany and Russia on June 22, 1941, it was taken over by a German Ministry. The building is now no longer habitable and is virtually a ruin. It cannot be assumed, therefore, that within the foreseeable future it will again be used by the defendant [Latvia] for diplomatic purposes. For this reason it would not be correct to say that the lack of user for diplomatic purposes is of a temporary nature only. We accordingly agree with the District Court that the land is subject to the jurisdiction because at present it is not being used—nor will it be so used in the foreseeable future—for diplomatic purposes."

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[1] [In *Hoffmann* v. *Dralle, sub nom. Dralle* v. *Republic of Czechoslavakia*: *International Law Reports*, 1950, p. 155.]

[2] [*Loc. cit.*, at p. 166.]

[3] [Cf. *International Law Reports*, 1953, p. 178 (*sub nom. In re Danish State Railways in Germany*).]

[4] [Decision of April 14, 1951: see *International Law Reports*, 1951, p. 221 (*sub nom. Restitution of Property* (*Republic of Italy*) *Case*).]

As to (2): "The registered owner of the land is the Republic of Latvia, and in that capacity the Republic of Latvia is liable to make restitution to the plaintiff. The question arises, however, whether the defendant State, after the incorporation of the Republic of Latvia into the Soviet Union, can still be made liable. One of the essential requirements of a State is that the Government representing it shall exercise territorial sovereignty. Verdross (*International Law*, 1950, p. 218), however, points out that the personal sovereignty of a State is more fundamental because it continues to exist even when territorial sovereignty has been temporarily lost. This, according to Verdross, becomes evident when one considers the complete occupation of a country by an enemy Power, and where part of the Government has fled abroad and an exiled Government is able, with the consent of the host State, to exercise personal sovereignty over

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[[1] These two sections provide that, notwithstanding the exemption of duly accredited foreign diplomatic representatives from local jurisdiction, the German courts have exclusive jurisdiction over all proceedings concerning immovable property situate in Germany.]

its nationals from foreign territory, notwithstanding that it is no longer able to exercise territorial sovereignty. Personal sovereignty can thus exist independently of territorial sovereignty, and it follows that a country may be represented by a Government-in-exile. According to Verdross, however, it is an essential condition of such representation that the host country shall have given its consent to the continued exercise of such personal sovereignty. It may be said, therefore, that a Government-in-exile represents an occupied or annexed country where the requisite consent has been given, *viz.* where it is recognized as a Government-in-exile. The incorporation of Latvia has not been recognized in international law, and the Republic of Latvia is regarded as continuing to exist. The land which is the subject of the dispute is situate in the American sector of Berlin. In that sector the United States of America exercises supreme authority, by virtue of being the Occupying Power. The decisive consideration, therefore, is whether the Republic of Latvia and its representation by the Government-in-exile, which has its seat in London, are recognized by the United States. This question, from information obtained, must be answered in the affirmative. We accordingly agree with the lower Court that the Republic of Latvia, as represented by the Government-in-exile in London, has the requisite *locus standi* and is the defendant liable in these proceedings."

[Reports: *Jahrbuch für Internationales Recht,* 7 (1958), p. 397; RzW 1955, p. 211.]

Jurisdiction—Exemptions from—Foreign States—Foreign State-Owned Floating Crane—Waiver of Immunity—Crane Subject to Customs Examination by Virtue of Authority Granted by Foreign State—Dutiable Goods on Crane—Whether Person Importing Goods Liable to Prosecution.

IMPORT OF AMERICAN CIGARETTES (GERMANY) CASE.

German Federal Republic, District Court of Bremen. June 15, 1955.

THE FACTS.—The accused was employed as a helmsman on a floating crane owned by the United States army of occupation. The crane, which was based on the port of Bremerhaven, usually performed its work in an area beyond the German customs barrier and then returned to its anchorage in the port. While in the area beyond the customs barrier, the accused obtained a carton of American cigarettes from a person on an American vessel. He hid the cigarettes in a cupboard on the crane and then brought the crane back to port. There the crane was boarded by German customs officers, whose question as to whether he had dutiable cigarettes on board the accused answered in the negative. Notwithstanding the accused's denial, the cigarettes were found and the accused was convicted of defrauding the German customs. On appeal, it was contended on his behalf that the foreign State-owned ship on which he was serving was not subject to the local jurisdiction and that the purported exercise of authority by German customs officers was therefore contrary to international law. On behalf of the prosecution it was contended that the United States army of occupation, by issuing an order that the crane was to be subject to examination by German customs officers on passing the German customs barrier, had waived the crane's immunity, and that the accused had accordingly been properly convicted.

Held: that the order issued by the United States authorities constituted a waiver of immunity. The German customs officers had therefore acted in accordance with international law when boarding the crane, and the conviction must stand.

The Court said: " In determining the question whether the cigarettes when passing the customs barrier on board the floating crane became subject to import duty, thereby imposing a duty on the accused to declare them, it is immaterial whether auxiliary State vessels—such as the floating crane owned by the United States army of occupation—are, in principle, to be treated like warships provided that they are exclusively destined for sovereign purposes, and are therefore entitled to exterritoriality, *viz.*, are exempt from the jurisdiction of the riparian State and therefore not subject to customs examination. Even if this were to be the case, this rule of international law would not in the present case preclude the application of the German customs laws. It is a recognized rule of international law that the privilege of exterritoriality can be waived. This was done in the present case because, as the lower Court has found, there was an order of the American port authorities that the floating crane, prior to passing the customs barrier, was to be examined by the German customs authorities. In making this order the competent authority of the American Occupant subjected the floating crane to German customs examination and thereby waived the privilege of exterritoriality. Accordingly, the lower Court was right in holding that the accused was under a duty to declare the cigarettes. In this context it is immaterial that at the time when the offence was committed the crane was in a berth in the port which the Occupant had taken possession of and which could only be entered by permission of the Occupant. If, as the Court finds, the customs officers were entitled to board the floating crane, they were not precluded from exercising their authority on it."

[Report: NJW, 8 (1955), p. 1450.]

Jurisdiction — Exemptions from—Foreign States — Commercial Delegations of—Russian Trade Delegation—Waiver of Privilege—Necessity for Express Waiver — Trading Activity as Waiver—Distinction between Public Law and Private Law Activities—Treaties —Interpretation of—Principles and Rules of—Interpretation by Reference to Subsequent Treaty of Similar Kind—Effect of Outbreak of War on Functions of Commercial Delegation.

BORGA *v.* RUSSIAN TRADE DELEGATION.

Italy, Court of Cassation (United Chambers). August 14, 1953.

THE FACTS.—Article 3 of the Treaty of Commerce and Navigation concluded between Italy and the Union of Soviet Socialist Republics on February 7, 1924, provides, *ad fin.*, that goods imported for commercial purposes from Russia into Italy " shall not be subject to judicial measures in the nature of an arrest ".[1] Article 4 of the Annex to the Treaty of Commerce of December 11, 1948, between the two States was to the same effect, and provided further that commercial contracts entered into or guaranteed on Italian territory by the Russian Trade Delegation were subject, in the absence of an arbitration clause, to the jurisdiction of the Italian courts.

In the present case, the facts of which do not appear from the report, the Russian Trade Delegation appealed from the judgment of an inferior court that, in respect of its commercial activities, it was subject to the jurisdiction of the Italian courts.

Held: that the appeal must be rejected. A foreign State, and therefore an organ of a foreign State such as a trade delegation, does not enjoy any exemption from local jurisdiction for its commercial activities.

The Court said: " In the first place, it must be observed that it is not true to say, as was held by the Court below, that there could have been on the part of the Russian Trade Delegation a tacit renunciation of its right to be exempted from Italian jurisdiction; we know that the jurisdictional immunity of the foreign State derives from its sovereignty, and therefore any renunciation of such immunity can only be in a form which is recognized in the State of the *forum* under its own internal legal system, [so far as Italy is concerned], that is to say, tacit renunciation is not such a form.

" In the second place, it is contended that, in the present case, the derogation from the principle of the jurisdictional immunity of the foreign State depends on the fact that the dispute on which the Court has been required to adjudicate arose in connection with the commercial activity in Italy of the Russian Trade Delegation; but, so far as Russia is concerned—according to the appellant—one cannot make any distinction between private law and public law activities, since, owing to the peculiar social organization of Russia, the exercise of foreign commerce is closely linked with that of sovereignty; therefore the commercial acts of the Delegation cannot be regarded as acts performed *jure privatorum*.

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[1] For the text of Article 3 see *Annual Digest*, 1948, p. 142.

" In the third place, it must be remarked that in order to show that. the Delegation has no immunity from jurisdiction, it is not sufficient to refer, as the Court below has done, to Article 3 of the Treaty of Commerce between Italy and the U.S.S.R. of 1928, which provides that goods coming into Italy from the U.S.S.R. for commercial purposes cannot be seized; this provision, far from giving the Italian Court jurisdiction in all matters other than those connected with seizure, was clearly inserted in the Treaty for the sole purpose of dealing with one point on which disputes might arise. On the other hand, it would be implicit that Italian nationals who had claims against the Delegation arising out of commercial transactions with it, would have to seek a remedy in the Soviet, and not the Italian, courts.

" Lastly, it must be added that it is irrelevant to the new Treaty of Commerce of December 11, 1948, concluded between Italy and the U.S.S.R. Nor is it correct to assert either that the present Delegation must be regarded as an organ different from the Delegation established by the 1924 Treaty, which came to an end at the outbreak of war, or that the jurisdiction of the Italian courts [over the Delegation]—which has been granted to a limited extent by the new Treaty—can be exercised only in respect of new contracts concluded in pursuance of the 1948 Treaty, and not in respect of those made by the pre-war Delegation.

" The contentions of the appellant must, however, all be rejected.

" The question whether the U.S.S.R. can be subjected, through its Trade Delegation in Italy, to the jurisdiction of the Italian courts for disputes connected with contracts entered into by the Delegation, has already been decided in the affirmative by this Court, and the present case could be decided by simply referring to existing precedents. But the ample exposition which Counsel for the Delegation has given to the case, both in the written and in the oral defence, makes a further examination of the problem advisable. It cannot, however, lead to a solution different from that already given by this Court.

" The arguments in favour of the immunity of a foreign State from the jurisdiction [of the Italian courts] are well known. It has been said that such an immunity is the result of long-established custom formed in the reciprocal relations of States, who have constantly behaved in such a way as to show that they are conscious that they are complying with an international legal obligation in exempting other States from their jurisdiction. It has also been said that this exemption would be justified by the fundamental principles of equality and independence of States.

" As far as international custom is concerned, this Court observed in its decision of September 21, 1948,[1] that the existence of such a custom is to be doubted because the international acts from which it is said to derive are few and not recent. In more recent times we find declarations of several States which are clearly contrary to it and to the international obligation which would derive from it if it existed. Such obligations can only have their basis in generally accepted legal doctrine.

" Secondly, as far as the principle of equality and independence of States is concerned, that principle would not be violated by submitting a foreign State to the jurisdiction of our courts so long as we make the distinction between those activities of the foreign State which involve the exercise of public power, on the one hand, and mere private law activities, on the other.

" As regards acts of public power, it is right that a foreign State, for all controversies which derive from them, should be exempt from our jurisdiction in regard to disputes which arise out of such acts; the exercise of jurisdiction in those cases would interfere with public law relations and constitute a limitation of the sovereignty on which they are based. This Court applied that principle when it held that the Italian courts were incompetent to determine disputes between the Russian Trade Delegation and members of its staff, even if the contract of employment was made in Italy and with Italian nationals.

" On the other hand, the position of foreign States with respect to private law activities is quite different. When a foreign State, in order to obtain a result of an economic nature, performs in the territory of another State an activity which any citizen of the latter State could perform, it becomes for this reason alone a *subditus temporarius*. Of its own free will it becomes subject, like a private person, to all those rules of the legal system [of that other State] which regulate and guarantee, through *ad hoc* judicial bodies, legal activities connected with economic interests.

" As a result, a foreign State which acts like a private person is in effect deprived of any attribute of supremacy or of public power; it acts in the same way as the Italian State would act if it found it necessary to establish contractual relations with private individuals for economic purposes. Seeing that there can be no doubt that in such a case, should any dispute arise between the parties, the Italian State could be brought before our courts, there would be no reason whatsoever for not applying the same principle in regard to a foreign State.

" It has been rightly observed that the theory which would deny the possibility of submitting a foreign State to our jurisdiction in the field of private law activities is still influenced by the old conception

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[[1] (No. 1631) *Massimario Giurisprudenza Italiana*, 1948, col. 393; *Foro Italiana*, 72 (1949), I, p. 460; *Annual Digest*, 1948, Case No. 41 (*sub nom. Government of Bolivia* v. *Italian Association for Aeronautical Exports*).]

of the absolute State. According to that conception, it was not regarded as consonant with the dignity of a State that it should be sued in its own courts even in matters connected with its private law activities. Therefore, as such a submission was not to be tolerated at home, it was all the more strongly denied in regard to a foreign jurisdiction.

" Today, however, the theory is generally accepted that the State has a private law capacity, and not only is it bound by the rules which it itself makes to regulate the legal activity of private individuals, but it can also be summoned before its own courts, within the limits provided by law, to answer for the breach of its obligations. It follows that, since the Italian State could be sued before the Italian courts, it would be no derogation from the independence and sovereignty of a foreign State if it were sued in respect of its private law activities before an Italian court. On the basis of these principles, it is easy to see how irrelevant are the arguments put forward by the appellant in order to defend the principle that the Italian courts would have no competence in the case under discussion.

" It is superfluous to ask whether the Russian Trade Delegation has or has not renounced jurisdictional immunity; when a foreign State carries out, in the territory of another State, an economic activity which could be performed by a private person, it thereby divests itself of its public law personality and it cannot claim immunity from the jurisdiction of that other State. No express waiver of immunity is necessary.

" It cannot be seriously contended—as does the appellant—that in the particular case of the Russian Delegation the commercial activities performed by it constitute an exercise of sovereignty because for Russia, in view of its social organization, the exercise of commerce is to be regarded as a sovereign function. In the first place, we could point out that when a State, because of the collectivist nature of the organization of its economy, undertakes the exercise of activities aiming at producing or exchanging goods, such an undertaking does widen the limits of the competence of the State, but it does not necessarily imply exercise of sovereignty—at least, not if the idea of sovereignty is to retain its traditional meaning as the supreme function, in the political sense, of the State power as an *imperium*.

" Apart from this, the legal character of the activity performed by the foreign State from the point of view of whether or not it constitutes a submission to the jurisdiction of the State in which the activity is carried out, cannot be decided according to the nature of the internal organization of the foreign State, but only according to the general principles of law which would regulate that activity if it were performed by the ' home ' State. On the basis of these legal principles there is no doubt, for the above-mentioned reasons, that the commercial activity performed in Italy by Russia, through the *ad hoc* Delegation, must be classified as the economic activity of a State-owned enterprise. Therefore, a dispute arising out of the contractual relations of the Delegation with third persons cannot, as with analogous activities of Italian State-owned enterprises, be regarded as exempt from the jurisdiction of the Italian courts.

" It is now clear that there is no need, in order to affirm the jurisdiction of the Italian courts over such disputes, to refer to Article 3 of the old Treaty of Commerce between Italy and the U.S.S.R. and Article 4 of the Annex to the new Treaty of Commerce concluded between the same Parties in 1948. In any event, and contrary to the contentions of the appellants, the provisions of those Treaties concur in reaffirming the principle of the existence of Italian jurisdiction [over such disputes].

" The penultimate Article of the old Treaty of Commerce provided, in effect, that goods imported into Italy from the U.S.S.R. for the exercise of its commercial activity could not be subject to judicial measures in the nature of arrest. It is obvious from this provision that if the contracting States excluded Italian jurisdiction where conservatory measures were concerned, they thereby admitted that such jurisdiction might be exercised to adjudicate on disputes connected with the commercial activity performed in Italy by the Russian Trade Delegation.

" Article 4 of the Annex to the new Treaty of Commerce, after a clause similar to that in the old Treaty, expressly provides that disputes concerning commercial contracts entered into or guaranteed on Italian territory by the Commercial Delegation are, in the absence of an arbitration clause, subject to the jurisdiction of the Italian courts. It is true that the new clause refers to new contracts entered into by the Delegation, but it cannot be denied that it gives a criterion of interpretation also for contracts entered into under the old Treaty. It shows, through a direct and formal manifestation of will of the U.S.S.R., that the U.S.S.R. does not consider (as is contended in the present case) that it is impossible for itself to be subject to Italian jurisdiction for the commercial activity carried out in Italy by its Trade Delegation.

" Finally, there is no need to spend more time than necessary on the distinction put forward by the appellant—always for the purpose of denying Italian jurisdiction in the present case—between the Trade Delegation established by the U.S.S.R. under the old Treaty and that governed by the new Treaty.

" This Court has already decided that the Russian Trade Delegation is an organ of the Soviet State; therefore, in order to establish the conditions and the limits of its existence in Italy, it is not its own declarations but the declarations of the State which it represents in its particular commercial activity, that are relevant. Therefore, as there has never been a declaration on the part of the Soviet State bringing its Delegation to an end, and as, on the contrary, its existence has been recognized in the Commercial Treaty of 1948, it cannot be denied that the Delegation continued to exist during the period between the conclusion of the two Commercial Treaties.

" Nor can it be said that the existence of the Delegation was terminated *de jure* in 1941 owing to the outbreak of war between Italy and Russia. War, while it suspends international relations between the belligerent States, does not of itself bring about the extinction of the organs through which those relations are carried out, which organs again perform their functions as soon as normal international relations are resumed between those States . . .

" It is the internal legal system of the State which actually determines the legal effects that the outbreak or the termination of war produces with regard to relationships of substantive or of procedural law which were established on its territory before such events."

[Report: *Giurisprudenza Italiana*, 1954, I, 1, p. 440.]

Jurisdiction — Exemptions from — Foreign States — Distinction between Private Law and Public Law Activities — Liability on Trading Contract—Irrelevance of Fact that Contract Signed on Diplomatic Premises.

La Mercantile *v.* Kingdom of Greece.

Italy, Tribunal of Rome. January 30, 1955.

The Facts.—The Kingdom of Greece entered into a contract with the plaintiff firm for the purchase of copper and other metal scrap. The plaintiff sued the Kingdom of Greece in an action arising out of that contract. The defendant raised the plea of sovereign immunity from the jurisdiction of the Italian courts. The defendant also pleaded that as the contract had been executed at the Greek Embassy in Rome and therefore not within Italian territory, the Court had in any event no jurisdiction to hear the case.

Held: that both pleas must be rejected. The Greek State was subject to the jurisdiction of the Italian courts in proceedings arising out of its commercial transactions; and the fact that the contract was concluded at a foreign embassy did not deprive the Court of jurisdiction.

The Court said: " The defendant (the Kingdom of Greece) raises the objection that Italian courts cannot have jurisdiction in this case, for the following reasons: (1) the defendant being a foreign State, it is not subject to Italian jurisdiction; (2) in this case, Article 4 of the Code of Civil Procedure, on the basis of which Italian courts exercise jurisdiction over a foreign defendant, does not apply [because the contract was not concluded in Italy].

" On this point we must observe that the Supreme Court of

Cassation has long affirmed the principle, which has been adhered to by writers on international law of the highest authority, that a foreign State is subject to the jurisdiction of Italian courts, within the limits of the [municipal] rules regarding their competence (see the judgment of the Court of Cassation of September 24, 1948, No. 1631[1]). This principle is not, as the defendant contends, affected by Article 10 of the Constitution of the Republic, which provides for the incorporation of the rules of international customary law into Italian law; that provision presupposes that those rules are generally recognized.

" The principle that foreign States enjoy absolute jurisdictional immunity for all their activities, including acts of a private law nature, is admitted by some legal systems but not by all, and not by Italy. Therefore the rules which derive from that principle cannot be recognized as having that general character which is required by the above-mentioned constitutional principle for the incorporation of international law in our legal system.

" The enquiry which we must carry out in regard to the principle affirmed by the Supreme Court, that a foreign State may be made subject to Italian jurisdiction, is based on two grounds. On the one hand, we must ascertain whether the activity in respect of which the Greek State has been sued in the present case has a private law character. On the other hand, we must see whether in this case there exists one of the criteria which give the Italian court jurisdiction.

" On the first point, it does not seem possible to doubt that the supply of metal scrap by a State to private persons under a contract made with it, constitutes a manifestation of a private activity of that State. The defendant contends otherwise, arguing that the contract for the supply of metal scrap and copper, which form the subject matter of the present proceedings, having been entered into in pursuance of the Greco-Italian Agreement for Economic Collaboration signed on August 31, 1949, which both contracting States had brought into operation by their own laws, does not constitute a form of private activity. Such a contention, however, is clearly unfounded in so far as the Agreement mentioned—although it was intended to regulate all matters connected with reparations due, under Article 74 (b) of the Peace Treaty of 1947 between Italy and the Allied and Associated Powers, from Italy to the Greek State, and therefore contained clauses which are binding on the political activity of the two States—provides for Greece to deal in Italy (within the limits of the Agreement) with private persons, *i.e.*, to enter directly with such persons into contracts for the supply of raw materials necessary for the production of goods to be imported into Greece on the reparations account. It is evident, therefore, that whenever the Greek State, even in pursuance of the above-mentioned Agreement, enters into contractual relations with private citizens and deals with them on a basis of parity, it is performing an activity which, for its object, must be regarded as purely private and as being distinct from those activities which the State performs *jure imperii*. On the second point, we must observe that in the present case the jurisdictional competence of the Italian courts depends on the fact that the subject-matter of this litigation is a contract made by the Greek State in Italy. The contract was entered into in Rome on August 6, 1952, between the plaintiff and the Greek Ambassador to Italy. The circumstance that the contract was concluded in the building of the Greek Embassy does not alter the fact that it was concluded in Italy. The contention of the defendant to the contrary is unfounded; it is based on the theory that the seat of a diplomatic mission enjoys so-called exterritoriality. A series of immunities and limitations of the normal powers of the [receiving] State are a part of the privileges which the foreign diplomat enjoys. However, we cannot believe that these immunities extend to the place in which the diplomatic official performs his mission, so that that place is regarded as being outside the territory of the [receiving] State and that as a consequence the acts performed by him [in an Embassy in Rome] must be deemed to be performed outside the territory of the Republic. This is in keeping with the most modern opinion which, for the very purpose of eliminating any doubt on this point, has rejected the fiction of exterritoriality to which earlier authorities referred in order to explain the basis of the immunities.

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[1] [*Government of Bolivia* v. *Italian Association for Aeronautical Exports*: *Annual Digest*, 1948, Case No. 41.]

"Therefore we must conclude that in the present case Italy has jurisdiction over the Greek State, the defendant in this action."

[Report: *Rivista di Diritto Internazionale*, 1955, p. 377.]

Jurisdiction — Exemptions from — Foreign States — Bankruptcy Proceedings—How Far Local State Bound by Time-Limits Set in the Course of Proceedings.

In re PRODUST, *Ex parte* FEDERAL PEOPLE'S REPUBLIC OF YUGOSLAVIA.

Czechoslovakia, Regional Court in Prague. December 16, 1955.

THE FACTS.—By Order of April 6, 1955, the People's Civil Court (Court of first instance) made an order under secs. 570 ff. of the Code of Civil Procedure for the liquidation of Produst Sales Co-operative of Metalworking Factories, a registered co-operative with limited liability. At the same time the Court, acting under s. 579 of the Code of Civil Procedure, ordered that claims of the creditors be proved within thirty days, *i.e.*, by May 5, 1955.

On June 28, 1955, the Federal People's Republic of Yugoslavia, acting on behalf of the Presidium of the Government of the People's

Republic of Montenegro, a creditor of Produst, lodged proof of its debt with the said Court through the consular section of its Embassy in Prague. In the application it was stated that the delay in lodging it was due to the fact that the applicant had only on April 26, 1955, been informed of the winding-up order, through a diplomatic Note of the Ministry of Foreign Affairs of the Czechoslovak Republic, and that as all documentation was in Belgrade, the exact amount of the debt was not known to the applicant prior to the date of filing of the application.

The Court of first instance rejected the proof as having been lodged out of time. On appeal by the Presidium of the Government of the People's Republic of Montenegro,

Held: that the appeal must be allowed. The Court of first instance was in error in holding that the proof was lodged out of time, and the case must be remitted to the Court of first instance for a new trial.

The Court said: " According to the provisions of s. 611 of the Code of Civil Procedure, the jurisdiction of the Czechoslovak ordinary courts may be exercised in respect of matters that are submitted to the local courts either under international agreements, duly promulgated in the *Gazette of Laws and Decrees*, or under other rules of international law. The said rules, however, provide that a foreign State is not subject to the jurisdiction of the Czechoslovak courts unless it voluntarily waives the privilege of immunity.

" Since the appellant took no steps in proceedings before June 28, 1955, the date on which it lodged its proof of debt in the bankruptcy under consideration, its submission to the jurisdiction of the Czechoslovak courts cannot be implied save as from that date. It would plainly be erroneous to construe the previous attitude of the appellant in relation to the Czechoslovak courts as a failure to act within the legal meaning of that expression and to draw from this attitude the conclusions provided for in s. 576 (a) of the Code of Civil Procedure. Therefore, we are unable to accept the finding of the Court below which saw in the applicant's attitude a failure to act in the sense of s. 576 (c) and, accordingly, rejected the proof.

" In the result, we allow the appeal."

[Report: Unpublished (File No. 22, Co. 729/52–82).[1]]

NOTE.—The above decision is based on the view that foreign States are not subject to the jurisdiction of the Czechoslovak courts unless they voluntarily waive the right of immunity. The Regional Court (Court of Appeal) held that a time-limit fixed by a court prior to the waiver of immunity on behalf of the People's Federal Republic of Yugoslavia and its voluntary submission to the jurisdiction of the Czechoslovak courts could not be binding upon the foreign State. It is clear that the above rule cannot be extended so as to cover all cases of belated proof in bankruptcy by foreign States, no matter when it was lodged. Such belated lodging of proof would be inadmissible where the final adjudication order in bankruptcy had resulted in *res judicata.*

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[1] Communicated by the International Law Section of the Law Institute of the Czechoslovak Academy of Sciences.

Jurisdiction—Exemptions from—Foreign States—Heads of States—Immunity from Suit as Distinguished from Other Legal Proceedings.

MAHARAJ INDRAJITSINGHJI VIJAYSINGHJI *v.* H.H. MAHARAJA RAJENDRASINGHJI VIJAYSINGHJI.

India, High Court of Bombay. March 17, 1955.

(Chagla C.J.; Tendolkar J.)

THE FACTS.—The Maharaja of Rajpipla, Sir Vijaysinghji, who died on April 29, 1951, directed that his property in India should be divided equally among his four sons. On June 10, 1953, the third son of the deceased, Maharaj Indrajitsinghji (plaintiff) filed a petition for letters of administration with the will annexed to the estate of the deceased, H.H. Maharaja Rajendrasinghji Vijaysinghji (defendant) who had succeeded his father as the Maharaja of Rajpipla. The defendant filed a caveat on July 22, 1953, and the probate proceedings were converted into a suit. When the suit came on for hearing, the defendant contended, *inter alia,* that the suit was not maintainable because he was a foreign Ruler within the meaning of s. 86 of the Code of Civil Procedure, 1908, and consent in writing of the Central Government had not been obtained by the plaintiff in respect of the suit. Desai J., who heard the suit, dismissed it on August 24/25, 1954, on the ground that, according to s. 86, foreign Rulers enjoy immunity from suit, the term " suit " comprising not only proceedings which commence with the filing of a plaint but also other proceedings which under particular enactments and circumstances are described and treated as suits, such as divorce or probate proceedings. The Judge reached the conclusion that when a non-contentious probate proceeding on becoming contentious is converted into a suit, it is a suit properly so called and is within the ambit of s. 86 of the Code.

The case came on appeal from the Order of the Judge before the High Court, the appellant maintaining that he could not be sued as he was a foreign Ruler within the meaning of s. 86 of the Code of Civil Procedure and that consent in writing of the Central Government to sue him had not been secured by the plaintiff in the suit.

Held: that the appeal must succeed; the Order of the Court below must be set aside and the action sent back to the learned Judge for disposal according to law. The probate proceedings not being identifiable with the term " suit " in s. 86 of the Code of Civil Procedure, a foreign Ruler in India was not entitled to immunity from jurisdiction unless a suit was started against him by presentation of a plaint. It was only in that case that proceedings taken against him without the consent of the Government of India would be a violation of the right to immunity.

The Court (*per* Chagla C.J.), considering the provisions of s. 86 of the Code of Civil Procedure, said: " [That Section] gave certain immunity to Rulers of foreign States; that immunity was that they could not be sued in any court otherwise competent to try the suit except with the consent of the Central Government certified in writing by the Secretary to that Government. This section applied to Rulers of all foreign States, and before 1947 it also applied naturally to the Rulers of Indian States, which were looked upon as foreign States. After 1947, when the Indian States merged with the Union of India, a special section was enacted to preserve certain rights which Rulers of Indian States had enjoyed, and the Section that was enacted was s. 87B, which was in the following terms:

> 'The provisions of Section 85 and of sub-sections (1) and (3) of section 86 shall apply in relation to the Rulers of any former Indian State as they apply in relation to the Ruler of a Foreign State.'

Therefore, the immunity which a Ruler of a foreign State enjoyed under s. 86 (1) is still enjoyed by the Ruler of a former Indian State, and it is not disputed that the respondent is the Ruler of a former Indian State as defined in s. 87B. What we have to consider, therefore, is; what is the immunity which the Code of Civil Procedure confers upon the Ruler of a Foreign State under s. 86 (1) ?

" It will be best to construe s. 86 (1) in the first instance, apart from authorities. It confers a substantive right upon the Ruler of a foreign State and it also imposes a disability upon a litigant who wants to sue the Ruler of a foreign State. The Legislature has used the expression 'may be sued', and it has further made that expression clear by stating 'in any Court otherwise competent to try the suit'. Therefore, it is clear that, apart from any other considerations, s. 86 (1) strictly construed applies only to a case where a suit is filed in a Civil Court against the Ruler of a foreign State. It is true that the expression 'may be sued' in its plain, ordinary meaning may have a wider connotation. It may mean to claim a civil right in a Court of law by any legal process by which that civil right can be established. But, in our opinion, this expression must be construed in the context of the Code of Civil Procedure. It must be borne in mind that the Legislature has used this expression in a Law which deals with procedure and it has used the expression in a Code where the expression 'suit' is used and understood in a strictly technical sense. As far as the Code of Civil Procedure is concerned, 'a suit' means a legal proceeding instituted by means of the filing of a plaint as specifically provided for by s. 26 which deals with 'institution of suits', and the Code draws a sharp distinction between ‘ suits ’ and ‘ legal proceedings ’. This is clear if one looks at the provisions of s. 141 . . .

“ . . . It is difficult to understand the contention that s. 86 independently of s. 141 applies not only to suits but also to proceedings. In terms it applies only to suits, and there is no reason why an extensive meaning should be given to the expression ‘ suits ’ in s. 86 which is not justified by the scheme of the Code of Civil Procedure. It is pointed out, and rightly, that s. 86 is a statutory recognition of the [rule of] international law that a foreign Ruler should not be subjected to the jurisdiction of a municipal court. It is pointed out that Dicey in his *Conflict of Laws*, 6th ed., at p. 131, broadly lays down the proposition that the Court has no jurisdiction to entertain an action or other proceeding against any foreign Sovereign, . . . and it is pointed out that no distinction is made, with regard to the immunity of the foreign Sovereign, between ‘ action ’ or ‘ other proceeding ’. The rule of international law is perhaps slightly differently stated by Lord Atkin in *Compania Naviera Vascongado* v. *S.S. Cristina.*[1] He deals with two propositions of international law which according to him are engrafted into the domestic law of England and which seem to the learned Law Lord to be well established and beyond dispute. The first with which we are concerned is that the courts of a country will not implead a foreign Sovereign, *i.e.*, make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. These observations seem to imply that the legal proceedings must be such as to involve a process against the person of the foreign Sovereign or to seek to recover from him specific property or damages. But whatever the principle of international law may be, we are concerned with the statutory form that it has taken in our country. In the very forefront we notice that there is an important departure from the rule of international law because in India a Ruler of a foreign State can be sued with the consent of the Central Government. Further, in England a foreign Ruler can waive the privilege of [immunity from] being sued. The Privy Council has held that the consent required under s. 86 cannot be waived and therefore it would not be treading on safe ground to inquire what is the principle of international law and to construe s. 86 in the light of that principle. If the language of s. 86 permitted such a construction, perhaps it would not be objectionable to consider rules of international law because our country also is in the comity of nations, and there is no reason why we should not as much as other countries give effect to well-settled principles of international law. But if the language of the section is clear and is capable of only one construction in the context in which that language is used, then in our opinion it would be an unjustifiable attempt on the part of the Court to engraft upon the statutory provision a principle of international law which the Legislature itself did not think it proper to do.

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[1] [1938] A.C. 485 at 490 [*Annual Digest*, 1938–1940, Case No. 86].

" The same view of the law has been taken in *Madanlal* v. *Ruler of Rampur State.*[1] In that case a debtor presented a petition in bankruptcy and the petition was opposed by a Ruling Chief who was a creditor. Mr. Justice Ali and Mr. Justice Rau held that s. 86 of the Code of Civil Procedure applied in terms only to suits. Mr. Justice Tendolkar, in an unreported judgment in *His Highness Vir Sing Dev alias V. S. Deo* v. *Gangavishandas Lachmandas,*[2] where an application was presented to adjudicate the ex-Ruler of Orchha bankrupt, has also taken the view that s. 86 by its very words is limited to a suit and does not extend to any other proceedings. With respect, we are in agreement with the views expressed in both these judgments.

" If, then, s. 86 deals only with ' suits ', the next question is whether by reason of s. 141 the provisions of s. 86 have been made applicable to other proceedings. Now, it is possible to take two views of the ambit of s. 141. One is that every section in the Code relating to suits has been made applicable to other proceedings; the other view is that only those provisions of the Code which deal with procedure and not with substantive rights are made applicable to independent proceedings initiated in a court. In our opinion the language used by s. 141 itself rules out the first view . . .

" The next contention . . . is that even assuming that s. 86 applied only to suits, what we have before us is a suit and therefore s. 86 applies, and as no consent [of the Central Government] has been taken, the respondent was right in contending that the appellant's suit must fail on that ground. Now, in order to appreciate this contention we must understand the nature of probate proceedings. [After a discussion of this problem the Court continued]: In our opinion it is very difficult to accept the . . . contention . . . that the probate proceedings in this case became a suit when the defendant filed his affidavit in support of his caveat and s. 86 came into operation.

[The Court referred also to the case of *Rao* v. *Advani*[3] and said:] " There also we had to construe the expression ' to sue ', but we were construing that expression as used in s. 176 of the Government of India Act and we gave to that expression its plain, natural meaning. But, as we have pointed out, that expression has a very different meaning and a very different connotation when used in the context of the Code of Civil Procedure. In our opinion, therefore, with respect the learned Judge was in error when he took the view that the defendant was protected by s. 86 and in the absence of the consent of the Central Government the proceedings taken by the appellant could not be maintained."

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[1] (1940) A.I.R. Cal. 244.

[2] (1951) Insolvency No. 89 of 1951.

[3] 1949, 51 Bom. L.R. 342.

[Report: 57 Bom. L.R. 962.]

Jurisdiction—Exemptions from—Foreign States—Immunity from Process—Submission to Jurisdiction—Title to Goods—Proof of—Sufficiency of Mere Assertion of Title—Certificate of Executive Department.

INDIAN NATIONAL STEAMSHIP CO. *v.* MAUX FAULBAUM.

India, High Court of Calcutta. April 22, 1955.

(Bose J.)

THE FACTS.—As stated in the Order of the Court issued on the application of the Republic of Indonesia (petitioner), "the Indonesian Purchasing Commission, which is a department of the Defence Ministry of the Government of Indonesia, purchased 51 reels of cable from Alfred Lohse, Exporters, Hamburg . . . and shipped the said goods on board the vessel S.S. *Shiva Ranjita* for carriage from Hamburg to Djakarta under a Bill of Lading dated December 19, 1952 . . . The said goods were consigned in favour of staff A of the Headquarters of the Air Force of the Republic of Indonesia . . . The petitioner claims to be the indorsee and/or the consignee of the said Bill of Lading and in any event the owner of the goods covered by the said Bill of Lading. The petitioner further claims to be in constructive possession of the goods and as being entitled to immediate actual possession of the said goods. It appears that the vessel *Shiva Ranjita* altered course and, at the direction of the Indian National Steamship Company Ltd., the owners of the said vessel, proceeded to Calcutta and there unloaded the entire cargo which was on board the vessel. The Indian National Steamship Co. thereafter, on September 8, 1953, filed a suit against Maux Faulbaum, the charterer of the said vessel, being suit No. 3248 of 1953 (in which this application is made) claiming certain sums alleged to be due to it on account of the arrears of hire of the said vessel and claiming a lien on all goods on board, including goods which are the subject-matter of this application. On September 25, 1953, . . . an advocate of the High Court was appointed receiver of the entire cargo of the said vessel . . . On February 3, 1954, the petitioner, claiming a title paramount to that of the receiver, made an application to the Court in the said suit . . . for leave to be examined *pro interesse suo*, and for an order directing an enquiry to be made as to whether the petitioner had any and what interest in the said 51 reels of cable and also for a direction to the receiver to release and give delivery of the said reels of cable. In paragraph 15 of the petition it was asserted that the petitioner is a sovereign State recognized by the Government of the Union of India, and this fact was admitted in the affidavit in opposition filed on behalf of the Indian National Steamship Co. Ltd. On April 1, 1954, the Court acceded to that application of the petitioner and directed an enquiry into the interest of the petitioner in the said 51 reels of cable. The enquiry was directed to be held on May 25, 1954 . . .

"On July 6, 1954, an application was made by the petitioner for the issue of Letters of Request for examination of witnesses in Holland, to prove the title of the petitioner to the said goods . . . In the petition filed in support of that application the issues arising in the enquiry were set out; it was also asserted in paragraph 1 of the petition that the Republic of Indonesia is a sovereign State . . . In the affidavit in opposition filed in [the] proceeding for the issue of Letters of Request, the fact of the petitioner being a sovereign State was admitted. On July 29, 1954, [the] Court ordered the issue of letters of requests, but the order was made conditional upon the petitioner depositing Rs. 5000 with its solicitors, prior to the issue of the said letters of requests. In compliance with that order the petitioner on August 29, 1954, deposited with its solicitors the sum of Rs. 5000 as directed. On December 10, 1954, the Embassy of the Republic of Indonesia in India made a representation to the Minister of External Affairs of the Government of India stating that the said goods, being the public property of the petitioner, which was a foreign sovereign State, were immune from the legal processes of the Courts in this country according to the generally recognized principles of international law and the comity of nations and requested the Government to recognize such claim to immunity. On December 14, 1954, the Secretary to the Government of India, Ministry of External Affairs, sent a certificate to the Embassy of the Republic of Indonesia stating that the Government of India accepted the contentions set forth in the said representation as true and that the petitioner is entitled to the immunity as claimed."

The petitioner contended that the Court had no jurisdiction to prevent a foreign sovereign State from removing its property [in India] and that even if the petitioner *per inconcessum* submitted to the jurisdiction of the Court, there could still be no waiver of the right to remove its property.[1]

Held: that the application of the petitioner must be dismissed. Although the petitioner (the Government of Indonesia) was entitled to the delivery of goods which were in the custody and possession of the Commissioners of the Port of Calcutta, and although a *prima facie* case was made out as to the claim to immunity from interference by the Court with regard to the goods in question, the petitioner nevertheless had submitted to the jurisdiction of the Court and was therefore not entitled to relief. According to international law a sovereign State enjoyed immunity from jurisdiction unless it voluntarily submitted to the jurisdiction of the Court concerned.

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[1] The respondent (plaintiff in the suit) contended in reply that even if it was held that the petitioner had not submitted in the present case to the jurisdiction of the Court, it could not obtain relief without proving by proper evidence a *prima facie* title to the goods.

The Court (*per* Bose J.) said: " There cannot . . . be any doubt that the petitioner has submitted to the jurisdiction of this Court and has waived its privilege to claim immunity from the jurisdiction of this Court.

" The petitioner in the present application is asking the Court to release the goods without making any inquiry as to the title and so the effect of this Court's acceding to this application will be to nullify the order for inquiry which the petitioner itself asked this Court to make and which order this Court did make on April 1, 1954.

" [Counsel for the petitioner] has drawn my attention to the case of *Duff Development Co. Ltd.* v. *Government of Kelantan* ([1924] A.C. 797[1] and has pointed out that although in that case the Kelantan Government had applied for the setting aside of an award of an arbitrator . . . and thereby submitted to the jurisdiction of the Court, this fact did not preclude the Government from claiming the immunity in a separate and distinct proceeding which was brought by the Duff Development Company Ltd. for the purpose of enforcing the award . . . .

" I am unable to treat the application for leave to be examined *pro interesse suo* and for an inquiry, and the present application, as two independent and distinct proceedings. The earlier application asked for an inquiry as to title and for release of the goods after such inquiry, but the present application asks for release of the goods without any inquiry as to the title of the petitioner. The object of the present application is to nullify the inquiry proceedings initiated by the earlier application for examination *pro interesse suo*.

" [Counsel] also referred to Halsbury (vol. I, para. 30, pp. 28–29) for the proposition that even though a foreign sovereign State has submitted to the jurisdiction, there can still be no waiver of the right of removing its property. It appears, however, that the statement in Halsbury is based on the case of (1878) 9 Ch. D. 351 (*Vavasseur* v. *Krupp*) . . . But that case does not warrant the broad proposition as is contended for by [Counsel]. The statement in Halsbury is to be understood and read in the light of the facts of that case. What was held in that case was that submission to the jurisdiction for the limited purpose of claiming immunity and obtaining the setting aside of the order or process of Court which adversely affected the property of the sovereign State, did not prevent the sovereign State from removing the property from England.

" [Counsel] also submitted that as the present application could not be made without getting some evidence of recognition of the sovereign status of the petitioner by the Indian Government, and as such recognition was not obtained until December 14, 1954, the application must be treated as a separate and distinct proceeding and that no question of any waiver of immunity by reason of the application for examination *pro interesse suo* can arise. But as I have pointed out already, the fact that the petitioner was a sovereign State recognized by the Government of India was also asserted in the previous petition, and this fact was not disputed by the plaintiff. There was thus no necessity for obtaining any evidence of formal recognition from the Government of India. If the Court felt the necessity of any information on this point, the Court would have entered into correspondence with the appropriate authorities of the Government in order to obtain the requisite information.

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[1] [*Annual Digest*, 1923–1924, Case No. 65.]

" It appears to me that the petitioner has waived its claim to immunity by submitting to the jurisdiction of this Court and the petitioner cannot have any relief in this application.

" It has been contended by . . . counsel for the plaintiff-respondent that even if it be held by this Court that the Republic of Indonesia has not submitted to the jurisdiction of this Court by making the application for leave to be examined *pro interesse suo* and obtaining an order thereon and by following it up by taking other steps and proceedings in connection with that application, the petitioner cannot have any relief in the present application without proving by proper evidence that it has a *prima facie* title to the 51 reels of cable, and the Certificate granted by the Government of India or the declaration made by the representative of the Government of Indonesia cannot be treated as conclusive on this question of title to the goods in question. [Counsel for the respondent placed reliance on the observations of Lord Sumner in *Duff Development* v. *Government of Kelantan* [*supra*], and on the observations of Lord Wright and Lord Maugham in *Compania Naviera Vascongado* v. *The Cristina* ([1938] A.C. 485 at 502.[1]]

" [Counsel for the petitioner] has, on the other hand, contended that the declaration by a foreign sovereign State or its representative to the effect that a particular property belongs to it or is in its possession is conclusive and the Court cannot enquire into the correctness or otherwise of such a declaration or require proof of such title or possession from the sovereign State. [Counsel referred here to the observations of Scrutton L.J. in *Luther* v. *James Sagor Co.* ([1921] 3 K.B. 532 at 555[2]) and also to the following cases: *The Parlement Belge*, (1880) 5 P.D. 197 at 219; *The Schooner Exchange* v. *M'Faddon*, (1812), 7 Cranch 116 at 219–20; and *Sayce* v. *Ameer, Bahawalpur State*, [1952] 2 All E.R. 64,[3] in which the Court of Appeal held that a certificate given by the Commonwealth Relations Office

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[[1] *Annual Digest*, 1938–1940, Case No. 86.]

[[2] *Ibid.*, 1919–1922, Case No. 26.]

[[3] *International Law Reports*, 1952, Case No. 45.]

was conclusive as to the fact that the State of Bahawalpur was not within His Majesty's Dominions and that, within the limits stated, the defendant was the sovereign Ruler of the State. After a brief discussion of these cases the Court continued:] " The courts have spoken with divided voice on the question whether the declaration of a sovereign State that any property belongs to it or is in its possession is conclusive or not. Similarly, the decisions of the courts on the point whether a certificate granted by the Government of the country testifying to matters or facts in relation to a foreign sovereign State other than as to its sovereign status, is conclusive or not as to such matters or facts, have been far from uniform.

" It appears, however, to be the trend of modern decisions that the mere assertion of a claim by a foreign Sovereign to property which is not admittedly vested in him or which is not in his possession cannot attract the principle of immunity from the legal processes of the municipal courts of the country.

" It has been held that the doctrine of immunity does not extend to cases where the property is in the hands of a third person and the foreign Sovereign has merely made a claim to it (*Haile Selassie* v. *Cable and Wireless Ltd.*, [1938] 1 Ch. 839 at 845–6.[1])

" In the case before me the petitioner holds the Bill of Lading under which the goods were shipped. Maux Faulbaum, who was the charterer of the vessel and who issued the Bill of Lading and with whom the goods were entrusted for carriage, was in the position of a bailee in respect of the goods and so the possession of Maux Faulbaum was the legal possession of the Republic of Indonesia. It is true that the petitioner was not in actual physical possession of the goods when they were on board the vessel, but the petitioner or its representatives mentioned in the Bill of Lading had the immediate right to possession of the goods, and it has been held that this is sufficient to attract the principle of immunity.

" This is the view taken by the House of Lords in the case of *United States of America and Republic of France* v. *Dollfus Mieg et Compagnie S.A. and Bank of England*, [1952] 1 All E.R. 572[2] . . .

" But the case before me is complicated by the further fact that Maux Faulbaum has been forced to part with possession of the goods and the goods are lying with the Commissioners of the Port of Calcutta and are incurring demurrage at their hands. Now, although it may be said that the petitioner is not in possession of the goods after they passed into the custody and possession of the Commissioners of the Port of Calcutta, the Bill of Lading annexed to the petition shows that it is the departments of the Government of Indonesia who are entitled to the delivery of the goods. A Bill of Lading is a document of title to the goods. It is clear, therefore, that the petitioner has made out on affidavits a somewhat *prima*

[[1] *Annual Digest*, 1938–1940, Case No. 67.]

[[2] *International Law Reports*, 1952, Case No. 37.]

facie case as to its claim to immunity from interference by this Court with regard to the goods in question; but as the petitioner has in my view submitted to the jurisdiction of this Court, the petitioner is not entitled to any relief in this application.

"Some comment was made as to the nature of the Certificate which has been obtained in this case from the Government of India by the petitioner, but I do not think that such a Certificate obtained by means of correspondence between the foreign sovereign State and the Government of this country can be described as a thing altogether unknown or irregular (see [1952] 1 All E.R. 1261[1] at 1266) . . ."

[Report: A.I.R. 1955 Calcutta 491.]

NOTE.—The Judge, after dismissing the application, observed at the end of the order that "as the matter is not free from doubt and difficulty I direct that each party will bear and pay its own costs of this application."

Jurisdiction—Exemptions from—Foreign States—History and Development of Privilege — Comparison with Immunities of Diplomatic Agents.

See p. 533 (*Lagos* v. *Baggianini*).

Jurisdiction—Exemptions from—Foreign States—Loan Issued by Foreign State in Country of Forum—Whether Courts of Forum Competent to Exercise Jurisdiction—Belgian Congo Sued in France—The Law of France.

See p. 226 (*Montefiore* v. *Belgian Congo*).

(b) HEADS OF FOREIGN STATES

Jurisdiction—Exemptions from—Heads of States—Cessation of Immunity on Cessation of Recognition as Head of State—Ex-Rulers of Indian States—Immunity from Jurisdiction—Waiver of — International Law and Municipal Law — Enforcement of Merger Agreement.

THAKORE SAHEB KHANJI KASHARI KHANJI *v.* GULAM RASUL CHANDBHAL.

India, High Court of Bombay. March 16, 1955.

(Bavdekar J.)

THE FACTS.—The respondent (plaintiff) filed a suit on December 11, 1948, in the Court of the Civil Judge at Godhra, against the petitioner (defendant) who was the former Thakor (Ruler) of the Vajiria State, and obtained a money decree on February 24,

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[1] *Sultan of Johore* v. *Abubakar*, [1952] A.C. 318 (*International Law Reports*, 1952, Case No. 38).]

1949. The Vajiria State had merged in the Dominion of India and under one of the terms of the Merger Agreement dated May 24, 1948, the defendant was entitled to all the personal dignities and titles enjoyed by him before August 15, 1947 (the date of the independence of India). The plaintiff applied for execution of the decree by attachment of certain agricultural lands of the Jagir of Vajiria State and for the appointment of a receiver of these lands to recover the rent therefrom from the tenants and to pay the rent towards the decretal dues. The defendant contended, *inter alia,* that the decree was obtained by the plaintiff without jurisdiction. The trial Judge held that the decree was not void for want of jurisdiction. The defendant appealed to the High Court, claiming immunity from jurisdiction as an ex-Ruler of an Indian State. The respondent contended that the appellant had not raised any objection to the jurisdiction of the Court.

Held: that after his State had merged in the Dominion of India, the appellant could no longer claim immunity from jurisdiction under s. 86 of the Code of Civil Procedure. According to international law, once a Ruler ceases to be recognized as Sovereign or Ruling Prince, he cannot enjoy the privilege of immunity from jurisdiction.

The Court said: " . . . the first point which is made before me is that the decree in this case was without jurisdiction . . . The respondent attempts to meet this contention by pointing out that the appellant did not raise any contention about jurisdiction in the suit, and he says that now that the Court has passed a decree this question cannot be gone into in execution. It appears, however, that their Lordships of the Privy Council have now decided once and for all that s. 86 of the Code of Civil Procedure is based upon public policy; it was not open, therefore, to any Ruling Chief to waive the provisions of that section. The failure of the appellant to object to the jurisdiction would consequently not validate the decree as though it had been passed by a Court which had jurisdiction to try the suit.

" Now, the privilege which had been claimed in this case on behalf of the appellant was that under s. 86, and the privilege was only available to Sovereigns or Ruling Princes. The suit in this case was filed in December 1948, and it is no longer in dispute that at that time the State of the appellant had merged in the Dominion of India and the appellant was no longer a Sovereign or Ruling Prince. It is contended, however, that under the terms of the Merger Agreement the appellant was entitled to the same personal dignity and titles as before the date of the Agreement, and he is consequently entitled to the dignity which s. 86 confers upon all Sovereigns and Ruling Princes.

" In support of this contention, reliance is placed upon the decision of the High Court of Allahabad in *Kant Narain* v.

Chandrabhal, (1951) A.I.R. All. 603. In that case there was a clause in the Merger Agreement which read as follows:

> 'The Maharaja and his family shall be entitled to all personal privileges enjoyed by them, whether within or outside the territories of the State, immediately before the 15th August, 1947.'

It was held that this had reference to the privilege conferred under s. 86 of the Code of Civil Procedure, the guarantees having been given statutory effect in Article 363 of the Constitution of India.

"Now, in the first instance, a personal dignity is different from a personal privilege, and the right of being exempt from being sued in a Court cannot properly be called a dignity. But even if it amounted to one, I do not see how it would help the appellant. It is true that the Government under the Merger Agreement guaranteed the personal dignity of the appellant. But what is required when exemption from being sued is claimed is a provision of an enactment. The Merger Agreement does not enjoy the force of law. This appears to have been impliedly recognized by the High Court of Allahabad, when it pointed to Article 363 of the Constitution. That Article provides:

> 'Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other Court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, *sanad* or other similar instrument.'

It seems to have reference to disputes arising out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument between the Ruler of the State, on the one hand, and the Government of the Dominion of India or any of its predecessor Governments, on the other. Now, the suit which was before the Court had, by itself, no reference to any such dispute. It is true that there is a dispute between the two parties to the suit with regard to the meaning of the words 'personal dignity' in one of the clauses of the Merger Agreement between the appellant and the Dominion of India, on the assumption that the Agreement has application. But that does not render the dispute which was before the Court in the suit against the appellant a dispute arising out of the provisions of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument.

"In that case, inasmuch as s. 86 has no application to the appellant, who had ceased to be a Ruling Chief when the suit was filed, the trial Court had jurisdiction to try the suit against the appellant."

[Report: 57 Bom. L.R. 824.]

NOTE.—The Court considered the case from the point of view of s. 86 of the Code of Civil Procedure only. It did not refer to s. 87 (B), which was enacted after 1947 when the Indian States merged with the Dominion of India. This section preserved certain rights and privileges which the Rulers of Indian States had enjoyed. The trial Judge made it clear that " had the judgment-debtor (appellant) been the Ruler duly recognized by the Government of India, the contention raised by him would have force in it. But from the list published by the Ministry of States, Central Government, on April 1, 1951, we find that there is no mention of the State of Vajiria in that list, which is published for the purpose of s. 87 (B) (2) of the Code of Civil Procedure ". By not referring to the provisions of s. 87 (B), the present judgment may give the wrong impression that even recognized Rulers of former Indian States do not at present enjoy the privileges under s. 86.

See also *Bhimaji Narasu Mane* v. *Vijayasinvrao Ramrao Dale* (*supra*, p. 67).

Jurisdiction—Exemptions from—Foreign States—Rulers of Vassal and Other Semi-Independent States.

See p. 67 (*Bhimaji Narasu Mane* v. *Vijayasinvrao Ramrao Dale*).

Jurisdiction—Exemptions from—Rulers of Vassal States—Immunity from Taxation.

See p. 64 (*Maharaja Bikram Kishore of Tripura* v. *Province of Assam*).

Jurisdiction—Exemptions from—Rulers of Vassal States—Immunity from Taxation.

See p. 73 (*Rani Amrit Kunwar* v. *Commissioner of Income Tax*).

Jurisdiction—Exemptions from—Foreign States—Heads of States—Immunity from Suit as Distinguished from Other Legal Proceedings.

See p. 244 (*Maharaj Indrajitsinghji Vijaysinghji* v. *H.H. Maharaja Rajendrasinghji Vijaysinghji*).

(c) PUBLIC SHIPS AND OTHER PROPERTY OF FOREIGN STATES

Jurisdiction—Immunity from—" National Enterprise " Engaged in Commerce—The Law of Germany.

See p. 17 (*Confiscation of Trade Marks* (*Germany*) *Case*).

(d) FOREIGN ARMED FORCES

Jurisdiction—Immunity from—Foreign Armed Forces—The " Civilian Component "—Merchant Seamen—Vessel under Charter by Armed Forces—Crime Committed Ashore—Exclusive and Concurrent Jurisdiction—Waiver of Jurisdiction by Receiving State—International Agreement—Interpretation of—Subsequent Conduct of Parties.

UNITED STATES *v.* ROBERTSON.

United States, Court of Military Appeals. May 27, 1955.

THE FACTS.—Robertson was a merchant seaman serving as a member of the crew of the *S.S. Provo Victory*, a United States Department of Commerce vessel allocated to the Military Sea Transportation Service. The *Provo Victory* was at the relevant time docked at Yokohama, Japan, and was discharging cargo intended for the United States Armed Forces in Japan. In an altercation ashore, Robertson struck the deceased, a fellow member of the crew, and the victim died as the result of the brain hemorrhage caused by the blow. Robertson was tried for premeditated murder by a Navy court-martial. He was convicted of unpremeditated murder in violation of Article 118 of the Uniform Code of Military Justice, 50 U.S.C. § 712, and was sentenced to confinement for twenty-five years. A Navy board of review affirmed the findings but reduced the sentence to confinement by ten years.

Robertson petitioned for review, contending, *inter alia*, that the court-martial lacked jurisdiction over him since he was not a person " serving with, employed by, or accompanying the armed forces without the continental limits of the United States " within the meaning of Article 2 (11) of the Uniform Code of Military Justice, 50 U.S.C. § 552 (11), dealing with military jurisdiction over civilians, and that he was not a member of the " civilian component " within the meaning of Article I of the Administrative Agreement under Article III of the Security Treaty between the United States of America and Japan, signed at Tokyo on February 28, 1952, 3 *U.S.T.* 3341; *T.I.A.S.* No. 2492.

Held: that the record of trial must, on other grounds, be sent back to the Judge Advocate General, United States Navy, for further proceedings, but that the motion of the accused to dismiss the charge against him for want of jurisdiction was properly denied. The accused was not a member of the " civilian component," subject to the exclusive jurisdiction of the United States. Both the directives issued by the United States forces in Japan and the minutes of the Joint Committee established by the United States and Japan to implement the Administrative Agreement indicated that merchant seamen on vessels merely controlled by the United

States Armed Forces had not hitherto been regarded as members of the " civilian component ". In the light of the history of extraterritoriality, grants of exclusive jurisdiction to the sending State should be strictly construed. However, Japan had relinquished its right to prosecute the accused by turning him over to the United States authorities, and, since the jurisdiction of the United States and Japan over Robertson was concurrent, the United States was entitled to proceed against him.

After stating that the accused would have been subject to military jurisdiction under Article 2 (11) of the Uniform Code of Military Justice for any offence committed aboard ship, the Court said: " What change then was wrought in his status by the circumstance that he took shore leave in Yokohama?[1] Of course, the brevity of the stay contemplated would serve to eliminate any possibility of termination of military jurisdiction by the accused's merger with the Japanese economy and population.[2] *United States* v. *Garcia*, . . . [5 U.S.C.M.A. 8, 17 C.M.R. 88]. At this point, however, we must reckon with the Administrative Agreement which, at all relevant times, governed relations between the United States and Japan.

" Article XVII of the Agreement provides that

> ' the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed

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[1] While Robertson was aboard the *Provo Victory*, and at sea, he was within the " special maritime and territorial jurisdiction of the United States," which would render him subject to trial—for at least certain offenses—by a Federal District Court. See 18 USC § 7. Once ashore in Japan, however, he would be subject to trial by a Federal civilian court only for crimes injurious to the United States—a category which would not include the instant homicide. *United States* v. *Bowman*, 260 US 94, 67 L ed 149, 43 S Ct 39 [*Annual Digest*, 1919–1922, p. 159]. Thus, jurisdiction lay in a court-martial here, or in no American tribunal.

It may be argued that, if Federal precedents support military jurisdiction while the accused was aboard the *Provo Victory*, and also the notion that he would be subject to punishment by American civilian courts, he should at least be equally subject to *military* jurisdiction when the crime is committed in a locale within which our civilian courts totally lack jurisdiction. This argument would seem to proceed on the premise that it is desirable that *some* American court be empowered to deal with offenses committed by American Nationals overseas. This, in fact, was the *raison d'être* of the consular courts which the United States and other nations once maintained in certain countries. See *Ross* v. *McIntyre*, 140 US 453, 35 L ed 581, 11 S Ct 897.

[2] Foreign Service Dispatch No. 164 from Mr. Taylor, the Consul General in Yokohama, dated March 3, 1953, indicates that Robertson, like Garcia, would have been treated by the Japanese authorities as an illegal entrant, and thus clearly would never have been allowed to merge with the Japanese populace and economy.

This same Dispatch reveals that a substantial problem was created in Yokohama by the presence there of numerous seamen who had failed to rejoin their ships— " with a resultant increase in the number and seriousness of misconduct problems and violations of law and order over which the Japanese authorities are denied jurisdiction or control." It can be inferred from the Dispatch, as well as from other information, that American authorities in Japan, the Department of State, and the Japanese nation entertained divergent views with respect to the proper handling of this problem, and the agencies which possessed jurisdiction over these seamen.

> forces, the civilian component, and their dependents, excluding their dependents who have only Japanese nationality. Such jurisdiction may in any case be waived by the United States.' Paragraph 2.

The ' civilian component ' is defined in Article I (b) as

> ' civilian persons of United States nationality who are in the employ of, serving with, or accompanying the United States armed forces in Japan, but excludes persons who are ordinarily resident in Japan or who are mentioned in paragraph 1 of Article XIV. For the purposes of this Agreement only, dual nationals, United States and Japanese, who are brought to Japan by the United States shall be considered as United States nationals.'

As we noted in *Garcia*, paragraph 1 of Article XIV relates to certain civilian businessmen, but in no possible way to merchant seamen.

" The definition of ' civilian component ' in the Agreement clearly parallels the wording in Article 2 (11), which delimits those overseas civilians who are subject to the Uniform Code. There are, however, certain minor divergencies. For instance, the category of businessmen, expressly excluded from the component in the Agreement, might well have been deemed to fall within Article 2 (11) —and this would seem to have been the very point of the exception. See also Article XIV, paragraph 7. More important, the civilian component is defined in terms of American nationality. To be sure, ' Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar.' See *Johnson* v. *Eisentrager*, 339 US 763, 769, 94 L. ed. 1255, 70 S. Ct. 936. It is not an exclusive ground, however—for this Court has expressly determined that an alien serving with our Forces overseas would, in the absence of treaty, fall within the scope of Article 2 (11). *United States* v. *Weiman*, 3 USCMA 216, 11 CMR 216.[1]

" The defense in the present case has contended that the term ' civilian component ' was not meant to include merchant seamen nor civil service employees of the Defense Department—of whom, they argue, Robertson was one. Indeed, Government appellate counsel—for a time at least—seem to have inclined toward a similar viewpoint. To support this contention, defense counsel at the trial introduced testimony to the effect that merchant seamen were generally excluded from post exchange or ships store facilities in Japan and were not permitted to make use of military payment certificates. On the other hand, however, it seems to have been generally accepted in Japan that members of the ' civilian component ' would have been entitled both to the use of military payment certificates and to access to post exchange and like facilities.

" Moreover, the defense called to the court-martial's attention Circular No. 8, promulgated on May 16, 1952, by Headquarters, Far East Command, and dealing with the exit from and entry into

[[1] *International Law Reports*, 1953, p. 182.]

Japan of individuals, cargo, aircraft, and surface vessels of the United States Forces. Paragraph 3a (2) of that document purports to define ' United States Forces personnel,' one category of which is the ' civilian component.' This phrase, in turn, ' includes the following: ' ' (b) Civilian employees on United States Forces operated vessels and aircraft. (This excludes contract operated, chartered and General Agency Agreement vessels.) '

" Subsequently in paragraph 3b ' United States Forces vessels and aircraft ' are defined as ' vessels and aircraft under the operational control of the United States Forces,' which ' includes ':

> '(1) United States Forces operated vessels and aircraft (commissioned Navy, Army, and Coast Guard ships; Civil Service manned Military Sea Transportation Service ships, United States Air Forces, Military Air Transport Service, Navy, Marine, Coast Guard, and Army aircraft). These vessels and aircraft will normally carry only United States Forces cargo, passengers, and crewmen, except for a limited number of non-United States nationality Civil Service crewmen and foreign Naval personnel.
>
> '(2) United States Forces controlled vessels and aircraft (contract operated, time chartered, General Agency Agreement ships, ships assigned to the United States Forces by a foreign country and chartered aircraft, but not including voyage or space charter). These vessels and aircraft will normally carry only United States Forces cargo, but crewmen, except for a limited number of United States Naval or Air Force crewmen, will be non-United States Forces personnel.'

" This circular—issued by the highest American military authority of the Far East—manifestly views merchant seamen, of the style of Robertson, as falling outside the ' civilian component.' This is clear from the definition of that term found in paragraph 3a, and as well from the statement in 3b to the effect that crewmen on vessels and aircraft controlled by the United States Forces—which includes General Agency Agreement vessels—will, for the most part, ' be non-United States Forces personnel.' The latter category certainly does not include members of the civilian component.

" Circular No. 8 makes provision for the issuance of special landing permits to crewmen of the United States Forces controlled vessels—but in their issuance [a] certain discretion seems to reside in the Japanese immigration authorities. Since, under Article IX of the Administrative Agreement, the United States may, in the service of the purposes of the Agreement, introduce into Japan members of the civilian component, the possession of admissive discretion by the local immigration authorities suggests strongly that these crewmen are not part of the civilian component. Also, under this Circular, Japanese immigration authorities handle the deportation of crewmen from United States controlled vessels, although they ' will turn over to the United States authorities for appropriate action, all crewmen over which the United States has jurisdiction, if apprehended for the commission of an offense.' However, under Article XVII, paragraph 3(f),

> ' The United States armed forces shall have the exclusive right of removing from Japan members of the United States armed forces, the civilian component, and their dependents.'[1]

If Japanese officials are charged with the removal from Japan of merchant seamen who ship on General Agency Agreement vessels—like Robertson, the accused in the present case—then it may be said to follow that these seamen constitute no part of the civilian component.

" The attention of the court-martial was also directed to Circular No 9, Law Enforcement Procedures in Japan, which was issued on May 20, 1952, by the same Headquarters. Here it is noted that

> ' Members of the United States Forces, Japan, are in Japan today at the request of the Japanese Government in accordance with the Security Treaty between the United States of America and Japan.'

(Paragraph 7a.) The document additionally points out that, under the Administrative Agreement, the United States possesses exclusive jurisdiction over offenses committed by members of the United States Forces, Japan—this grant of jurisdiction constituting, of course, a *quid pro quo* tendered by the Japanese as a part of their invitation to the United States to aid in the protection of the former nation. (Paragraph 8a.) These United States Forces are defined so as to include the ' civilian component,' which signifies ' Civilian persons of United States nationality who are in the employ of, serving with, or accompanying the United States Forces, Japan, excluding those persons who are ordinarily resident in Japan and contractual persons.' (Paragraph 6a (2).) Unlike Circular No. 8, this directive attempts no further delimitation of this category.

" In attempting still further to explore the import of the phrase, ' civilian component,' we have examined the deliberations of the Joint Committee established by the United States and Japan, pursuant to Article XXVI of the Administrative Agreement—which agency was designed to render aid through an implementation of that compact. Here we discover that, by action of May 23, 1952, as amended on December 3, 1952—action taken in accordance with the recommendations of a Subcommittee on Jurisdiction—a procedure was established for the entry and exit of crewmen to and from Japan, which parallels that of Circular No. 8. While no express definition of ' civilian component ' was attempted at the time, it seems quite clear that crewmen on ' United States Forces Controlled

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[1] This provision appears to reflect an assumption that although the crewman may have enjoyed no right to be in Japan—and thus might not be a member of the civilian component—he might nevertheless be subject to American jurisdiction for an offense committed in Japan.

Vessels' were regarded as falling outside the component. It also appears that, under this implementive directive, the Japanese immigration authorities were assigned the function of determining whether such individuals should receive shore passes—and their deportation in proper cases would likewise constitute a responsibility of the Japanese. However, the latter 'shall turn over to the United States authorities for appropriate action, all crewmen over which the United States has jurisdiction, if apprehended for the commission of an offense.' This latter phraseology is identical with that of Circular No. 8—and, for this and other reasons, it is unmistakable that this document was in a substantial sense a product of the Joint Committee's deliberations. Therefore, since the Joint Committee was established and empowered by the Administrative Agreement, Circular No. 8 may safely be read into that concord.

"We note with interest other deliberations of this Committee—in particular those of October 22, 1953. See Minutes of 74th Meeting of the Joint Committee, page 80. At that time it was stated that the definition of 'civilian component' appearing in certain Japanese legislation includes 'all members of the crews of vessels under time charter to the United States Government or its agencies.' Undoubtedly the term, 'civilian component,' as used in the statute concerned, was intended to reflect the phraseology of the Administrative Agreement, and should thus be construed in accordance with the intendment of that Agreement. Yet here the interpretation seems to differ from that utilized in connection with the establishment of entry and exit procedures.

"Although the *Provo Victory* was not under written charter to the Military Sea Transportation Service, we are sure that the vessel must be assimilated to a ship under time charter, rather than to one under voyage or space charter. Indeed, the close Government control over a General Agency Agreement vessel—a control which clearly underlay the several Supreme Court decisions adverted to earlier and involving the Jones Act—would necessitate such an assimilation. It would follow then that, if the construction of 'civilian component' used by the Joint Committee in October 1953 is to be our guide, we will be required to conclude that Robertson falls within that category. If, conversely, we are to adopt the interpretation which appears to have been in the minds of the Joint Committee in May 1952—as well as that of the draftsmen of Circular No. 8—he will not be so included.

"Where does all of this leave us? The Navy Board of Review in the case at bar concluded from its consideration of Circulars Nos. 8 and 9 that 'for different purposes the Headquarters, Far East Command, promulgated different and administratively appropriate definitions of "civilian component" as used in the Administrative Agreement.' We can readily understand this interpretation. For different purposes it might indeed be desirable to have different interpretations of this component. For instance, currency control might well present problems distinct from those of criminal jurisdiction. Nonetheless, the Agreement itself utilized but a single definition of the term in question, although it caused a wide variety of consequences to hinge on placement within that component. We doubt that it was there intended that the phrase should possess a meaning calculated to shift with the question involved. Indeed, to conclude to this effect virtually would be to find that the framers of the Agreement intended to condemn its administration to utter chaos. We are, therefore, reluctant to assume that the adoption of the Joint Committee of variable interpretations of the term ' civilian component,' was authorized or even contemplated by the Agreement.

" Giving due weight, therefore, to Circular No. 8, and to testimony concerning the practices in Japan with respect to such a one's access to military payment and post exchange privileges, we feel more than reasonably sure that the more general understanding of the Administrative Agreement must be that Robertson fell *without* the ' civilian component.' Therefore, we shall proceed from the premise that the accused was not a member of this group.

" The Administrative Agreement provides that the United States shall exercise *exclusive* jurisdiction over members of the American civilian component in Japan. In a sense, this constitutes a grant to the United States of something closely akin to extraterritorial rights. Extraterritoriality has long been known to the law and, in fact, was at an earlier time exercised by United States consular courts over Americans in Japan. See *Ross* v. *McIntyre*, 140 US 453, 35 L. ed. 581, 11 S. Ct. 897.[1] However, markedly it has lost favor in recent years,

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[1] That case concerned a British subject who had signed on an American ship and had been tried by an American consular court for an offense committed aboard ship in the Yokohama harbor. Suggestive even today are the following comments by the Supreme Court in upholding the extraterritorial jurisdiction of that American tribunal:

" The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are termed the Middle Ages. During those ages these commercial magistrates, generally designated as consuls, possessed to some extent a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offenses. After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offense, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential and frequently is resented by the nation conceding extraterritorial rights.

" A type of extraterritoriality was embodied in the doctrine of the famous *Schooner Exchange* case, reported in 7 Cranch 116 (US 1812). There, Chief Justice Marshall stated that a visiting Army is immune from the jurisdiction of a friendly sovereign through whose realm its troops pass. See also *United States* v. *Weiman*, 3 USCMA 216, 11 CMR 216.[1] However, some international lawyers—both in this country and abroad—have expressed grave doubt that this pronouncement constitutes a correct statement of international law. Consequently not a few of the countries in which American Forces have been stationed have asserted jurisdiction over these troops, retainers and employees—especially with respect to offenses against the local populace. The NATO Status of Forces Agreement today provides specifically for such an exercise of jurisdiction over American personnel by the courts of the country in which our military forces are stationed.

" In light of the history of extraterritoriality, it may well be deemed more nearly suitable to the intendment of the contracting parties that the Administrative Agreement between the United States and Japan be construed narrowly—particularly insofar as the grant of *exclusive* jurisdiction is concerned. This, in turn, would imply a narrow construction of the phrase, ' civilian component.' Certainly an interpretation of the term which excluded therefrom merchant seamen—like the accused in the case at bar—would not, we think, defeat the basic purposes of the Administrative Agreement. For instance, we suspect that no important purpose of the United States would have been impaired had Robertson been refused permission to land in Japan.

" We are sure, though, that there is no policy—with a single conceivable exception—which would require a limiting construction of American *concurrent* jurisdiction, that is, one shared with Japan.

to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people.

. . . . .

" We have not overlooked the objection repeatedly made and earnestly pressed by counsel, that the consular tribunal is a court of limited jurisdiction. It is undoubtedly a court of that character, limited by the treaty and the statutes passed to carry it into effect, and its jurisdiction cannot be extended beyond their legitimate meaning. But their construction is not, therefore, to be so restricted as to practically defeat the purposes to be accomplished by the treaty, but rather so as to give it full operation, in order that it may not be a vain and nugatory act.

" It is true that the occasion for consular tribunals in Japan may hereafter be less than at present, as every year that country progresses in civilization and in the assimilation of its system of judicial procedure to that of Christian countries, as well as in the improvement of its penal statutes; but the system of consular tribunals which have a general similarity in their main provisions, is of the highest importance, and their establishment in other than Christian countries, where our people may desire to go in pursuit of commerce, will often be essential for the protection of their persons and property." [*Ross* v. *McIntyre*, *supra*, at pages 462 and 479.]

[1] *International Law Reports*, 1953, p. 182.]

Of course, the exception suggested has to do with persons who are citizens of, or ordinarily resident in, Japan—and it is manifest that the present accused does not fall within this category. In short, we find nothing in the Agreement which would serve to defeat military jurisdiction over Robertson—although he is probably no part of the civilian component—if under the Uniform Code that jurisdiction may be said otherwise to exist. Indeed, with reference to one group —businessmen covered by Article XIV—the possibility of concurrent jurisdiction appears to be recognized expressly in the Agreement. See Article XIV, paragraph 7.

" Since the definition of ' civilian component ' parallels largely the language found in Article 2 (11) of the Code with respect to those persons subject to American military justice, the draftsmen of the Administrative Agreement may have envisaged little likelihood that there would be a substantial number of persons who, although not members of the component, would be triable by American courts-martial for offenses committed in Japan. However, the Agreement involves the wishes and interests of Japan as well, and it is understandable that this foreign Power might well take a view of ' civilian component ' divergent from American interpretations of persons falling within the language of Article 2 (11). We doubt that Japan bound herself to accept *every* interpretation of the Uniform Code made by American courts. Instead, it appears to have been envisaged that the Joint Committee—in its implementation of the Agreement—would resolve any issue which might arise regarding such matters as the composition of the civilian component. Too, normal diplomatic channels would be available for this purpose.

" However, save as to persons who may have enjoyed some special bond with Japan, that nation would have no interest whatever in limiting the jurisdiction which might otherwise be possessed by American courts—military or civilian. Thus, no reason would exist for the Administrative Agreement to contemplate that American courts, in interpreting the Code, would be bound to accept for jurisdictional purposes the determinations of the Joint Committee, or those made by diplomatic authorities, with respect to the civilian component's membership. Therefore, with an eye to the purposes of this compact, we conclude that it did not remove the present accused from the operation of military jurisdiction at the moment he stepped ashore from the *Provo Victory* and by reason of the fact that he had done so. Of course, had he failed to rejoin his ship and elected to remain in Japan over a substantial period, Robertson might at some point have left the ambit of military jurisdiction as defined in Article 2 (11)—but we are sure that, at the time of the homicide, he remained subject to the provisions of the Uniform Code.

" We are remanded then to the normal rules governing concurrent jurisdiction. Since Japanese authorities had arrested

Robertson initially, and thereafter surrendered him to American officials, under those rules the former relinquished all right to proceed first against him. Of course, the rules of former jeopardy—inapplicable between separate sovereignties—would not prevent a subsequent Japanese trial—regardless of the action of a court-martial. Under the circumstances then, we hold that the accused's motion to dismiss the charge laid against him was properly denied . . ."

(The Court concluded its opinion by finding error in the failure of the law officer of the court-martial to instruct the court on the lesser included offence of involuntary manslaughter.)

[Reports: 5 U.S.C.M.A. 806; 19 C.M.R. 102.]

NOTE.—The above case is noted in *Columbia Law Review*, 56 (1956), p. 277.

In so far as *United States* v. *Robertson* holds that the accused was subject to the jurisdiction of a court-martial under Article 2 (11) of the Uniform Code of Military Justice, the case appears to have been overruled by implication in *Reid* v. *Covert*, 354 U.S. 1, 1 L. Ed. 2d 1148, 77 Sup. Ct. 1222 (1957), which found unconstitutional the trial for a capital offence of a civilian dependent accompanying the Armed Forces overseas.

Jurisdiction—Exemptions from—Members of Visiting Forces—Concurrent Jurisdiction of Sending and Receiving States—Immunity of Members of Visiting Forces under Customary International Law—The NATO Status of Forces Agreement—Prohibition of Double Jeopardy—Whether Commitment for Contempt by Court of Receiving State Constituted a "Trial"—The Law of the United States of America.

UNITED STATES *v.* SINIGAR.

United States, Court of Military Appeals. September 16, 1955.

THE FACTS.—The accused in this case had been committed to a Canadian gaol for contempt of a Canadian Coroner's Court, before which he had refused to testify. He was thereupon tried by a United States general court-martial for, *inter alia*, violation of Article 134 of the Uniform Code of Military Justice, 50 U.S.C. § 728, dealing with " all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital." The accused was found guilty of the offences with which he was charged, including the violation of Article 134 in failing to testify before the Canadian Court. The Army Board of Review affirmed. [Report: 18 C.M.R. 338 (1954).]

On petition for review, the accused contended, *inter alia*, that he could not be tried by both a Canadian and a United States Court for what was essentially one act, and that in particular his trial by court-martial was barred by the double jeopardy provision of the NATO Status of Forces Agreement, which is quoted in the body of the opinion.

Held: that the decision of the Board of Review must be reversed as to the charge of violation of Article 134 of the Uniform Code of Military Justice. The accused was subject to Canadian jurisdiction in so far as he had, while not in the performance of official duties, committed a violation of Canadian law. The contempt proceedings did not constitute a trial within the meaning of the provision of the NATO Status of Forces Agreement which precludes any contracting party from trying for the same offence a person who has previously been tried by another contracting party. However, in seeking to test a substantial right which he believed on reasonable grounds that he was entitled to exercise, the accused did not bring discredit upon the armed forces of the United States within the meaning of Article 134 of the Uniform Code of Military Justice.

The Court, after stating that the judgment of the Canadian Court would not be given conclusive effect in a later proceeding before a United States court-martial, said: " The next issue presents a question of double jeopardy. That is, may the accused be punished by both Canada and the United States for what he insists was essentially one act ? ' In that connection,' the Supreme Court has said, in *Jerome* v. *United States*, 318 US 101, 105, 63 S Ct 483, 87 L ed 640 (1942), ' it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to Federal prosecution though a state conviction based on the same acts has already been obtained.' We have here two sovereignties, deriving power from different sources, and capable of dealing with the same subject matter within the same territory. *United States* v. *Lanza*, 260 US 377, 43 S Ct 141, 67 L ed 314 (1922). Assuming for the moment that there was but one act done by the accused, international law has long recognized the possibility of the existence of two concurrent jurisdictions. 1 Oppenheim, *International Law*, 7th (Lauterpacht's) ed., § 145. In this case, jurisdiction in the United States springs from its personal supremacy over the individual, while Canadian jurisdiction is founded upon its sovereignty in the place where the offense occurred.

" Although it is the general rule, in the absence of an international agreement, that whenever armed forces are on foreign territory in the service of their home state they are considered exterritorial and remain under its jurisdiction, that proposition has no application here. Where, as in this case, a soldier belonging to a foreign garrison leaves his camp, post, or station, not on duty but for recreation and pleasure, and commits an offense, the local authorities are competent to punish him. *United States* v. *Thierichens*, 243 Fed 419, 420 (ED Pa) 1917; 1 Oppenheim, *International Law*, *supra*, § 445; King, 'Further Developments Concerning Jurisdiction over Friendly Foreign Forces,' 40 *Am. J. Int'l L.* 257 (1946).

" In order to escape the general rule, it is vigorously urged by defense counsel that the North Atlantic Treaty Organization, Status of Forces Agreement, 99 Cong Rec 8838, July 15, 1953, has effectively re-established the theory of double jeopardy as a complete barrier to trial in circumstances such as exist here. Paragraph 8, Article VII, of this Agreement provides as follows:

> ' Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party.'[1]

" We are met at the outset with the question of whether the accused was ' tried ' by the Canadian court within the meaning of the word as used in the quoted paragraph. The answer to this question depends upon whether a contempt commitment is viewed as a trial under Canadian law. But we are faced with a failure of proof at the trial level, for nothing was shown concerning local law on the subject. We are remitted, therefore, to an examination of American law on the subject, for reasons which will later appear.

" In *Ex Parte Terry*, 128 US 289, 309, 9 S Ct 77, 32 L ed 405 (1888), the Supreme Court had this to say concerning contempts committed in the very presence of a court:

> ' It results from what has been said that it was competent for the circuit court, immediately upon the commission, in its presence, of the contempt recited in the order of September 3, to proceed upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form. It was not bound to hear any explanation of his motives, if it was satisfied, and we must conclusively presume, from the record before us, that it was satisfied—from what occurred under its own eye and within its hearing—that the ends of justice demanded immediate action, and that no explanation could mitigate his offense or disprove the fact that he had committed such contempt of its authority and dignity as deserved instant punishment.'

This opinion has been often cited and followed, and its rationale is now embodied in Rule 42 (a), Federal Rules of Criminal Procedure, 18 USC. *Offutt* v. *United States*, 348 US 11, 75 S Ct 11, 99 L ed 7 (1954); *United States* v. *Landes*, 97 F.2d 378, 380 (CA2d Cir) (1938).

" There is sound cause to accord special status to contempt proceedings, and refuse to characterize them as trials. The power to punish for contempt is inherent in every Federal court. It is summary in nature, and is the primary instrument through which a court safeguards its own authority. Thus, in their very essence, contempt proceedings are *sui generis*. *Ex Parte Grossman*, 267 US 87, 45 S Ct 332, 69 L ed 527 (1925). They possess none of the touchstones of a trial, as we know them. In the case of a direct criminal contempt, there need not be indictment, nor jury, nor the reception of evidence, nor opportunity extended to the defendant to be heard, nor the entry of a formal judgment. *Sacher* v. *United States*, 343 US 1, 72 S Ct 451, 96 L ed 717 (1952); *Ex Parte Terry, supra.*

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[1] [4 U.S.T. 1792, 1806; T.I.A.S. No. 2846.]

"In the case of *In re Manufacturers Trading Corp.*, 194 F2d 948, 956 (CA 6th Cir) (1952), a bankruptcy proceeding, the appellant, a partner in the bankrupt concern, was called as a witness before the master appointed by the court. Upon his refusal to give testimony, he was held in contempt by the district court and committed to the custody of the marshal until he should submit to examination. Relying, among others, on the authorities which we have earlier set forth, the court held that, although contempt proceedings are criminal in nature, and contempt orders are appealable, such proceedings are not criminal prosecutions. Thus, the normal constitutional safeguards are not available to a defendant, and he is not entitled to a trial.

"We take it as established, therefore, that a criminal contempt proceeding is not treated as a trial within the Federal system. Furthermore, we may presume that the Canadian rule is the same as that of the United States. Our reasoning is aptly illustrated by the following quotation from Wigmore, *Evidence*, 3d ed. § 2536:

'*Similarity of Foreign Law.* Whether a foreign rule of law is to be adopted as applicable to any part of the litigation before the Court, depends upon principles of substantive law. Supposing the foreign rule to control, then it is to be noted, with reference to ascertaining the terms of the foreign rule, that if the Court does not know it judicially (*post*, § 2573), it must be proved like any 'factum probandum' (*post*, § 2258), and that in aid of such proof a presumption may within certain limits be resorted to, as follows:

'If it is the law of a State possessing the English *common law as the foundation of its system*, in particular, *one of the United States*, it is generally said to be presumed to be the same as that of the forum. Even if it involves the existence of a statutory enactment altering the common law, the same rule is often applied (*i.e.* by presuming that the statutory alteration in the forum has been repeated in the other State by a similar process of evolution), though many Courts draw a distinction here and confine the presumption to the common or judicially-declared law. But if the *foreign State* is *not* one whose system is founded on the common law, the presumption will probably not be made, unless the principle involved is one of the law merchant common to civilized countries.'

Because Canada is a common law country, it follows that the accused was not 'tried' for his refusal to testify by the Canadian court, within the meaning of the Status of Forces Agreement.

" We come then to the question of the sufficiency of the evidence. May it fairly be said there is substantial evidence to justify the conclusion that the accused's conduct was wrongful and discreditable to the military service? We conclude not.

" The facts out of which the third specification arose were not in substantial dispute at trial. It was the theory of the Government that members of the Armed Forces, to preserve the good name thereof, have a positive duty to cooperate with the law enforcement officials of a friendly nation, in the exercise of their functions, and that failure to do so is a violation of the general article, in that it tends to discredit the military services. We need not quarrel with that general proposition, which accords with prior military law; *United States* v. *Coleman,* 6 BR—JC 35, but it cannot be extended to cover the situation where an accused merely seeks to test a substantial right which he believes, on reasonable grounds, that he is entitled to exercise."

(The Court then proceeded to state its reasons for this conclusion.)

[Report: 6 U.S.C.M.A. 330; 20 C.M.R. 46.]

Jurisdiction—Exemptions from—Foreign Armed Forces—Position of — Privileges of — United States Armed Forces in Newfoundland.

GALLANT *v.* WEST.

Canada, Supreme Court of Newfoundland. March 11, 1955.

(Walsh C.J. and Winter J.)

THE FACTS.—Under the terms of a Treaty an Air Base in Newfoundland was leased to the United States Government. Employed on the Base were large numbers of service men and civilians. The United States Military Authorities had exclusive possession and control within the Base, and had complete control over the comings and goings of their personnel whether within or without the Base. The Commandant of the Base issued a pamphlet which on p. 5 stated, *inter alia,* that the bedroom part of Gallant's Hotel was declared to be " off limits " to men on the Base. Gallant, the proprietor of the hotel, brought an action against the Commandant of the Base, alleging that the pamphlet contained a libel upon him because, he maintained, the offending passage in the pamphlet meant that the rooms of his hotel were not a proper place to which Air Force personnel or civilian employees should resort and that he, the plaintiff, was conducting an establishment of a disreputable nature. On November 2, 1954, Dunfield J. dismissed the plaintiff's claim, since the occasion of the issue of the pamphlet was privileged.[1] The plaintiff appealed.

Held: that the appeal must be dismissed. Where there passed between a commanding officer and personnel under his command a communication in which they had a common interest, the communication was privileged.

Walsh C.J. reviewed the facts, and continued: " One of the grounds of the defendant's application was that the words were not defamatory of the plaintiff. Respecting this the trial Judge said: ' In the present situation I think I should have to leave it to the jury, as I should not be able to say that the words were not capable of being understood in a libellous sense.' This question was discussed, but was not pressed on behalf of the defendant, at the hearing of the appeal. The defendant has not admitted that the words are reasonably capable of a defamatory meaning in their natural and ordinary sense or in the sense alleged in the statement of claim by way of innuendo. I, therefore, consider that the question is before this Court.

" There is evidence, including the evidence of a civilian, other than the plaintiff, who saw a copy of the booklet on the Base, that there are persons of ill-repute amongst those whose names appear on page 5. This evidence establishes special facts or circumstances which would lead reasonable persons to infer that the words meant that the plaintiff was conducting a disreputable establishment, particularly when the words include a recommendation to become familiar with the off-limits areas to prevent embarrassing entanglements. Indeed, in the natural and ordinary meaning of the words used in association with the names of a number of women, I consider that they have a libellous tendency and that any person to whom they are published, even without knowledge of the special facts or circumstances, may reasonably infer that there is an imputation discreditable to the plaintiff in the operation of his hotel.

" Off-limits sanctions are imposed in the case of establishments patronized by service personnel, when these establishments are conducted in a manner adversely affecting the health, morals or welfare of such personnel. Establishments may be placed off-limits for many reasons, some of which, as is the case in respect of Gallant's Hotel, may not carry any imputation whatever against the operators. In law, however, a statement, alleged to be defamatory, means what it naturally and reasonably means for those to whom it is published. [Walsh C.J. then referred to *Morris* v. *Sandess Universal Products*,[2] and continued:] The general public know that the power to declare establishments off-limits is frequently exercised to keep servicemen from places where immorality is permitted. It would surely not be unreasonable for a jury to reach the conclusion that the words conveyed that meaning in this case and I consider that the trial Judge was right in saying that, on this point, he should have to leave the case to the jury.

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[1] For a report of the earlier proceedings see *International Law Reports*, 1954, p. 114.

[2] [1954] 1 All E.R. 47.

" The trial Judge, however, withdrew the case from the jury on the ground that the occasion was privileged, that there was no excess of privilege and that malice had not been established. The precise ground of the decision is not clear, and it becomes necessary, in view of the arguments addressed to the Court on appeal, to review the facts and to apply to them the law in relation to privilege, malice and unnecessarily wide publication. [After reviewing the procedure whereby certain places were declared to be ' off-limits ', Walsh C.J. continued:] By s. 4 of the American Bases Act, 1941 (No. 12 of the 1941 Acts of the Newfoundland Commission of Government) the rights, power and authority conferred upon the United States by the Bases Agreement of 1941 are confirmed and Newfoundland laws are to be construed accordingly. By Term 18 of the Terms of Union between Canada and Newfoundland [[1949] (Can.), c. 1] this Act was continued and has not since been repealed. By cl. 5 (a) of Article VIII of the Agreement forming the Schedule to the Visiting Forces (North Atlantic Treaty) Act, R.S.C. 1952, s. 284, claims against members of a Force of a sending State arising out of acts or omissions in the performance of official duty may be adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own Armed Forces. Clause 5 (c) refers to adjudication by a competent tribunal of the receiving State. The coming into force of the Act under s. 28 is not proved. I do not, however, regard proof of its operation as important as I consider that the North Atlantic Treaty incorporates the existing law in respect of civil claims, and that the Forces of a friendly State in Canadian territory by consent for the public purposes of their State stand, in respect of civil claims against their Commanders for acts done in the performance of their duty, in the same position as Her Majesty's Canadian Forces in any part of Canada.

" The defence is that the booklet was issued in good faith and without malice and is privileged. The defence of absolute privilege is not raised by the pleadings and it is unnecessary for me to consider whether that defence would be available.

" The occasion is undoubtedly a privileged one, as claimed in the defence. It was the duty of the Commander to communicate to the servicemen in his command the regulations about off-limits areas and it was equally the duty of the servicemen to receive the communication and to obey the regulations. Counsel for the plaintiff does not seriously dispute that the occasion was one of qualified privilege insofar as the regulations were communicated to military personnel within the defendant's command, but argues that the privilege did not extend to publication in places on the Base where civilian workers could read the words complained of, or to publication outside the Base, and that, in any event, the privilege was destroyed by malice.

" The plaintiff says that he found a copy of the booklet on a table in the sitting and dining room of his hotel. His son-in-law, who is a civilian worker employed by the Airforce as a driver of one of the Airforce vehicles, says that he saw several copies of the booklet on benches and on the floor of the waiting room of the motor pool. This room is used by both service personnel and civilians driving service vehicles. The number of drivers is not in evidence but this witness says that about half of them are civilians. Employees of contractors carrying on construction and other projects on the base do not use this room.

" On the bulletin board of this waiting-room there had already been a poster on which appeared these off-limit establishments. There was one at Caribou Club and it is presumed that several others were exhibited on other bulletin boards about the Base to bring the regulations to the attention of the thousands of servicemen there. It is urged on behalf of the plaintiff that the Commander, as such, is responsible for the presence of these booklets in the waiting-room of the motor pool and on the table in Gallant's Hotel and that proof that they were placed there by him or on his instructions is unnecessary, as this will be presumed, and, alternatively, that it was his duty to use care not to permit these booklets to come to the attention of any but military personnel.

" It is clear from the oral evidence, as well as from the contents of the booklet, that it was intended for the visiting refuelling squadron only. The other service personnel on the Base were already aware of the off-limits regulations and the other matters in the booklet. The Provost Marshal says that all newly-arrived personnel are called into the theatre and are there completely briefed by him and by representatives of the Fire Department. He says that at this briefing they are told of off-limits places. He says, further, that the booklet was distributed to all members of the refuelling squadron but it is not clear that the distribution took place on the occasion of the briefing in the theatre. He considered that there was no reason for distribution to service personnel other than the visiting Force. He was unable to say how the booklet reached Gallant's Hotel ' except that it might have been carried off the Base by people to whom it was given '. The plaintiff says ' I do not know how it came to be there '. The Provost Marshal did not know how the copies came to be about the waiting-room of the motor pool but he said that this was possible, as the refuelling squadron had a number of motors in the pool. It will be noted that the evidence is that copies of the booklet were on benches and on the floor of the waiting-room in the motor pool and that there is no evidence of their having been put on the bulletin board there or that any of the booklets were at Caribou Club at all.

"In these circumstances was there publication by the defendant or with his authority at the motor pool or at Gallant's Hotel? I consider that there was not. Nor do I consider that the evidence warrants any presumption of publication by him, or any authority to publish, to civilians, or any presumption of authority to leave copies in a place where civilians may read them, or that there was any duty on him, the breach of which could create liability on his part for publication by personnel to whom copies were delivered.

"I hold, therefore, that, insofar as there was publication to service personnel, the occasion was privileged and that there is no evidence or presumption of publication outside service ranks. Indeed, whatever evidence there is respecting publication to civilians is to the contrary. There is no evidence of negligence on the part of the defendant or of anyone for whose acts or omissions he, as an officer of the United States Air Force, can be held responsible, and unintentional publication due to no such negligence is not actionable against him.

"On the questions of privilege and the extent of publication, therefore, the trial Judge was, in my view, right in withdrawing the case from the jury.

"The defendant argues further that there was evidence of malice which would destroy the privilege and that, on this ground, the case should have been left to the jury. The malice that destroys privilege is express malice and the burden of proving express malice rests upon the plaintiff. For this purpose it is necessary to show that the defendant used the occasion for some indirect or wrong motive, that is, for a motive other than a sense of duty or, in other words, that the defendant did not use the occasion in accordance with the purpose for which the occasion arose or existed. The trial Judge says: 'There is not a shred of evidence of express malice on the part of the military authorities.'

"While there is no direct evidence of malice, the defendant says that malice should be inferred from (a) too wide publication, (b) failure to take care that the booklets reached only those who were concerned with the regulations, and (c) failure to afford the plaintiff the opportunity of correcting the condition that the Disciplinary Board regarded as objectionable.

"I have already considered the evidence in relation to the extent of publication and pointed out that there was no publication by the defendant, or for which he could be held responsible, to others than service personnel. Nor is there evidence of failure to take care in distribution to those for whom the booklet was intended. The defendant cannot be held responsible for carelessness by service personnel after distribution to them—a matter quite distinct from carelessness in making the distribution.

"The United States Northeast Command Regulations provide against arbitrary action in imposing 'Off-Limits' sanctions. These Regulations contain the following:

> 'It is essential that boards do not act arbitrarily. Unless emergency conditions inimical to the welfare of military personnel exists, proprietors of establishments considered for "Off-Limits" action will be given appropriate warning, in writing, and extended the opportunity to present their cases before the board prior to such action being taken.'

"Suggested procedures to be adopted by the Board make provision for warning, and giving an opportunity to correct unsatisfactory conditions, before an establishment is placed 'Off-Limits'.

"The plaintiff says that he did not receive any warning and was not given an opportunity to appear before the Board and that he did not receive any notification of the declaration that his hotel rooms were off-limits. The Provost Marshal has been unable to find any record of a communication to the plaintiff. He says, however, that the procedure was usual but that there was a different system of filing at the Base in 1951 and 1952. The plaintiff admits that he had heard, before issue of the booklet, that his hotel rooms were off-limits. It does not appear that he made any protest or application for reconsideration. If he had made an application to this Court it would probably have been held that civil Courts have no jurisdiction to entertain the application. In *R.* v. *Army Council, Ex p. Ravenscroft*, [1917] 2 K.B. 504, it was held, on the application of a person subject to military law, that the Court will not intervene in matters relating to military law prescribing rules for the guidance of officers. The plaintiff in this case is a civilian, but I am unable to see any right on his part to require notification. Nor can I see what useful purpose could have been served by notifying him of a hearing by the Board, as there was no step that he could take short of refusing to receive servicemen as guests. I do not consider that failure of the Board to follow the procedure laid down by the regulations amounts to evidence sufficient, without other evidence, to justify leaving a case to a jury. Again, assuming that the Board acted through indirect motives on the part of its members, the order, which is the order of the Commander-in-Chief or the Base Commander at that time, would nonetheless be effective until rescinded, and it would be the duty of the defendant to convey it to those under his command. Express malice must be that of the defendant or an agent of the defendant, and malice on the part of members of the Board or a former Commander cannot be attributed to him.

"I consider, therefore, that there was no evidence of malice, that would destroy the privilege attaching to the communication by the defendant to the personnel under his command, and that the case was properly withdrawn from the jury."

Winter J. concurred.

[Report: [1955] 4 D.L.R. 209.]

Jurisdiction—Exemptions from—Foreign Armed Forces—Leased Territory—Naval Bases in Bermuda.

See p. 154 (*Hans* v. *The Queen*).

(e) MISCELLANEOUS

Jurisdiction—Territorial—Exemptions from—International Organizations—North Atlantic Treaty Organization.

See p. 756 (*Branno* v. *Ministry of War*).

Jurisdiction—Territorial—Exemptions from—International Organizations—Headquarters Established Under North Atlantic Treaty, 1949.

See p. 758 (*Mazzanti* v. *H.A.F.S.E. and Ministry of Defence*).

Jurisdiction—Territorial—Exemptions from—Sovereign Order of Malta.

See p. 1 (*Sovereign Order of Malta* v. *Soc. An. Commerciale*).

C—HIGH SEAS

I.—Conception of the High Seas and of the Freedom of the Sea

High Seas—Claim to Area of High Seas—Maori Trusteeship over Area of High Seas—Jurisdiction of Maori Land Court.

Re THE NGAPUHI TRIBE.

New Zealand, North Auckland Maori Land Court. March 22, 1955.

(Clark J.)

THE FACTS.—The Ngapuhi tribe, whose territory borders the coast of New Zealand, claimed that that part of the Pacific Ocean which surrounds New Zealand should be vested in Maori trusteeship. The basis of this claim was that such trusteeship was required out of respect to the sea god Moana, who had allowed New Zealand to rise out of the sea.

Held: that the claim must be dismissed. The maritime jurisdiction of the Maori Land Court was limited to disputes regarding Maori fishing rights.

[Report: *New Zealand Law Journal*, vol. 31 (1955), p. 204.]

II.—Jurisdiction on the High Seas

i.—For Ensuring the Safety of Traffic. Collisions. Salvage. Pollution of the High Seas

Jurisdiction on the High Seas—Assistance and Salvage—Assistance Rendered by Warship—Whether Flag State Entitled to Salvage — Article 14 of Brussels Convention on Assistance and Salvage at Sea, 1910.

FRENCH STATE *v.* SCHJELDERUP.

France, Court of Appeal of Algiers. July 19, 1955.

THE FACTS.—A French warship rendered assistance to the respondent's vessel. The claim of the French Government to salvage was rejected by the Court of first instance on the ground that, by virtue of Article 14 of the Brussels Convention of 1910 for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea, salvage was not due where assistance had been rendered by warships or public vessels.[1] The French Government appealed and contended that the Court of first instance had misinterpreted Article 14 of the Convention.

Held: that the appeal must be allowed; Article 14 of the Convention did not preclude a claim to salvage where assistance had been rendered by a warship.

The Court said: " Only an unduly extensive interpretation of Article 14 of the Brussels Convention would permit the conclusion that warships are precluded from claiming salvage. This Article merely provides that the Convention does not apply to warships and to State-owned vessels exclusively destined for the public service. If interpreted literally, this provision has only negative scope. It simply means that in rendering assistance a State is not subject to the provisions of the Convention of September 23, 1910. This becomes even more obvious if one considers that the Brussels Convention is a convention of commercial maritime law, *i.e.*, private law, to which, by definition, State-owned vessels, and in particular warships, are not subject. It follows that in interpreting the spirit of the Brussels Convention the conclusion is inescapable that the Convention did not intend to lay down any prohibition in the international sphere against warships claiming salvage from foreign vessels in suitable cases, provided that they comply with the rules of municipal law binding upon them. . . . In the absence of rules of international law governing the matter, municipal law must apply. In view of the fact that French law does not preclude the

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[1] Article 14 of the Convention is in the following terms: " The present Convention does not apply to warships and public vessels exclusively destined for the public service."

French Navy from signing a contract of 'no cure no pay', the action is maintainable."

(The Court then dealt with the facts of the case and awarded a sum of 3,000,000 francs to the French Government.)

[Report: *Gazette du Palais*, September 28–29, 1955.]

ii.—For Enforcement of International Conventions.
Slave Trade

Jurisdiction on the High Seas—Exercise of National Jurisdiction on the High Seas Covering the Continental Shelf—Enforcement of International Convention for Protection of Fisheries and Other Natural Resources—Declaration of Maritime Zone by Peru, Chile and Ecuador, 1952—The Law of Peru.

THE *OLYMPIC VICTOR* AND OTHER VESSELS.

Peru, Judgment of the Port Officer of Paita. November 26, 1954.

THE FACTS (as stated in the Judgment[1]).—"On information received by the Government that a whaling fleet under the orders of Captain Wilhelm Reichert of the *Olympic Challenger* [which appeared to have been the mother ship] was whaling in Peruvian territorial waters without first having obtained permission, and killing whales in breach of the international and national regulations made for the preservation of these marine resources, ships of the Peruvian Navy intercepted and arrested the two whalers *Olympic Victor* and *Olympic Lightning*; nine other whalers made off, and the *Olympic Fighter*, *Olympic Conqueror* and *Olympic Challenger* were arrested later. These facts have been fully proved by the report and maps, exhibited to the Court, giving the positions and sightings and movements of the ships of the Peruvian Navy." The other relevant facts, as ascertained by the Port Officer, are stated in the Judgment below.

Held: (1) that "Captains Sofus Sauger, Willi Schlatermunel, Juel Eugbretsen, Bjarne Anderson and Wilhelm Reichert, masters respectively of the ships *Olympic Victor*, *Olympic Lightning*, *Olympic Fighter*, *Olympic Conqueror* and *Olympic Challenger*, and the owners or proprietors of the arrested ships, whose agents at law the said masters are, shall pay jointly and in common a fine of three million dollars or its equivalent in the national currency, within five days reckoned from the date of notification of this judgment, into the Deposit Accounts Fund, Revenue Department, Lima."

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[1] The *Olympic Victor* and the four other vessels were whaling vessels owned by A. S. Onassis and flying the Panamanian flag. In November 1954 they were seized by Peruvian naval and air units. Two were captured 160 miles off the Peruvian coast, two were attacked 300 miles off the coast, and the fifth, a factory vessel, was attacked 364 miles off the coast. Panama (whose flag the vessels flew), the United States of America and the United Kingdom protested against the seizure and against the Judgment reported above.

(2) "The ships *Olympic Victor, Olympic Lightning, Olympic Fighter, Olympic Conqueror* and *Olympic Challenger* shall remain impounded as security for the payment of the aforesaid, and shall be released on its payment in full."

The Court said: "1. In this case none of the masters responsible for the offence the subject of these proceedings asked permission of the Supreme Government to hunt either in coastal or in deep waters.

2. "The total company of all the arrested ships was 354 men, of whom 348 are German, 2 Norwegian, 1 British, 1 Chilean, 1 Canadian and 1 Greek. The crew list of the *Olympic Challenger* contains the name of Mr. Antonio Usaza in the post of *Inspector, nationality Panamanian.* None of the captains was able to exhibit the documents required to be carried by the Port Authorities Regulations and the ordinary law: such as the ship's log, engine-room log or charts, nor the whaling register or whaling schedule. This fact constitutes the strongest evidence of the unlawfulness of the operations which they were carrying out. Captain Wilhelm Reichert testified on page 5 that he threw those books into the sea in the belief that Panama and Peru were at war. This statement was improbable, not only because of its intrinsic extravagance but also because his ship was equipped with radio and other means of communication through which he was in constant touch with the stations of his superiors. This ingenuous excuse must therefore be rejected.

"3. It has been proved that the position of 11 whalers—that is, practically the whole whaling fleet—was ascertained by the ships of the Peruvian Navy, which detected and sighted them in a position exactly 110 miles from the Peruvian coast. The ships *Olympic Victor* and *Olympic Lightning* were captured at a distance of exactly 126 miles from the Peruvian coast, and the ships *Olympic Fighter, Olympic Conqueror* and *Olympic Challenger* were intercepted later when they took to flight.

"4. From the reports of the commanding officers of the ships of the squadron and from the declarations put in evidence, it appears that the whalers were first ordered to stop but did not do so until the order was supported by the measures of enforcement preliminary to the methods usually employed in these cases. These warning measures caused neither damage to the ships nor casualties among their crews.

"5. It has also been proved that the arrested ships and those which made off had operated within Peruvian territorial waters and had taken between 2,500 and 3,000 whales. This was admitted in the depositions put in evidence, starting at page 3. It was necessary for the required manoeuvre that the *Olympic Challenger* should be close to the catchers. This was corroborated by the depositions of the members of the crew. The fact that the *Olympic Challenger* was captured outside the 200-mile limit does not weaken that evidence in any way, for those depositions show that when the mother-ship received word of the capture of the first two of the ships just mentioned she proceeded continuously for 24 hours at high speed with special precautions, so that she was able to leave the zone and reach the point from which she was obliged to return and be impounded in this port. The *Olympic Challenger* was the ship which directed the catchers and gave them their bearings, and received and processed the catch taken within the 200-mile limit: about 6,800 tons of whale oil was found in her tanks.

"6. Hunting and fishing in territorial waters is permitted only to Peruvian nationals and to aliens domiciled in the Republic, by Article 731 of the *Port Authorities Regulations*. Foreign vessels are not permitted to fish in territorial waters. Whaling and the commercial utilization of its products are industries which may be carried on by any citizen of the nation or by any alien domiciled in Peru subject to the provisions of the existing statutes and regulations. Individuals and commercial undertakings intending to engage in these industries are required to apply to the Supreme Government for a license to do so; and for whaling it is necessary to apply for a special concession under Articles 740, 742 and 743 of the *Port Authorities and National Merchant Marine Regulations*. The captains and agents of the arrested ships had acted in full knowledge of the declaration of the maritime zone published by Peru, Chile and Ecuador in 1952, but none of them had obtained such a licence or special concession.

"7. The Supreme Decree of 1 August 1947, considering that it is necessary that the State protect, maintain and establish a control of fisheries and other natural resources found in the continental waters which cover the submarine shelf and the adjacent continental seas in order that these resources, which are so essential to our national life, may continue to be exploited now and in the future in such a way as to cause no detriment to the country's economy or to its food production, lays down that national sovereignty and jurisdiction are to be extended over the sea adjoining the shores of the national territory, whatever its depth and to the extent necessary to preserve, protect, maintain and utilize natural resources and wealth of any kind which may be found in or below those waters. These provisions are in harmony with those of the Declaration of the Maritime Zone signed by Peru, Chile and Ecuador on 18 August 1952, to ensure the conservation and protection of their natural resources and to regulate the use thereof to the greatest possible advantage of each country; hence it is likewise the duty of each Government to prevent the said resources from being used outside the area of its jurisdiction so as to endanger their existence, integrity and conservation to the prejudice of peoples so situated geographically that their seas are irreplaceable sources of essential economic materials.

" These principles are defended by the *Port Authorities Regulations*, which require the issue of a special concession or license. It follows that the masters and crews of the arrested ships not only contravened the domestic law on whaling, but also acted to the prejudice of the national interests and wealth by engaging in a clandestine and unlawful form of whaling, which they attempted to conceal, encroaching on Peruvian jurisdictional waters without license from the authorities, and throwing overboard the documents concerning not only their location or status at sea, but also the quantity, species and age of the whales killed. It is also a matter of common knowledge and of international repute that the arrested ships belong to a person associated with an industrial organization which disobeys and contravenes every international rule made for the defence of the species which he was hunting.

" 8. The principle referred to in the preceding paragraph is stated expressly and in all the necessary detail in Article 764 of the *Port Authorities Regulations*, already cited more than once, which lay down that any person or undertaking intending to fish or hunt either in coastal or in deep waters shall be required to apply to the Supreme Government for a license. This provision, in both the letter and the spirit, applies to individuals and bodies corporate, national and alien, whether domiciled in Peru or not, operating within or outside territorial waters; for the expression ' deep water ' hunting and fishing is expressly defined in Article 735 of the *Regulations* as hunting or fishing carried on outside the territorial waters of the Republic. Unquestionably this requirement of a license from the Supreme Government, which in the present case was not complied with, is the elementary or fundamental measure of protection which States are bound and entitled to give to the marine fauna and biological complex in the waters contiguous to their territories for the purpose of averting the extermination and disappearance of given species as a result of intensive clandestine operations which may cause irreparable harm.

" 9. By Article 555 of the *Port Authorities Regulations* the master is the commanding officer of a merchant ship and is personally responsible for the navigation and control of the ship, her crew and her cargo, and is the representative and confidential agent of the owner. For that reason these proceedings have been brought against the masters of the ships *Olympic Victor*, *Olympic Lightning*, *Olympic Fighter*, *Olympic Conqueror* and *Olympic Challenger*, because they personally conduct the venture of hunting and also because they are liable to make restitution for the damage and to suffer the penalty which is awarded to them jointly with the shipowners or proprietors, if these avail themselves of their lawful rights during these proceedings or any other proceedings which may be had in consequence thereof.

" 10. In this case not only has a breach of the *Port Authorities Regulations* been committed, but there has also been evasion of payment of dues and the provocative attitude of the masters and of the persons who have instructed them to trespass in territorial waters. They were debarred from entering these because it was common knowledge that they had had notice of the prohibition by Peru of encroachment on her waters. Although these circumstances have not been a subject of examination in these proceedings, they constitute circumstances aggravating the offence charged.

" 11. By Article 33 port officers are empowered to punish offences against the *Regulations* by the penalties and in the manner set forth in that Article. Article 34 lays down that any offence for which the *Regulations* do not expressly provide a penalty shall render the offender liable to a fine proportional to the gravity of the offence.

" 12. The act charged is an offence against the *Regulations*, punishable under the two Articles just cited by a penalty appropriate to the gravity of the offence itself and also to the numerous attendant circumstances, including the use and deployment of units of the Navy and Air Force to put down the offence."

[Report: U.S. Naval War College, *International Law Situation and Documents*, 1956, pp. 290–294.]

NOTE.—This Judgment has been included in the present volume in pursuance of the editorial policy of reporting judicial, or analogous, decisions of interest for international law. As stated in n. 1 on p. 278 a number of maritime States have challenged the validity, in international law, of the Decree on which the above Judgment is based.

iv.—The Law Governing the Flag. Ship's Papers

Jurisdiction—On the High Seas—Merchant Vessels—As Determined by Flag—Law Concerning Internal Order of Vessel—Discharge of Seaman—The Bustamante Code—Consular Jurisdiction.

MCQUADE *v.* COMPANIA DE VAPORES SAN ANTONIO, S.A., AND THE S.S. *EURYSTHEUS*.

United States, District Court, Southern District, New York.

February 1, 1955.

THE FACTS.—This was an action on behalf of a Greek national against a ship registered in Honduras and against her owners, a corporation incorporated under the laws of Panama, for wages, vacation pay and transportation expenses from a port in Persia at which he had been discharged to his port of engagement. The decedent on whose behalf the action was brought had signed on the vessel in the United States. The libelant contended that the discharge was in violation of the agreement with the seaman. The libelant sued under the law of Panama, the domicile of the shipowner. The respondent maintained that the law of Honduras, rather than that of Panama, was applicable, and moved that the Court decline jurisdiction on the ground that the matter was one solely within the jurisdiction of a Honduran consular officer pursuant to Article XXII of the Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras, signed at Tegucigalpa on December 7, 1927 (45 Stat. 2618, 2634, T.S. No. 764). On motion to dismiss the libel,

Held: that the libel must be dismissed. Under both the Bustamante Code and private international law, the law applicable to the internal order of a vessel, including seamen's contracts, was the law of the flag. The claim asserted on behalf of the decedent was accordingly governed by the law of Honduras, the state of registry of the vessel on which he had shipped. Under the Treaty between the United States and Honduras, Honduran jurisdiction rested in a consular officer of that State.

The Court said: "A treaty[1] between Honduras and the United States provides that:

> 'A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country . . . [and] shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.'

" In an affidavit of Juan F. Funes, Consul General of Honduras in New York, which has been submitted, he states that his office is prepared to hear libelant's claim and to pass upon the merits so that a proper determination may be made under the laws of Honduras.

" Panama and Honduras are both parties to a multilateral treaty, being a Code of Private International Law, approved in 1928 by the Sixth International American Conference. The treaty contains the following provisions:

> 'Article 274. The Nationality of ships is proved by the navigation license and the certificate of registration and has the flag as an apparent distinctive symbol. '
>
> ' Article 279. The powers and obligations of the master and the liability of the proprietors and ship's husbands for their acts are also subject to the law of the flag. '
>
> ' Article 281. The obligations of the officers and seamen and the internal order of the vessel are subject to the law of the flag.' *League of Nations Treaty Series*, 246, 326, vol. 86, 1929.

"According to the plain terms of this treaty the appropriate law applicable to the internal order of the vessel is the law of the flag.

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[1] Treaty of 1928, 45 Statutes at Large 2618, Article XXII, and see Article X.

Seamen's contracts are treated as matters of internal order or economy. See *Taylor* v. *Atlantic Maritime Co.*, 2 Cir., 179 F.2d 597.

" In the absence of treaty the result that the law of the flag controls seems to be called for under the conflict of laws principles recognized in this country as applied to maritime causes.

" In *Lauritzen* v. *Larsen*, 345 U.S. 571, 585, 73 S.Ct. 921, 929, 97 L.Ed. 1254 [*International Law Reports*, 1953, p. 197], Mr. Justice Jackson, writing for a majority of the court, stated:

> ' Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag.'

And the court listed the factors which courts have taken into consideration in determining the applicable law. Among these were ' Law of the Flag ' and 'Allegiance of the Defendant Shipowner.' In respect to the former the court held that the weight given to the ensign overbears most other connecting events in determining applicable law. At page 585 of 345 U.S., at page 929 of 73 S.Ct. This is in accord with the view that where the domicile of the shipowner and the country of the flag differ it is the latter that controls. II Wheaton, *International Law*, 6 ed., 694.

" Furthermore, since a State may grant its nationality to a merchant ship and the flag evidences nationality, then authority given by a State for a ship to fly its flag ought to be construed as constituting a grant of its nationality by the State to the ship. But States are permitted under international law to authorize vessels which are the property of foreigners to fly its flag. 1 Oppenheim, *International Law*, 3 ed., 422, § 261. It would seem to follow that a State, under international law, may be permitted to grant its nationality to a ship owned by foreigners and is considered to have done so when it authorizes the use of its maritime flag.

" In any event the conflict of laws rule in maritime cases is:

> ' In all matters relating to " the internal economy or discipline " of a ship " the law of the flag " controls.' *Kyriakos* v. *Goulandris*, 2 Cir., 151 F.2d 132, 139.

" To the same effect are: *Ozanic* v. *United States*, 2 Cir., 165 F.2d 738,[1] and cases cited on page 744; Dicey, *Conflict of Laws*, 3 ed., Rule 165(s) and American Law Institute, *Conflict of Laws*, § 45.

" *Gerradin* v. *United Fruit Company*, 2 Cir., 60 F.2d 927, and *Zielinski* v. *Empresa Hondurena de Vapores*, D.C., 113 F.Supp. 93, are not contrary. In those cases the courts of our country disregarded the foreign registration in order ' to enforce against American shipowners the obligations which our law places upon them.' *Lauritzen* v. *Larsen*, *supra*, 345 U.S. 587, 73 S.Ct. 931. No similar reason is shown here for disregarding the ship's registration and flag.

[[1] *Annual Digest*, 1949, Case No. 50.]

"*Fisher* v. *Fisher*, 250 N.Y. 313, 165 N.E. 460, 61 A.L.R. 1523; *International Navigation Co.* v. *Lindstrom*, 2 Cir., 123 F. 475, and *The Havana*, 2 Cir., 64 F. 496, are consistent with the law of the flag rule. 'Where states, not nations, are involved the law of the domicile of the vessel is equivalent to the law of the flag . . . .' *Hickman* v. *Taylor*, D.C., 75 F.Supp. 528, 533.

"Libelant contends that respondent is bound by the laws of Panama in personam according to ordinary principles of contract and corporate law. But the cases relied on, *Skiriotes* v. *Florida*, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193, *The Hamilton*, 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed. 264, are not in point. As was stated in the *Skiriotes* case, 313 U.S. at page 72, 61 S.Ct. at page 927, '. . . no question of international law . . . is presented.' Those cases dealt with the respective jurisdictions of state and federal governments. Moreover, this contention would seem to be expressly answered to the contrary by the terms of the treaty cited above making the liability of the ship's owner subject to the law of the flag. Article 279, Code of Private International Law, *League of Nations Treaty Series*, *supra*, page 328.

"This is not a case calling for the application of American law. Signing articles in an American port does not bring American law into the case. *Lauritzen* v. *Larsen*, *supra*, 345 U.S. 588–589, 73 S.Ct. 931–932; *Sonnesen* v. *Panama Transport Co.*, 298 N.Y. 262, 267, 82 N.E.2d 569. Also the general maritime law as accepted in this country cannot apply. A mariner's contract, unlike a salvage or a tort claim, is not a matter of general maritime law, but is 'a creature of the particular institutions of the country, to be applied and construed and explained by its own particular rules.' *The Belgenland*, 114 U.S. 355, 362 and 367, 5 S.Ct. 860, 863, 29 L.Ed. 152.

"If this suit is governed by the law of Panama it would seem that it is barred, as section 623 of the Panama Labor Law provides that a suit of this character must be brought within one year. *Bournias* v. *Atlantic Maritime Co.*, D.C., 117 F.Supp. 864, now on appeal to the Court of Appeals, 2 Cir., 220 F.2d 152. The alleged wrongful discharge occurred in November, 1949, and suit was not instituted until February, 1954.

"I think the case at bar is not governed by the law of Panama, but is by the law of Honduras, and as libelant has alleged and seeks recovery solely under the law of Panama, and offered no proof of the law of Honduras, I am unable to determine the respective rights of the parties. I may not assume that the law of Honduras is the same as that of the United States. *Ozanic* v. *United States*, *supra*, 165 F.2d 744; *Sonnesen* v. *Panama Transport Co.*, *supra*, 298 N.Y. 267, 82 N.E.2d 570.

[Report: 131 F. Supp. 365.]

NOTE.—In *Nakken* v. *Fearnley & Eger*, 137 F.Supp. 288 (S.D.N.Y. 1955), a Norwegian seaman had in New York signed articles, to be governed by Norwegian law, for service aboard a Norwegian vessel owned by citizens of Norway. He was injured aboard the vessel while it was docked in New York. It was *held* that the law of the United States should not be applied and that jurisdiction over the case should be declined.

vi.—Enforcement of Hovering, Revenue and Other Municipal Laws

Jurisdiction—Enforcement of Revenue Laws—Whether Enforceable by Action in Courts of Another State—Whether Rule Different in the British Commonwealth of Nations—Tax Claim by Indian Government against Liquidator of English Company—Whether Actionable in English Courts—Whether Alternatively Recoverable as " Liability " of Company in Voluntary Liquidation.

GOVERNMENT OF INDIA, MINISTRY OF FINANCE (REVENUE DIVISION) *v.* TAYLOR AND ANOTHER.

England, House of Lords. January 20, 1955.

(Viscount Simonds, Lords Morton, Reid, Keith, and Somervell.)

THE FACTS (as stated by Viscount Simonds).—" The respondents to this appeal were the liquidators in the voluntary winding up of an English company, the Delhi Electric Supply & Traction Co. Ltd., which was in the year 1906 incorporated for the purpose of operating an electricity supply undertaking and tramway undertakings under a licence and order granted by the Municipality of Delhi. The appellant was the Government of India, a sovereign independent republic which acknowledged Her Majesty as head of the British Commonwealth. The question for decision was whether Vaisey J. and the Court of Appeal were right in rejecting the appellant's claim to prove in the liquidation of the company in respect of an amount of income tax due from the company to the appellant under Indian income tax law.

" The company having carried on its undertakings in India until the year 1947, in that year sold the whole of them to the Government of India as from March 2, 1947, for the sum of Rs.82,11,580. The greater part of that sum was paid to the company in India on March 1, 1947, and was remitted to England a few days later. The balance was paid to the company in India in September, 1948, and remitted to England shortly afterwards.

" On April 18, 1947, the Indian Income Tax and Excess Profits Tax (Amendment) Act, 1947, was passed, and by section 6 thereof section 12B was inserted in the Indian Income Tax Act, 1922. The opening words of section 12B were as follows:

> ' The tax shall be payable by an assessee under the head " Capital gains " in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after March 31, 1946; and such profits and gains shall be deemed to be income of the previous year in which the sale, exchange or transfer took place.'

This amendment was deemed by section 1 (2) of the Act of 1947 to have come into force on March 31, 1947.

" On May 25, 1949, the company went into voluntary liquidation by special resolution and the respondent Taylor and one Lovering were appointed joint liquidators. They had previously as directors of the company made a statutory declaration as to the solvency of the company and later in their statement as to the position of the liquidation of the company they referred to the liability for special taxation in India. They also in March 1951 inserted a notice in the Gazette of India calling upon all creditors to prove their debts or claims and acceded to a request by the Commissioner of Income Tax at Delhi to stay the liquidation proceedings to enable his Department to prove their claim.

" On October 24, 1951, the Commissioner of Income Tax served a demand notice under section 29 of the Indian Income Tax Act, 1922, for the year 1948–49 calling on the company to pay Rs.16,54,945.11.0 of tax, which consisted mainly of a sum of Rs.15,62,817.3.0 representing tax on the surplus on the sale of the company's undertakings. Various steps were taken in India, appeals against the assessment, payment of a sum on account out of assets which were still in India, re-assessment of the amounts claimed to be due under the head ' capital gains ' and further demands which culminated in a claim upon the surviving liquidator Taylor in February 1953 (Lovering having in the meantime died), for sums of Rs.15,62,817.3.0 and Rs.13,001.10.0. The quantum of those assessments was still a matter of appeal in India, but that there was some liability in India in respect of tax for capital gains was beyond doubt, and there appeared to be also an ascertained liability in respect of ordinary income tax which was not under appeal.

" It was in those circumstances that the respondent Taylor in April and May 1953 rejected the appellant's claims, stating that no part of the company's assets (all of which were then in England) could properly be applied in payment of any claim for taxes by a foreign Government. Thereupon the appellant applied to the High Court in England for an order reversing the rejection of its claim and on July 30, 1953 (the respondent Hume having in the meantime been appointed joint liquidator with the respondent Taylor), Vaisey J. made an order refusing the appellant's application. From that order the appellant appealed to the Court of Appeal

(Evershed M.R., Jenkins and Morris L.JJ.) and that court unanimously dismissed the appeal."

It was argued for the appellants that the alleged rule that the courts could be used to enforce penalties or collect taxes by a foreign State, extended only to penalties imposed by a foreign State for a breach of its laws, and did not extend to collection of taxes analogous to those imposed by the British legislature; further, that the claim was in any case a " liability " within the meaning of s. 302 of the Companies Act, 1948, which the liquidators were bound by that enactment to discharge.

Held: (i) that claims on behalf of a foreign State to recover taxes due under its laws were unenforceable in English courts and there was no valid distinction for this purpose between foreign States and States of the British Commonwealth; (ii) (*per* Viscount Simonds and Lords Morton and Reid): that " liabilities " in s. 302 of the Companies Act, 1948, did not include claims unenforceable in the English courts, and (*per* Lords Keith and Somervell) that although the liability to tax in India might be a " liability " within s. 302 of the Act, it was not enforceable in relation to assets in England in a liquidation in England.

Viscount Simonds, after stating the facts and the issues for decision, continued: " My Lords, I will admit that I was greatly surprised to hear it suggested that the courts of this country would and should entertain a suit by a foreign State to recover a tax. For at any time since I have had any acquaintance with the law I should have said as Rowlatt J. said in *The King of the Hellenes* v. *Brostrom* (1923), 16 Ll.L.Rep. 190, 193[1]:

> 'It is perfectly elementary that a foreign government cannot come here—nor will the courts of other countries allow our Government to go there—and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to in the country to which he belongs.'

That was in 1923. In 1928 Tomlin J. in *In re Visser, Queen of Holland* v. *Drukker* [1928] Ch. 877, 884[2], after referring to the case of *Sydney Municipal Council* v. *Bull* [1909] 1 K.B. 7, in which the same proposition had been unequivocably stated by Grantham J., and saying that he was bound to follow it, added:

> ' My own opinion is that there is a well-recognized rule, which has been enforced for at least 200 years or thereabouts, under which these courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States; and this is one of those actions which these courts will not entertain.'

My Lords, it is not seemly to weigh the pronouncements of living judges, but it is, I think, permissible to say that the opinions of few, if any, judges of the past command greater respect than those of Lord Tomlin and Rowlatt J., and what appeared to one of them to be a ‘ well-recognized rule ’ and to the other ‘ elementary ’ law cannot easily be displaced.

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[1] [*Annual Digest*, 1923–1924, p. 148.]

[2] [*Ibid.*, 1927–1928, Case No. 18.]

“ My Lords, the history and origin of the rule, if it be a rule, are not easy to ascertain and there is on the whole remarkably little authority upon the subject. I am inclined to agree with the Court of Appeal that the early cases of *Attorney-General* v. *Lutwydge* (1729) Bunb. 280 and *Boucher* v. *Lawson,* (1735–6) Cunning. 144, to which some reference was made, do not give much help. It is otherwise when we advance a few years to the age of Lord Mansfield C.J. That great judge in a series of cases repeated the formula ‘ For no country ever takes notice of the revenue laws of another.’ See *Planché* v. *Fletcher* (1779) 1 Doug. 251, 253, *Holman* v. *Johnson* (1775) 1 Cowp. 341, 343 and *Lever* v. *Fletcher* (1780) Unrep. The last-named case I find only in a textbook, Park on *Marine Insurance,* which in its day ran through many editions. I am myself referring to the 8th edition, vol. I, pp. 506–7. The author James Allan Park, himself a distinguished judge of the Common Pleas, states the rule as I have cited it from *Planché* v. *Fletcher* (1 Doug. 251) and then proceeds:

> ‘ In another case, a short time afterwards, at Guildhall, Lord Mansfield, in his charge to the jury, advanced the same doctrine which had been established by the whole court in the preceding case.’

He then refers to *Lever* v. *Fletcher*. It is true that Lord Mansfield was not directly concerned with the case of a foreign power suing in an English court to recover revenue, but with the validity of a contract made abroad where the seller was not implicated in smuggling operations which contravened the revenue laws of this country or with the rights of insurers where a ship which had cleared for Ostend went direct to Nantes thereby affecting the customs dues payable abroad. But in each case he could not have reached his conclusion but for the fact that he applied the rule that no country ever takes notice of the revenue laws of another. Where Lord Mansfield led, Lord Kenyon C.J. followed, though he was not a judge who followed blindly. I agree with the learned Master of the Rolls, [1954] Ch. 131, 147–9[1], that it is clear from such cases as *Clugas* v. *Penaluna* (1791) 4 Term Rep. 466, *Bernard* v. *Reed* (1794) 1 Esp. 91 and *Waymell* v. *Reed* (1794) 5 Term Rep. 599, that Lord Kenyon accepted without qualification the broad rule which Lord Mansfield had formulated. I pass over a number of cases where the question was as to the admissibility of documents made in a foreign country and not stamped according to the law of that country, pausing only to remind your Lordships that in *James* v. *Catherwood* (1823) 3 Dow. & Ry.K.B. 190, 191 Lord Tenterden (then Abbott C.J.) said:

[[1] *In re Delhi Electric Supply and Traction Co. Ld.* (*International Law Reports*, 1953, p. 7).]

'This point is too plain for argument. It has been settled, or at least considered as settled, ever since the time of Lord Hardwicke that in a British court we cannot take notice of the revenue laws of a foreign State.'

The learned Chief Justice went on to apply the rule in a manner that may not have been justified but that does not detract from the importance of his unqualified assertion of it.

" Here, my Lords, is a formidable array of authority. It is possible that the words ' take notice of ' might, if applied without discrimination, lead to too wide an application of the rule; for as Lord Tomlin pointed out in *In re Visser* [1928] Ch. 877, 883 there may be cases in which our courts, although they do not enforce foreign revenue law, are bound to recognize some of the consequences of that law, and for this reason the terms of Lord Mansfield's proposition have been criticized. But in its narrower interpretation it has not been challenged except in the three cases mentioned earlier in this opinion and in them it was unequivocally affirmed.

" Nor does the matter rest there. For Sir Andrew Clark, who argued the case for the appellant with equal vigour and candour, admitted that he knew of no case in which a foreign State had recovered taxes by suit in this country nor of any case in any foreign country in which the government of this country had done so. And in this connexion it is worthy of note that, as my noble and learned friend, Lord Somervell of Harrow, has by his independent researches discovered and will presently tell your Lordships, this same rule is stated in at least one French textbook of high authority.

" The matter is carried one step further by the fact that the rule appears to have been recognized by Parliament. For I see no other reason for the exclusion from the advantages of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, of a judgment for ' a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty ' (section 1 (2) (b)), except that it was regarded as axiomatic that the courts of one country do not have regard to the revenue laws of another and therefore will not allow judgments for foreign taxes to be enforced.

" It may well be asked, then, upon what grounds this appeal is founded. I think that counsel relied upon two main grounds, first that Lord Mansfield's proposition, which I have more than once quoted, extended to revenue law a doctrine properly applicable only to penal law and (I think it must be faced) that Lord Mansfield was wrong in so extending it and everyone who has since followed him was wrong: and secondly that, whatever may have been the rule in the past, there ought to be and is a trend towards a mitigation of the rule, particularly as between States which are united by the bonds of federal union or by such looser ties as bind the British Commonwealth of Nations.

" My Lords, these seem to me frail weapons with which to attack a strong fortress. The suggestion that Lord Mansfield's proposition was too wide was supported partly by the fact that in *Huntington* v. *Attrill* [1893] A.C. 150, the proposition was somewhat more narrowly stated, as it was also in the case of the *Attorney-General for Canada* v. *William Schulze & Co.* (1901) 9 S.L.T. 4. In those cases the question was of enforcement of a penalty imposed by a foreign State and the observations of the court were directed to that question. This seems to me an inadequate reason for challenging a wider statement in regard to a different subject-matter. Further upon the assumption which must be made, that the decision in *Huntington* v. *Attrill* [1893] A.C. 150 was correct, it was conceded that it must cover not only a penalty strictly so-called but also any tax which could be regarded as penal or confiscatory. This seems to me to create a difficult task of discrimination, which is not made easier by the test suggested by counsel. ' If a tax ', he said, ' is the sort of tax which is recognized in this country, it is not penal.' I am little disposed to introduce so nice a refinement into a rule which has hitherto been stated in terms that are easy to understand and to apply.

" Then some reliance was placed on the fact that in earlier editions of Dicey's *Conflict of Laws* the relevant rule was thus stated: ' The court has no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal law of a foreign country '; and that it was only after the decision of *Sydney Municipal Council* v. *Bull* [1909] 1 K.B. 7 that in later editions the words ' or revenue ' were added after ' penal '. (Later the words ' or political ' were also added.) This seems to me a worthless argument, for already in the earlier editions it was said that the ' essential characteristic, in short, of a penal action is that it should be an action on behalf of the government or the community, and not an action for remedying a wrong done to an individual ' (see *e.g.*, 2nd ed., at p. 208), an apt description, as it seems to me, of a suit to recover taxes.

" The second branch of the argument for the appellant was directed to showing that in the United States of America there had been in certain States a disposition to relax the rigidity of the rule, and counsel was able to point to certain cases not cited to the Court of Appeal where the courts of one State had admitted and enforced claims for revenue by another State, notably in the States of Missouri and Kentucky. And reference was made also to the fact that in the 1948 supplement to the well-known ' Restatement ' some doubt was cast upon the rule (*Conflict of Laws*, section 610). But it was conceded that this was not the trend in all States, the States of New York and of Delaware continuing to apply the old rule. My Lords, I do not think it necessary to occupy your time by an examination of the American cases. I am ever willing to get help from seeing how the law, which is our common heritage, has developed on the other side of the Atlantic, but a development which is not universal, and is in any case confined to relations between State and State within the Union, can have no weight in determining what the law is in this country.

" Finally, it was urged that, whatever might be the position as between this country and a foreign country, it was not the same as between different members of the British Commonwealth, including those members which, though within the Commonwealth, do not acknowledge the sovereignty of the Queen. For such a disstinction there is no authority and I can see no reason. If such a change is to be made, it is not for the courts to make it. It will be the task of Governments and perhaps of Parliaments. I do not think that it will be an easy task.

" I must add that since writing this part of my opinion I have learned from my noble and learned friend, Lord Keith of Avonholm, that he has discovered a case in the courts of Eire which confirms the view I have expressed.

" I come then, my Lords, to the second question and will not detain you long, for, with all deference to those who have thought otherwise, I find it an easy one to answer.

" We proceed upon the assumption that there is a rule of the common law that our courts will not regard the revenue laws of other countries: it is sometimes, not happily perhaps, called a rule of private international law: it is at least a rule which is enforced with the knowledge that in foreign countries the same rule is observed. And since it is a rule which operates equally in regard to natural and artificial persons, the company, with which we are here concerned, could not on the day before its resolution to wind up became effective have been sued by the Indian Government for the recovery of tax in the courts of this country. But it is said that from the moment that the company went into liquidation the situation changed, the old rule of law was abrogated, and our courts became the means of collecting the taxes of a foreign power. This may seem the more surprising when it is remembered that the winding up of a company, whether voluntarily or by the court, is only the machinery by which an entity, which can no longer, or at least no longer usefully, carry on its business, is brought to its statutory end. It is difficult to see why such a process should create new rights in foreign powers hitherto unknown in this or any other country. But it is said that under section 302 of the Companies Act, 1948, the ' liabilities ' which the liquidator in a voluntary winding up is bound to discharge include an obligation to pay tax due to a foreign State. All turns on the meaning of the word ' liabilities ' in this section. On the one hand it is said by the respondents that it means only those obligations which are enforceable in an English court, and on the other hand that its meaning is extended—I do not know how far—but at least so far as to cover liabilities for foreign tax in respect of which the company might have been sued in the courts of the country imposing it.

" My Lords, I have no hesitation in adopting the former of these meanings. I conceive that it is the duty of the liquidator to discharge out of the assets in his hands those claims which are legally enforceable, and to hand over any surplus to the contributories. I find no words which vest in him a discretion to meet claims which are not legally enforceable. It will be remembered that, so far as is relevant for this purpose, the law is the same whether the winding up is voluntary or by the court, whether the company is solvent or insolvent, and that an additional purpose of a winding up is to secure that creditors who have enforceable claims shall be treated equally, subject only to the priorities for which the statute provides. It would be a strange result if it were found that the statute introduced a new category of creditors to compete with those who alone, apart from it, could enforce their claims.

" It was urged upon your Lordships that in certain other sections of the Act, notably sections 278 and 283, ' liabilities ' must include obligations not enforceable in this country. That may well be, but, though I accept the proposition that a word should be used in the same sense throughout a statute, it is by no means a universal rule and I am not pressed by it in construing a section of an Act so long and complex as the Companies Act, 1948, where a word may be and, in the case of ' liabilities ' in fact is, used in many different contexts.

" I am, on the other hand, satisfied that the case of a statute-barred debt presents a very close analogy and that in concluding that the present claim cannot be admitted your Lordships are assisted by such cases as *In re Lorillard,* [1922] 2 Ch. 638, and *In re Art Reproduction Co. Ltd.,* [1952] Ch. 89, which were in my opinion rightly decided.

" I would dismiss this appeal with costs."

Lords Morton and Reid concurred with Viscount Simonds's speech. Lord Keith found strong support for the decision of the House in the decision of the High Court of Eire in *Buchanan* v. *McVey* (see *supra,* p. 46, in this volume), which he described in some detail. The remainder of his speech was concerned about the meaning of s. 302 of the Companies Act, 1948.

Lord Somervell said: " The first issue in the present appeal is whether a foreign State can use the courts of this country for the collection of its taxes. The statement by Lord Mansfield in *Holman* v. *Johnson,* 1 Cowp. 341, 343: ' For no country ever takes notice of the revenue laws of another ', may include the present issue but goes beyond it and is, I think, directed to a different problem. The plaintiff claimed the price of tea delivered in Dunkirk. The defendant intended, as the plaintiff knew, to smuggle the tea into

England. Lord Mansfield uses the words cited in considering the lex loci contractus. He is stating that the courts there would in no circumstances have regard to any illegality arising under the revenue laws of this or any other country. He then proceeds to consider the alleged illegality under our law. The question whether today our courts would as between parties enforce a contract to break the revenue laws of another country has little if any relevance to the issue which we have to decide. In *Ralli Brothers* v. *Compania Naviera Sota y Aznar* ([1920] 2 K.B. 287, 300) Scrutton L.J., in a passage cited by the Master of the Rolls, reserved that issue for consideration should it arise. What I desire to make clear is that I am not dealing with that issue.

"There is no decision binding on your Lordships' House and the matter therefore falls to be considered in principle. If one State could collect its taxes through the courts of another, it would have arisen through what is described, vaguely perhaps, as comity or the general practice of nations inter se. The appellant was therefore in a difficulty from the outset in that after considerable research no case of any country could be found in which taxes due to State A had been enforced in the courts of State B. Apart from the comparatively recent English, Scotch and Irish cases there is no authority. There are, however, many propositions for which no express authority can be found because they have been regarded as self-evident to all concerned. There must have been many potential defendants.

"Tax gathering is an administrative act, though in settling the quantum as well as in the final act of collection judicial process may be involved. Our courts will apply foreign law if it is the proper law of a contract, the subject of a suit. Tax gathering is not a matter of contract but of authority and administration as between the State and those within its jurisdiction. If one considers the initial stages of the process, which may, as the records of your Lordships' House show, be intricate and prolonged, it would be remarkable comity if State B allowed the time of its courts to be expended in assisting in this regard the tax gatherers of State A. Once a judgment has been obtained and it is a question only of its enforcement the factor of time and expense will normally have disappeared. The principle remains. The claim is one for a tax. That fact, I think, itself justifies what has been clearly the practice of States. They have not in the past thought it appropriate to seek to use legal process abroad against debtor taxpayers. They assumed, rightly, that the courts would object to being so used. The position in the United States of America has been referred to, and I agree that the position as between member States of a federation, wherever the reserve of sovereignty may be, does not help.

"The following passage from Pillet's *Traité de Droit International Privé*, 1924, paragraph 674, confirms the negative result of counsel's researches in respect of French law:

'Les jugements rendus en matière criminelle ne sont pas les seuls qui soient soumis à la loi de la territorialité absolue. Les jugements rendus en matière fiscale ne sont eux non plus susceptibles d'aucune execution à l'étranger, et l'on n'a même jamais songé à la possibilité de faire exécuter sur le territoire de l'un d'eux une sentence relative aux droits fiscaux de l'État qui aurait été rendue sur le territoire d'un autre.'

"The applicant is asking the English courts to do what the courts of no other country have done. In some fields this might commend the argument but here, for the reason which I stated at the outset, it is fatal.

"Some tentative suggestion was made that some different principle should apply as between members of the Commonwealth. No ground which I could follow was put forward in support.

"On the question of the construction and application of section 302 of the Companies Act, 1948, I think that the appeal also fails. For myself, assuming that the word 'liabilities' should have regard to the law of the country in which the company had been doing business, I would not have regarded this as sufficient to overrule the special principle that foreign States cannot directly or indirectly enforce their tax claims here."

[Report: L.R. [1955] A.C. 491.]

Jurisdiction—On the High Seas—Criminal Jurisdiction—Merchant Vessel — Manslaughter — Elements of Crime Occurring Partly on Board Ship and Partly in the Sea—Whether Courts of Flag State have Jurisdiction.

THE PEOPLE *v.* ROBERT J. THOMAS.

Eire, Supreme Court. June 3, 1954.

(Maguire C.J., Lavery, Kingsmill Moore, O'Daly and Budd JJ.)

THE FACTS.—The accused was convicted of the manslaughter of one Humphries. The accused and Humphries were travelling together on the Irish ship *Munster*, from Liverpool to Dublin. They had both been drinking, when, some 15 miles out from the Welsh coast, about midnight, there was a fight in which Humphries went overboard and was lost. Thomas was not an Irish citizen.

There was an appeal on the ground, first, of alleged lack of evidence, and secondly on the ground that the Court had no jurisdiction to try an offence of manslaughter on an Irish ship where the death did not occur on board the ship, or within the jurisdiction.

Held (affirming the Court of Criminal Appeal): that the appeal failed on both grounds.

On the question of jurisdiction, Maguire C.J. said: "The next ground of appeal is that there was no jurisdiction in the Central

Criminal Court to try the appellant for manslaughter as the death did not occur on board the ship and so was not within the jurisdiction of the Court. It is clear that the Central Criminal Court has all the jurisdiction formerly exercised by the Admiral and later exercised by the Commissioners of Oyer and Terminer appointed to exercise the Admiralty jurisdiction in criminal cases (11, 12, 13 Jac. 1, c. 2 (Ir.)). This was not contested. Mr. Bell [Counsel for the accused] contended that the jurisdiction was confined to the trial of persons committing offences on board an Irish ship on the high seas where such offences were committed and completed on the ship. Manslaughter, Mr. Bell says, is a complex crime consisting of two essential ingredients. The first is some unlawful act or culpable neglect, which causes the death, and the second is the fact of death itself. The death admittedly did not take place on the ship. The crime, therefore, according to the argument, not being completed on board the ship was not committed within the jurisdiction. Mr. Bell referred at length to the case of *The Queen* v. *Keyn*, 2 Ex.D.63. Keyn, a foreigner, was in command of a foreign ship which ran into a British ship within three miles of the English shore and sank her. A passenger on board the English ship was drowned. The facts were such as would in English law amount to manslaughter. On his being indicted for that offence in the Central Criminal Court the jury found Keyn guilty. Counsel for the prisoner objected that the Court had no jurisdiction. Pollock B., the trial Judge, stated a case on the point for the opinion of the Court for Crown Cases Reserved. The majority of the Court held that as the offence was not committed on a British ship there was no jurisdiction to try the prisoner, even though the ship at the time of the occurrence was within what has become known as the 'three-mile limit.'

" Particular reliance was placed upon that portion of the judgment of Cockburn C.J. where he deals with the ingredients of the crime of manslaughter. The learned Chief Justice says that the crime involved two things essentially distinct—the act of the party killing, as the cause of death; and the death of the party killed, as the effect of the act. 'But it is obvious,' said the Chief Justice, 'that the act of the party killing may take place in one jurisdiction, the death of the party killed in another.' He then poses the question, 'In which jurisdiction was the offence committed?' and answers, 'In neither.' If the offence was committed in neither jurisdiction, he goes on to point out, it cannot, apart from express legislation, be tried at common law in either jurisdiction.

" Applying these observations to the present case, the contention on behalf of the appellant is that since the death took place, if at all, in the water, the crime was not complete upon the Irish ship and therefore no crime in fact or in law took place on the ship, and it follows that the jurisdiction of the Central Criminal Court which is confined in its admiralty jurisdiction to trying cases of crimes committed in Irish ships is not brought into operation. If the argument is correct it would appear that there is no jurisdiction in any Court of this country to try either a citizen or foreigner on an Irish ship who by culpable negligence or design throws another overboard with the result that death occurs in the water.

" Mr. Bell also relied on *R.* v. *Coombes*, 1 Lea. Cr. C. 388, which was a case of conviction for murder under an Admiralty Commission. A shot was fired from the shore at a person in a vessel on the sea which killed him. The death therefore took place at sea. The judges held that the case was properly tried under the Admiralty Commission. It does not follow that the local territorial Court would not also have had jurisdiction. Reference was also made to the statute 2 and 3 Edw. 6, c. 24, in the preamble of which it is recited that where a person is stricken in one county and dies in another, no indictment lay in either, to avoid which the statute gives jurisdiction to the Court sitting in the county where death occurs. This was relied on as showing that in homicide cases where the act and the death take place in different areas of jurisdiction it requires a statute to give a Court in either area jurisdiction to try the crime.

" The fact that numerous statutes exist settling disputes between rival Courts claiming jurisdiction, be they both territorial or one territorial and the other pertaining to the Admiralty, seems to have no real bearing on the issues in this case. Granted that there may have been no jurisdiction in either Court where the act in cases of homicide was done in one jurisdiction and death occurred in another, such considerations have no bearing where both the act causing the death and the death itself take place in a place where the trial Court has jurisdiction.

" It is apparent that the offence the Court has to deal with was not committed within the territorial limits of the jurisdiction of the Central Criminal Court. If cognizable by that Court, it must be by reason of the fact that the ancient jurisdiction of the Admiral vested in that Court. It was not questioned that the ancient jurisdiction of the Admiral was now vested in the Central Criminal Court.

" It will be convenient in discussing the matter of the Admiral's jurisdiction to consider it from two aspects. First, what jurisdiction the Admiral had as regards the place where the crime was committed, and, secondly, in respect of what persons that jurisdiction operated.

" The jurisdiction as regards place is described in Blackstone's *Commentaries*, Bk. IV, pp. 267–8, as being over ' . . . all crimes and offences committed either upon the sea, or on the coasts, out of the body or extent of any English county, . . .'. Stephens in his *History of the English Criminal Law* says that crimes at sea were under the jurisdiction of the Admiral. The statute, 11, 12 and 13 Jac. 1, c. 2 (Ir.), by which the jurisdiction of the Admiral was transferred to certain Commissioners, refers *inter alia* to all felonies thereafter to be committed 'in or upon the sea' whereon the Admiral had or pretended to have jurisdiction. The English statute, 28 Hen. 8, c. 15, is similarly worded.

"In *Keyn's* case 2 Ex.D.63, Sir R. Phillimore, at p. 67, Lindley J., at pp. 87, 88, Denman J., at p. 100, Brett J.A., at p. 148, Cockburn C.J., at p. 162, all refer to the jurisdiction exercised by the Central Criminal Court in England inherited from the Admiral and the Commissioners as covering offences committed on the high seas. It was decided in *The Queen* v. *Armstrong*, 13 Cox C.C. 184, where the deceased was thrown into the water and not seen again that the offence need not be consummated on board ship, and this Court is of opinion that the case was rightly decided. This Court holds that as regards place, the offence was committed within the jurisdiction of the Admiral.

"The other aspect of the jurisdiction now requires consideration. It is not necessary for the purposes of this case to enumerate all persons over whom the jurisdiction may extend. It is sufficient to say that it is clear law that the jurisdiction extends to a foreigner on an Irish ship.

"It being undoubted that crimes committed by foreigners on board British or Irish ships are cognizable by British or Irish Courts, as the case may be, without any statute, is there anything in the origins or the legal theory giving rise to this rule of law to indicate that whatever jurisdiction attaches is limited to the punishment of a crime begun and completed on board the ship, as distinct from a crime completed by the death taking place in the water surrounding the ship?

"The basis of the jurisdiction is the right of the country to which the ships belong to control the conduct of those on board from the point of good order and the prevention of crime by virtue of the protection afforded to such persons while sailing in such ship. In *The Queen* v. *Anderson*, 1 Cr.Cas.Res. 161, Blackburn J., at p. 169 says: 'There are a vast number of cases which decide that when a ship is sailing on the high seas and bearing the flag of a particular nation, the ship forms a part of that nation's country, and all persons on board of her may be considered as within the jurisdiction of that nation whose flag is flying on the ship, in the same manner as if they were within the territory of that nation.' Coke says: '*Protectio trahit subjectionem et subjectio protectionem.*' Lord Coleridge in *The Queen* v. *Carr*, 10 Q.B.D. 76, says, at p. 85: 'The true principle is, that a person who comes on board a British ship where English law is reigning, places himself under the protection of the British flag, and as a correlative, if he thus becomes entitled to our law's protection, he becomes amenable to its jurisdiction, and liable to the punishment it inflicts upon those who there infringe its requirements.' He adds that there is no distinction to be drawn between a member of the crew and a passenger.

" In the case of *The Admiralty*, 12 Co. Rep. 79, at p. 80, Lord Coke cites with approval the words of Beresford C.J. who, voicing the view of the Court in a case in the time of Edward I, said:

> ". . . the King willeth that the peace be as well kept upon the sea as upon the land; and it is not possible that peace should be kept without jurisdiction of justice.'

In the very judgment relied on so much by Mr. Bell in his forceful argument, Cockburn C.J., at p. 235, says that the question is whether the defendant, at the time the act was done, was himself within British jurisdiction.

" A foreigner may not, while under the protection of the flag, infringe the criminal law of the protecting country without incurring punishment. In what way do these principles apply to the facts of the present case ?

" The verdict of manslaughter in this case involved a finding of fact that Humphries is dead. The evidence points only to a death by drowning on the high seas. The other ingredient of the crime, the act or omission causing the death, occurred on board the M.V. ' Munster ', an Irish ship. Thus the event leading to the death also took place upon the high seas. The two elements necessary to give jurisdiction were thus both present. The crime was committed on the high seas and the appellant was at the time of its commission on an Irish ship. The appellant was, therefore, properly triable in the Central Criminal Court.

" The appeal in so far as it was based on want of jurisdiction also fails.

" This Court does not see any reason for interfering with the sentence."

[Report: [1954] I.R. 319.]

viii.—Miscellaneous

High Seas—Crime Committed Partly Aboard Merchant Vessel and Partly in the Sea—Whether Flag State Has Jurisdiction.

See p. 295 (*The People* v. *Robert J. Thomas*).

PART V

STATE RESPONSIBILITY

A—NATURE AND KINDS OF STATE RESPONSIBILITY

I.—In General. Absolute Responsibility and Responsibility Based on Fault

State Responsibility—In General—Legal Basis of.

See p. 317 (*Re Rizzo and Others* (*No.* 3)).

State Responsibility—Absolute Responsibility and Responsibility Based on Fault—Responsibility for Loss or Damage Sustained by Sequestrated Property—Negligence of Sequestrator—Criteria of Responsibility—Extent of Liability.

See p. 317 (*Re Rizzo and Others* (*No.* 3)).

State Responsibility—In General—Joint Responsibility—Joint Occupation of Enemy Territory.

See p. 982 (*Anglo-Chinese Shipping Co., Ltd.* v. *United States*).

State Responsibility—In General—Unilateral Declaration of Intention as Creating Obligation to Another State.

See p. 500 (*Re Rizzo and Others* (*No.* 2)).

VI.—For Wrongs Unconnected with Contractual Obligations

i.—Acts and Omissions of State Organs and Officials

(b) Executive Action or Inaction

State Responsibility—For Acts and Omissions of State Organs and Officials—Negligence of Sequestrator of Enemy Property—Responsibility for Effect of Delay in Repairing War-Damaged Property—Measure of Damages—Cost of Restoring Buildings to Previous Condition—Allowance for Betterment—Value of Pre-War Model Motor-Car—Allowance for Superiority of Available Model—Whether Measures Taken against Property Discriminatory—Treaties—Interpretation of—Principles and Rules of—Interpretation by Reference to Decision of Another Conciliation Commission—Meaning of " Injury or damage suffered as a result of the war ".

Currie Claim.

Anglo-Italian Conciliation Commission. March 13, 1954.

(Hannaford, Sorrentino, Bolla.)

The Facts.—This was a claim under Article 78 of the Peace Treaty with Italy, 1947,[1] for compensation for damage caused in an air-raid to buildings and to movable property, including a motor-car, in Milan, belonging to Mr. and Mrs. Currie, British nationals. The assets of Mr. and Mrs. Currie at Milan were sequestrated by decrees of the Prefect of the Province of Milan dated September 18, 1940, and January 13, 1941. The sequestrator nominated was the " Ente di Gestione e Liquidazione immobiliare " (E.G.E.L.I.), which appointed the " Credito Fondiario della Cassa di Risparmio delle Provincie Lombarde " to act for it. Included amongst the assets sequestrated was also a Fiat car of the " Balilla " type, built in 1938, which according to the reading on the speedometer had done 5,083 kilometres. The car was in the courtyard of one of the buildings, covered by a tarpaulin and jacked up, as

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[1] Article 78 provides (in part) as follows:

" 4.—(*a*) The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Italian nationals.

"(*d*) The Italian Government shall grant United Nations nationals an indemnity in lire at the same rate as provided in sub-paragraph (*a*) above to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Italian property. This sub-paragraph does not apply to a loss of profit."

Mr. Currie had left it. During the air-raid which took place on the night of August 12–13, 1943, a piece of metal of considerable weight became detached from an aircraft in flight which had been hit by anti-aircraft fire and fell from a considerable height on to the main building owned by Mr. and Mrs. Currie, penetrating the roof and the ceiling of the fourth floor. Other damage was caused to the buildings as a whole by incendiary bombs and by the blast of high explosive bombs which fell close by. Owing to the fact that the necessary repairs were not carried out in time, the condition of the buildings deteriorated as a result of exposure to the weather.

On August 4, 1945, the Credito Fondiario della Cassa di Risparmio delle Provincie Lombarde handed back the sequestrated property to Mr. and Mrs. Currie, who made the fullest possible reservations in respect of the damage sustained. According to the instrument of release the motor-car was still in the courtyard, as it had been left by the owner, while the furniture had, during the prolonged absence of Mr. and Mrs. Currie, been placed in the cellar and was therefore in need of repair, re-covering and general overhaul.

On behalf of the British Government, the Commission were asked to confirm the liability of the Italian Government to: (i) restore to complete good order the immovable property of the claimants and also such of their movable property as had been returned to them in a damaged state capable of repair; (ii) pay two-thirds of the sum necessary at that date of payment to purchase property similar to such of the movable property of the claimants as could not be returned to them or was returned to them in a damaged state incapable of repair. The sum of 2,278,000 lire was claimed in respect of the immovable property and 300,000 lire in respect of furniture and household effects, or " such larger sums as are necessary in order to adjust building costs and prices of furniture and household effects ruling in November 1948 to those ruling in the month in which this Honourable Commission pronounces its decision "; and " two-thirds of the sums of 380,000 lire for the motor-car and 114,000 lire for furniture and household effects or of such larger sums as are necessary in order to adjust the prices of such property ruling in November 1948 to those ruling in the month in which the Commission pronounces its decision, or such other sums as may be just and equitable."

On behalf of the Italian Government it was contended that the claim should be rejected on the ground, *inter alia*, that the sequestration of enemy property did not itself involve the responsibility of the Italian Government, which, moreover, would be responsible only for damage caused deliberately or by negligence on the part of the sequestrator: in the present case the omission to safeguard the property was due to circumstances outside the control of the sequestrator. It was further contended that the obligations of the Italian Government under Article 78 (4) (*a*) of the Treaty for compensation for war damage extended only to such loss as was the direct consequence of "events of war" and not to loss such as was caused by the circumstances of the present case.

Held: that the claim must succeed. The Italian Government must pay compensation for the loss sustained as a result of the impossibility of safeguarding the property. It was not, however, liable to pay compensation for loss or damage caused by war-time measures, such as turning the cellar into an air-raid shelter (as was done in the present case), which were applied irrespective of the nationality of the owners of the property affected.

The Commission said: "The Commission is unanimous in considering it desirable, by means of a preliminary decision, to determine the rules which will have to be followed for the assessment of the damage in the present case and to invite the parties to proceed in accordance with the rules to fix the amount of the indemnity by common accord; should the parties fail to agree, the Commission, by a final decision, and, if necessary, after having sought the advice of experts, will fix the amount due.

"The first point on which the parties disagree is whether the Italian Government is responsible, in accordance with Article 78, para. 4, of the Peace Treaty, not only for the damage caused to buildings by aerial bombardment, but also for the increase of such damage due to delay in carrying out necessary repairs.

"The Italian Government argues that it is responsible only within the limits of paras. 4 (*a*) and 4 (*d*) of Article 78 of the Peace Treaty: para. 4 (*a*) covers damage resulting from a specific event of war, such as, in the present instance, aerial bombardment, and para. 4 (*d*) covers damage which results from discriminatory measures taken against enemy subjects; the sequestration of enemy property in accordance with the War Law does not in itself involve the responsibility of the Italian Government, which, on the contrary, is responsible whenever it is proved that the sequestrator caused damage either deliberately or by negligence; in the present case the sequestrator cannot be blamed for the fact that, during the war, the damage caused by bombing was not immediately repaired; in reality the omission complained of was due to the fact that the sequestrator was unable to make such arrangements, taking into due account the state of war, the shortage of raw materials and manpower, and the general difficulties prevailing at the time.

"In fact, there is no need to decide whether this inability existed *in casu.* Indeed, even if one were to accept the interpretation which the Italian Government places upon paras. 4 (*a*) and 4 (*d*) of the Peace Treaty, the responsibility of the Italian Government would still exist in either case, *i.e.*, whether or not the sequestrator was able to make arrangements in good time for the necessary repairs to be carried out.

" If the situation was such as to prevent the sequestrator from being able to take in good time the necessary measures to prevent the inclemency of the weather increasing the initial damage caused by the bombardment, then the Italian Government is responsible for such increase as was foreseeable and unavoidable, just as it is responsible under Article 78, para. 4 (*a*), of the Peace Treaty, for the initial damage. The ' loss suffered ', according to the terms of this provision, is not only that arising directly and immediately ' as a result of injury or damage ', but also that arising indirectly and subsequently as a result of the impossibility of arranging for repairs to be carried out in good time; moreover, in this case there exists a link of causation between the ' injury or damage ' and the ' loss suffered ' which continues to have effect until the moment at which it becomes materially possible to take action with a view to preventing a further increase in the loss itself.

" If, on the other hand, there was nothing to prevent such action from being taken immediately after the bombardment, the sequestrator is at fault for having failed to do so and the responsibility for the damage caused by delay lies with the Italian Government, in accordance with Article 78, para. 4 (*d*).

" The extent of the responsibility is identical on both hypotheses, *i.e.*, that based on the application of Article 78, para. 4 (*a*), and that based on Article 78, para. 4 (*d*).

" The amount claimed from the Italian Government in respect of damage to buildings also includes: (a) the cost of restoring to its normal condition the cellar which had to be altered on several occasions and at various times, at the owner's expense, in order to make it suitable for use as an air-raid shelter; (b) the cost of restoring the wooden dividing walls in the attics on the fourth floor, which (together with the doors) were removed at the time, in accordance with the safety laws, on the instruction of the sequestrator.

" The British Government argues that this work would not have been carried out, nor would it have been necessary, but for the war.

" The Italian Government objects that, in accordance with a decision given on March 8, 1951, by the Italo-French Conciliation Commission in connection with a claim of the Società Mineraria e Metallurgica di Pertusola and of the Società Minière et Métallurgique de Penarroye,[1] the obligation of partial indemnity created by Article 78, para. 4 (*a*), of the Peace Treaty does not extend to all losses which the war has caused to a national of the United Nations as the owner in Italy, on June 10, 1940, of movable or immovable property, corporeal or incorporeal, but only to a specific category of such losses, *i.e.*, to those which are the direct consequence of events of war.

[[1] *Recueil des Décisions*, Part III, p. 67; *International Law Reports*, 1951, p. 414 (*sub nom. Pertusola Claim*).]

" There is no need here to examine the question of principle, which was decided by the Italo-French Conciliation Commission in the aforementioned decision of March 8, 1951. In fact, in the present case the cellar was turned into an air-raid shelter and the dividing walls on the fourth floor removed in compliance with provisions laid down in time of war and aiming at reducing the risk of death and damage due to aerial bombardment. The said provisions form part of those ' measures adopted during the war ' mentioned in Article 78, para. (4) (*d*), of the Peace Treaty. But this provision involves the responsibility of the Italian Government only when the measures were of a special character and were not applied also to Italian property. Here, on the other hand, we are faced with measures of a general character which were applied without discrimination to all buildings in Italy, irrespective of the nationality of their owners and which, therefore, lack the quality of discrimination required by Article 78, para. 4 (*d*), of the Peace Treaty as a condition for the Italian Government's responsibility.

" The sum of 2,727,718 lire claimed by Mr. and Mrs. Currie for damage to the buildings is based on a report by a surveyor employed by them. An examination of the report reveals that the surveyor has calculated the cost which is necessary in order to restore the property to a new and technically up-to-date condition, ignoring its condition on June 10, 1940. This cannot be accepted by the Conciliation Commission. It is true that para. 4 (*a*) of Article 78 makes Italy responsible for the ' restoration to complete good order ' (' *remise en parfait état* '—' *rimessa in ottimo stato* ') of the property which is returned to nationals of the United Nations in accordance with para. 1 of the Article.

" But this initial assertion must be read with the second sentence of para. 4 (*a*), and with para. 4 (*d*), which impose upon the Italian Government the obligation to make good only up to a limit of two-thirds loss or damage arising out of the application of discriminatory measures. It cannot be admitted that the first sentence of para. 4 (*a*) was meant to lay down a liability—and a full liability—on the part of Italy in respect of damage different from that contemplated under the other two provisions mentioned, and particularly in respect of damage caused by the passage of time and by normal wear and tear during the war; as, in the latter hypothesis, the reasons for a limitation to two-thirds would be far more cogent than in the qualified cases contemplated in the second sentence of para. 4 (*a*), and in para. 4 (*d*). The first sentence of para. 4 (*a*) can therefore only mean: (i) where the special conditions mentioned in the second sentence of para. 4 (*a*) or in para. 4 (*d*) do not occur, the restitution of the property must be made in complete good order, *i.e.*, as though arrangements for its normal maintenance had been made during the period in which the owner was dispossessed of it; (ii) where the special conditions mentioned in the second sentence of para. 4 (*a*) or in para. 4 (*d*) do occur, the compensation of two-thirds shall be calculated by taking into account that the property would have had to be restored, if restitution had been possible, to complete good order, *i.e.*, as though arrangements for normal maintenance had been made during the period in which the owner had been dispossessed of it.

" *In casu*, the indemnity must be two-thirds of the cost required to restore the buildings to the condition in which they would have been at the time of the hand-over if the damage by bombing had not happened (including in that damage the damage caused by the failure to effect repairs in good time) and if the sequestrator had carried out normal maintenance. If such expenditure were to result in the improvement or increase in value of the buildings (as, for example, by the replacement of the destroyed or damaged sanitary installations by more up-to-date installations), this would justify a reduction equal to two-thirds of the excess value, in order to avoid undue profit, which Article 78, para. 4 (*a*), of the Peace Treaty certainly did not contemplate.

" Finally, the parties disagree in regard to the method of calculating the amount of compensation for the motor-car. It is not disputed that when the sequestration was lifted the car was found to have no more than scrap value. Compensation must therefore be calculated as though it had been impossible to effect restitution and must in consequence amount to two-thirds of the sum necessary, at the date of payment, to purchase similar property.

" According to the Italian Government, compensation as determined by the Peace Treaty is a substitute for restitution and not compensation for loss, and cannot therefore take into account depreciation due to the passage of time, whether as a result of age or of technical obsolescence. According to this line of reasoning, the Italian Government should make good the loss which nationals of the United Nations have suffered as a result of non-restitution, and not the loss suffered at the moment when the event occurred which today prevents restitution; *in casu*, compensation would be equal to two-thirds of the sum required to purchase now a Fiat car of the Balilla type built in 1938 which has run approximately 5,000 kilometres.

" Even without taking into consideration the practical difficulties of finding such a motor-car on the market today, the Conciliation Commission cannot accept the Italian Government's line of argument. If the property cannot be restored, the Peace Treaty (Article 78, para. 4 (*a*)) intends that the owner shall receive, not compensation equal to two-thirds of what would have been the value of the returned property (if restitution had been possible) but two-thirds of the sum necessary at the date of payment to purchase an equivalent article. In 1953 a motor-car can be said to be the equivalent of the one sequestrated in 1940 from Mr. and Mrs. Currie if the following conditions are fulfilled: (a) that it is of the 'Fiat' make; (b) that it belongs to the type of Fiat car, about two years old, which resembles as closely as possible the 1938 Balilla type; (c) that it has run about 5,000 kilometres. It is probable that a motor-car of this type is technically superior to the 1938 Balilla. In that case, in order to avoid undue profit, the sum necessary for the purchase must be adequately and fairly reduced."

The Commission left the parties to reach agreement on the amount of compensation due to the claimants on the basis of the principles laid down in its decision.

[Report: Unpublished.]

State Responsibility—For Acts and Omissions of State Organs and Officials—Sale of Goods by Custodian of Enemy Property—Sale of Goods After Sequestration—Measure of Damages—Calculation of Damages.

MacAndrews & Forbes Company Claim.

Italian-United States Conciliation Commission. December 1954.

(Matturri, Sorrentino, Sandström.)

The Facts.—The claimants were a company incorporated in the United States of America. In 1941 the claimants possessed at their plant in Corigliano, Italy, about 820 metric tons of dried licorice root. On May 31, 1941, the Prefect of Cosenza issued an order forbidding the sale of the root without express permission. A Custodian of the licorice root was appointed and on September 24, 1941, he was appointed Commissioner for selling it at the market price in favour of the producer. The Commission sold 17.524 metric tons of the root. Subsequently, on February 24, 1942, the Prefect of Cosenza by decree ordered the sequestration of the licorice root and revoked the appointment of the Commissioner. A Sequestrator was appointed in his stead, with instructions to sell the root and to deposit the proceeds in the "Enemy Property" account in the Bank of Italy. The Sequestrator accordingly sold some of the remaining licorice root (making 776.456 metric tons in all. The total net proceeds of sale amounted to 3,880,000 lire.

On November 27, 1945, the Prefect of Cosenza revoked the sequestration decree and the 3,880,000 lire was paid to the claimants. The latter then claimed, under Article 78 of the Peace Treaty with Italy of 1947, compensation for loss sustained as a result of the sequestration and sale by the Italian authorities of 776.456 metric tons of dried licorice root. They valued their claim at two-thirds of the sum necessary to purchase 705.3 metric tons of dried licorice root (the quantity calculated on a quantity of 820 metric tons sequestrated, with the deduction of 114.7 metric tons which quantity could have been bought for the sum of 3,880,000 lire returned to the claimants at the time of the restitution), which sum was estimated on November 4, 1948, to be 57,129,300 lire, subject to the necessary adjustment for variations of values between that date and the final date of payment.

The contentions of the parties are summarized, so far as necessary, in the *Held* below.

Held: that the claim must succeed. The licorice root was sequestrated because it was enemy property and the claimants were entitled to compensation. However, the Commission assessed the claim at 40,819,316 lire, being two-thirds of 61,228,974 lire.

The Commission said: " On the question of principle whether the claimants are entitled to compensation under Article 78, the defense can be summarized in the following way:

" The sale was ordered because the goods were considered to be perishable as regards both the state of transformation and the conditions of preservation in which they were at the time. The lack of restitution therefore was not the result of an act of war but of a measure of the authorities and, as Article 78, para. 4 (*a*),[1] requires a causal relation with a specific act of war within the technical meaning of the term, this paragraph would not be applicable to the instant case.

" While stressing that other paragraphs of Article 78 had not been invoked in the Petition, the Agent of the Italian Government alleged that the sale was not ordered because the goods were enemy-owned.

" The Agent of the United States Government, who in his Petition had based the claim on the fact that the licorice root had not been returned to the claimants, relying on Article 78, para. 4 (*a*), contested in his Reply the limiting interpretation which the Italian Government attempted to give to para. 4 (*a*), since nowhere in Article 78 is there any limitation in the sense that the cause of the damage must be an act of war. He further contended that the claimants' dry licorice roots had been sequestrated as enemy property under the Italian War Law and that such sequestration was patently as a result of the war. Therefore, while the right to compensation clearly exists under para. 4 (*a*) it could very well also exist under para. 4 (*d*),[2] and the dispute had not been confined to the application only of para. 4 (*a*).

" In his Counter-Reply, the Agent of the Italian Government maintained that the applicability of para. 4 (*d*) could not be considered in this dispute. He further alleged that the sequestration was not the cause of the damage and that the question in dispute is whether the sale was or was not an act of good administration.

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[1] See *infra*, p. 313, n. 1.

[2] *Ibid.*

" Even accepting the presentation of the issue as proposed by the Agent of the Italian Government, it must be held that the Italian Government is responsible.

" The Commission cannot sustain the Italian Agent's contention that the sequestration and the sale were effected because the goods were perishable. The facts of the case lead to a different conclusion.

" In a report on his administration dated December 4, 1943, the sequestrator wrote as follows with reference to the blocking of the goods:

> ' Upon information of the " Federazione Nazionale Industriali Prodotti Chimici " the Ministry of Corporations, by an urgent Government mail communication No. 5273 dated May 12, 1941, directed the local agency to make inquiries in order to ascertain the availability of the lots of licorice root pertaining to the above-mentioned company, and eventually to adopt measures for the blocking of the goods, pending further dispositions intended to guarantee that the product was to be employed in favor of the national industry which needed it for the production and export of the juice.'

According to the same report, the letter in which the Ministry of Agriculture and Forests requested the Prefect of Cosenza to appoint a custodian indicated the reason for the request as being ' to secure the prompt utilization and valorization of the product '.

" The preamble of the Decree of February 24, 1942, which ordered the sequestration of the property other than the licorice root belonging to the claimants, read as follows:

> ' Having seen Article 296 of the War Law approval by Royal Decree No. 1415 of July 8, 1938: having seen Decree No. 566 of June 10, 1940, which ordered the application of that law; in view of the occasion for taking advantage of the power granted by Article 295 of the aforesaid law: . . . '

" The preamble of the Decree of the same date concerning sequestration of the licorice roots first mentions the Decree appointing the custodian and a letter of the General Accounting Office of the State ' by which the sequestration of the above-mentioned licorice root was ordered '. The preamble then continues as follows:

> ' Having seen Decree No. 566 dated June 10, 1940, ordering the application of that law: in view of the occasion for taking advantage of the power provided by Article 295 of the aforesaid law: . . . '

It is obvious that the intention was to mention here, as in the other Decree, Article 296 of the War Law but that this part was omitted by mistake.

" However, Article 5 of the Decree provides:

> ' The sums recovered from the sale of the quantity of licorice referred to in Art. 2 of the present Decree must be deposited by the sequestrator with the Banca d'Italia in the account " Istcambi beni nemici " (" Foreign Exchange Institute, Enemy Property "), in

accordance with Law No. 1994 of December 19, 1940, in the manner indicated in circular No. 152200 of February 21, 1941.'

"In the inventory it is declared that the stacks of dried licorice root were in 'a fair state of preservation'. No other examination of the condition of the goods was made, and, before the sale, there was nowhere any reference to the licorice root being in a bad state.

"Both parties have relied on expert opinions to support their contentions about the perishability of the licorice root. The claimants rely upon affidavits of William Sidney Gall and Robert Thompson Sime who have been in the service of the claimants. They describe how the green licorice root bought by the claimants in both Italy and Greece has been cured, dried and stacked for storage, and they testify that with this method it has been possible to preserve the licorice root for years, in Greece during the entire period of the war, without deterioration. The only thing necessary would have been supervision, such as that for which the claimant had arranged. The Agent of the Italian Government relies on a report of Prof. Berna of the General Direction of Agricultural Production, who denies that it is possible to assure the preservation of dried licorice root for several years in the open air on the fields of Corigliano by the method used by the claimant.

"In weighing the value of these opinions, it must be kept in mind that, according to other evidence, it is at least doubtful whether the claimant's method of storing licorice roots is used in Italy by others than the claimant, and that consequently, there are here in opposition, on the one hand, the findings of experience and, on the other hand, more theoretical considerations. The Commission attributes more weight to the former.

"Taking all these circumstances into consideration, the Commission finds that the sequestration and sale took place not because of the perishability of the goods but because of their character as enemy property.

"Therefore, there can be no doubt that the sale of the licorice root gives rise to a claim for compensation under Article 78, para. 4 (*a*).

"In view of this conclusion, there is no need to examine the question of admissibility of the claim under para. 4 (*d*) of the same article.

"As to the amount of compensation, the Agent of the Italian Government denies that it should be calculated for 705.3 metric tons of dry licorice root, on the ground that the quantity of root mentioned in the Decree of Sequestration was not previously weighed but merely estimated to be about 820 tons. The only permissible method of calculating would be to take as a basis the quantity actually sold (776.456 metric tons), deduct the number of tons (114.7) equal to the amount in cash which was returned, and arrive at a result of 661.756 metric tons.

"The Agent of the Italian Government further disputes the value, as estimated by the claimant.

"The Conciliation Commission agrees with the objection of the Italian Agent with regard to the calculation of the quantity of licorice root. The quantity on which the amount of the loss must be calculated is 661.756 metric tons. With regard to the compensation to be awarded, the Agent of the Italian Government contends that the claimants replaced the licorice root in question some years ago and that the economic damage suffered is therefore represented by the sum which was expended at that time. In this respect he relies on a passage in the Petition wherein it is stated that 'the licorice in question represented their [the claimants'] total stock of raw material in Italy and had to be replaced after the war at many times the original cost'. The contention of the Italian Agent is not justified in the opinion of the Commission, because the passage in the Petition upon which he relies is merely a general statement and not a statement of a specific fact and therefore there is no proof of the actual replacement of that specific lot of merchandise.

"According to Article 78, para. 4 (*a*), the compensation must be two-thirds of the sum necessary at the date of payment to purchase the above-mentioned quantity of 661.756 metric tons of dry licorice root. To arrive at that sum, the Commission adopts the method of calculation used by the claimant and against which no specific objection has been made. The Commission finds that two and one-half tons of green root are required to produce one ton of dried root, and that the current market price of green root is 29,010 lire per metric ton. To the price thus obtained must be added the expenses of transportation to the Corigliano plant, cleaning, curing, bailing or stacking, with necessary protection from the weather. Such expenses have been declared by the claimant to be as of October 1948, 13,500 lire per metric ton of dry root, and, as of May 1954, 25,375 lire per metric ton of dry root. The elements of such expenses have not been specified in detail, but in the circumstances of the case the Commission finds that 20,000 lire per metric ton can be granted for that item.

"The cost of one ton of dry licorice root must therefore be computed as follows:

Price of 2½ tons of green root ..	L. 72,525
Expenses of processing	20,000
Total ..	L. 92,525

For the quantity of 661.756 metric tons, the compensation should therefore be based on a total value of 61,228,974 lire."

[Report: Unpublished (Decision No. 29).]

State Responsibility—For Acts and Omissions of State Organs and Officials—Responsibility of State for Negligent or Fraudulent Act of Administrator-Sequestrator or Officially Appointed Receiver—Duty of Supervision—Measure of Damages—Loss of Profits Due to Negligence or Fraud as Measure of Capital Loss to Owner of Business.

OUSSET CLAIM.

Franco-Italian Conciliation Commission. July 5, 1954.

(Perier de Feral, Sorrentino, Bolla.)

THE FACTS.—The claimant, Joseph Ousset, a French national, was the owner of a drapery store in Rome. Shortly before Italy declared war on France in 1940, Ousset left Italy for France. On August 21, 1940, the store was placed under sequestration by decree of the Minister of Corporations, by reason of the nationality of its owner. By the same decree, one de Bernardis, an *avocat*, was appointed administrator-sequestrator and authorized to carry on the business of the sequestrated store. In 1942, Ousset returned to Rome and to some extent resumed the running of the store. By a decree, dated June 2, 1942, of the Minister of Corporations, the store was placed under *sindacato* (*i.e.*, an official receivership), de Bernardis now being appointed syndic (assignee in bankruptcy).

On the arrival in Rome of the Allied armies in 1944, de Bernardis fled to the north and Ousset was able to retake possession of his business. He found, however, that the workroom attached to the store had been liquidated by de Bernardis. Ousset, who considered that he had been wronged by the acts done by de Bernardis as administrator and syndic and which had had disastrous consequences for his business, claimed compensation under Article 78 of the Treaty of Peace with Italy, 1947.

On behalf of the claimant it was alleged that whereas on May 31, 1940, the stock carried on the claimant's books amounted to some 826,890 lire, an inventory made in September 1940 by de Bernardis placed the stock at 493,540 lire. Moreover, de Bernardis then proceeded to sell off the stock at prices below those obtaining before the war, whereas prices in Rome generally had increased. He closed down the workroom and let off the premises at a nominal rent, and he sold off the plant, equipment, shop fittings, etc., at a derisory price. The claimant estimated his loss at over 43,000,000 lire, at 1943 prices, representing the difference between the value of the stock in 1940 and that at the date of the liberation of Rome, plus 923,000 lire, the value of the plant, etc., sold.

On behalf of the Italian Government the figures given by the claimant were contested in detail and some of the allegations were denied. In particular, it was contended that the sale of the stock was a normal transaction and that there was no proof that it had caused any loss to the business. The proper comparison to make was between the stock as it was on August 21, 1940, when the business was put under sequestration, and the position on July 23, 1942, when the claimant retook possession of the business. After that date, de Bernardis had no longer administered the business directly but merely controlled the management by the claimant of the business. During the course of the sequestration, the amount of the stock had not only not diminished, it had actually increased. It was in particular contended that the provisions of neither sub-para. (*a*) nor sub-para. (*d*) of Article 78 (4)[1] of the Treaty of Peace applied, because not only was there no proof of a loss capable of being compensated, but the Italian Government had demonstrated that there was in fact no loss. By the terms of sub-para. (*d*), no compensation was payable for loss of profit.

In reply, it was contended on behalf of the French Government that the responsibility of the Italian Government could not be limited to the period of sequestration seeing that the provisions of Article 78 (4) (*a*) applied also to the period during which the business was under *sindacato*.

The Commission heard witnesses of fact and an expert witness who was especially instructed to examine the books of the business and the inventory of September 1940, and to report whether the assets of the business had been abstracted or sold off without the proceeds being paid into the administration account of the sequestrator. The expert witness found that there was no conclusive evidence that any goods had been disposed of without the proceeds being properly accounted for, although there was a distinct possibility that that had occurred. On the other hand, the expert found that de Bernardis had committed " a grave error " in not making closing inventories, and that although no ledger account had been traced, it appeared from the day-book that de Bernardis had several times bought goods on his own account. The expert also found that the net profit realised during the periods of sequestration and *sindacato* were considerably less than would have been made by a diligent and capable administrator. The loss was estimated at about 570,000 lire and this, in the opinion of the expert, " should be regarded as sufficiently cogent evidence of the material loss of which the owner of the business has been the victim ".

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[1] Article 78 (4) provides in part:

" 4.—(*a*) . . . In cases where . . . , as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. . . .

"(*d*) The Italian Government shall grant United Nations nationals an indemnity in lire at the same rate as provided in sub-paragraph (*a*) above to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Italian property. This sub-paragraph does not apply to a loss of profit."

Held: that the claim must succeed. The Italian Government was responsible for the wrongful acts of de Bernardis, who had been put in control of the claimant's business under a special measure applied to the claimant's property. Although compensation was not payable for loss of profit as such, the failure of de Bernardis to show a reasonable profit during his control was to be taken into account in assessing the loss caused to the claimant by the " special measure " applied to the latter's property.

The Commission said: " This claim is based . . . on Article 78 (4) (*d*) of the Treaty of Peace, which provides that the Italian Government shall grant United Nations nationals an indemnity in lire to the extent of two-thirds of the sum necessary to compensate for the loss or damage due to special measures applied to their property during the war and which were not applicable to Italian property, but excluding loss of profit. In the present case, the measures on which reliance is placed on behalf of the French Government are the sequestration and the *sindacato* imposed by the Italian Government on property in Italy belonging to [the claimant's] business. The Italian Government does not dispute the discriminatory character of these war-time measures. On the other hand, the French Government concedes that, in accordance with earlier rulings of the Conciliation Commission, the responsibility of the Italian Government, in the sense of the [Treaty] provisions above mentioned, does not necessarily derive from the putting under sequestration or under *sindacato* of property in Italy belonging to the United Nations or their nationals; there must also be a tortious act (*fait dolosif*) or some negligence (*faute*) on the part of the administrator-sequestrator or syndic. On behalf of the French Government, there has clearly been established the wrongful and negligent manner in which de Bernardis, first as administrator-sequestrator and then as syndic, exercised his functions with regard to the business of Ousset, thereby causing him damage. On behalf of the Italian Government it has been contended that any responsibility on its part is excluded in regard to the period of *sindacato*, that is, after July 23, 1942 (the date of the memorandum of surrender of possession of the store after the revocation of the sequestration). It is said that the syndic had a mere mandate to control the business and if, overstepping his mandate, he intermeddled with the carrying on of the business, whether or not with the consent of the proprietor, he would have to answer personally for the consequences. . . .

" The Italian Government is responsible for the measure of *sindacato*, seeing that it was effectively applied by the syndic, de Bernardis. If the latter overstepped his mandate of control, the Italian Government should be held responsible; having appointed de Bernardis, it should have supervised him. It is difficult to see by what means Ousset could, during the Franco-Italian Armistice,[1] have resumed the effective management of his business against the will of the syndic, de Bernardis. Ousset's position during the *sindacato* should be viewed in the light of Article 78 (3),[1] which is based on the nullity of transfers of property, rights and interests of any description belonging to United Nations nationals and effected by force or duress by Axis Governments or their agencies during the war. Clearly, Ousset did not give his consent to any transfer of property. But the *ratio* of the provision is opposed to what may be deduced from the unfavourable consequences to Ousset of the passive attitude which he was forced to adopt during the period of *sindacato* by reason of the continuous duress exercised over him by de Bernardis as an agency of the Italian Government. Ousset cannot be blamed for not having asserted himself more energetically with the syndic, when such conduct would very probably have merely resulted in the complete exclusion of the proprietor [of the business] and the loss of the opportunity of at least being able to follow what was going on in the store. . . ."

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[1] That is, after June 24, 1940.

With regard to the extent of the loss sustained by the claimant, the Commission said: "The Italian Government is in no way responsible for the loss of capital value (*diminution patrimoniale*) sustained during sequestration or under *sindacato*, even if the syndic acted as manager. The loss in value may be the consequence of a slump (*ralentissement des affaires*) during the war, or of losses which even an honest, diligent and efficient manager might not have been able to avoid. . . ."

The expert witness had found that "either sales were made by de Bernardis at derisory prices in order to wind up the business, or some part of the proceeds of sale were not brought into account. Either of these hypotheses involves gross negligence or even fraud on the part of de Bernardis and, therefore, the responsibility of the Italian Government. . . . The hypotheses are not mutually exclusive."

With regard to the finding of the expert witness regarding the loss caused to the business during the management of it by de Bernardis, the Commission rejected the objection raised on behalf of the Italian Government, that this was a "loss of profit" within the meaning of Article 78 (4) (*d*) *in fine* of the Treaty of Peace. "According to the expert, the inadequacy of the average net profit during the time of the official management by de Bernardis is an indication of the fraudulent and criminal nature of the acts which led to a fall in the capital value of the business. Ousset is not claiming compensation for a loss of profit, for a profit not made; he is claiming compensation for the lowering of the value of his business which resulted from criminal or fraudulent acts committed by the administrator-sequestrator and syndic, who was in reality a despotic manager of the business down to the end of the *sindacato*. The expert is not suggesting that Ousset should be compensated for the whole of the devaluation of the business during the sequestration and the *sindacato*, but only for that part of the devaluation which can only be explained by the criminal and fraudulent acts of the administrator-sequestrator. In other words, the loss assessed by the expert does not consist of the gains which the business would have realised had there been careful and successful management on the part of the administrator-sequestrator and syndic (' loss of profit '). It consists of the diminution in capital (*patrimoine commercial*) resulting from sales at derisory prices or sales not accounted for; and that is a positive loss [comprising] ' loss of stock '. The profit margins on which the expert worked are, in his view, only evidence of sales at a loss, or failure to bring such sales into account; only such facts can explain the losses. The Conciliation Commission has no reason to depart from the assessment of a conscientious and independent expert. . . ."

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[1] Article 78 (3) of the Treaty of Peace provides:

"3. The Italian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war."

The Commission reviewed the evidence of other witnesses as to the conduct of de Bernardis, and continued: " The Commission is of the opinion that the expert's report, complemented by the testimony of witnesses, provides indicative but convincing evidence that the discriminatory measures ordered by the Italian Government in despite of Ousset's business caused the latter, as the result of a series of fraudulent and negligent acts of de Bernardis as administrator-sequestrator and then as syndic, a loss of 571,645.46 lire, taking the value as at July 1, 1942, the mean date between September 7, 1940, and February 29, 1944. The coefficient of conversion of the lire on the basis of wholesale prices and the cost of living (see *Compendio Statistico italiano*, 1952, p. 322, table 230) from 1942 to 1951 is 36,580. In round figures, then, the loss should be assessed at 21,000,000 lire. By not allocating any particular sum for the furniture and machinery which disappeared without any clear evidence that the proceeds of their sale were paid in to the account of the business, the Commission takes into consideration, in favour of the debtor, the element of uncertainty which must necessarily govern the determination of the indemnity. Under Article 78 (4) (*d*) of the Treaty of Peace, the indemnity is to be two-thirds of the loss, that is, 14,000,000 lire. The question of revaluation must also be considered. This is, for the Italian Government, not a case of the payment of the credit balance of a sequestrator's administration account; it is an indemnity given in consequence of a negligent and fraudulent act committed by the administrator-sequestrator and syndic. The sum due under Article 78 (4) (*d*) of the Treaty of Peace should ' compensate for the loss or damage due to special measures applied to their property during the war and which were not applicable to Italian property': the date at which the loss is to be determined is the date on which judgment is pronounced."

The Commission accordingly awarded the claimant the sum of 14,000,000 lire.

[Report: *Recueil des Décisions*, Part 5, p. 36.]

NOTE.—The Italian member of the Commission appended a dissenting opinion.

State Responsibility—Wrongs Unconnected with Contractual Obligations—Acts and Omissions of State Organs and Officials—Responsibility for Acts of Judiciary—Basis and Nature of State Responsibility—Peace Treaties—Operation of—Right of Victorious Party to Seize Property of Defeated Party—Exempted Property—Sequestrated Property of Nationals of Defeated Party—Responsibility for Negligence of Sequestrator—Criteria of Responsibility—Responsibility for Delay in Raising Sequestration—Interpretation of Treaties—Principles and Rules of—Comparison with Wording of Earlier Clause in Same Treaty—Intention of the Parties—Conservatory Nature of Sequestration of Enemy Property.

Re RIZZO AND OTHERS (No. 3).

Franco-Italian Conciliation Commission. December 7, 1955.

(Périer de Féral, Sorrentino, Bolla.)

THE FACTS.—These proceedings were in continuation of those commenced on July 6, 1954,[1] before the Franco-Italian Conciliation Commission sitting as a *Collège arbitral.* The French Government raised the point that the competence of the *Collège arbitral* to adjudicate on claims submitted by the Italian Government for losses sustained by persons in Tunisia was limited to direct loss, to the exclusion of any *préjudice personnel et moral* (mental suffering). The Italian Government, for its part, raised the question of the responsibility of the French Government for acts of administrators-sequestrators of the property of Rizzo and eleven other Italian nationals, contending that the French Government was liable even for slight negligence of such officials. Against this, it was contended on behalf of the French Government that as the position of the officials was that of unfeed agents (*mandat gratuit*) (the Italian Government claiming reimbursement of all sums paid to the sequestrators), they, and therefore the French Government, would be liable for gross negligence ("*faute grave*") only. Moreover, the responsibility of the French Government could not exceed the limits established by the Franco-Italian Conciliation Commission to the application of Article 78 of the Treaty of Peace (*e.g.*, exclusion of liability for loss of profits).

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[1] See *Re Rizzo and Others (No. 2), infra,* p. 500.

The differences between the two Governments were most acute as regards judicial sequestration ordered after the coming into force of the Peace Treaty, as well as administrative sequestrations maintained after that date. It was contended on behalf of the Italian Government that all such sequestrations were illegal; the French Government was therefore under an obligation to place the persons concerned in the position in which they would have been if the sequestrations had not been ordered. It was contended in reply, on behalf of the French Government, that the legitimacy of the sequestrations now in dispute had been recognized by the Italian Government in an Exchange of Letters dated February 2, 1951; that, on the other hand, the provisions of Article 79 (6) (*c*)[1] of the Peace Treaty read with those of the Accord of November 29, 1947,[2] constituted a derogation from the general rule of confiscation contained in Article 79[3] and it was not for the French Government to proceed to an indiscriminate release of property, but it was for the persons concerned to substantiate claims for their properties by furnishing proof that on September 15, 1947, they were permitted to reside in France or on the territory of one of the United Nations; that most of the persons concerned had done nothing until after the Law of December 23, 1948, had put a liquidation procedure into operation; that the right to retain the property which was the subject of claims remained with the French Government until December 2, 1952, as regards the persons who were the subject of an Exchange of Notes of that date and for all others until the decision of the *Collège arbitral*; that any delay in restoring property was not the fault of the French Government; that the judicial sequestrations were authorized by courts of law and the State was not responsible for errors which may be made by its judicial organs; and that the responsibility of the French Government could derive only from international conventions or, at all events, from international law.

On behalf of the Italian Government it was denied that Article 79 (6) (*c*) of the Peace Treaty constituted a derogation from the general rule of liquidation. It was rather the latter which was a derogation from common law: Governments are responsible for their unlawful acts, even if they are confirmed by municipal courts. Where there is international responsibility for unlawful acts, the obligation of *restitutio ad integrum* is admitted by international law. The Italian Government opposed the objection to the competence of the Commission to deal with claims for mental suffering.

Held: (1) *On the question of competence:* that the *Collège arbitral* was not competent to deal with claims for damages for mental suffering. Its terms of reference were limited by the terms of

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[1] See *infra*, p. 501.

[2] *Ibid.*

[3] See *infra*, p. 500.

Article 79 (6) (*c*) of the Peace Treaty, which spoke only of property; and (2) *on the question of responsibility* for the negligence of administrators-sequestrators: that the French Government was responsible for any such negligence provided that there was a causal connection between the sequestration and the loss or damage complained of. It was liable to make good loss of profits, including loss of natural and juridical accretions to the sequestrated property, that could be proved to be due to negligence.

The Commission said: " The *Collège arbitral* must in the first place examine *ex officio* its own competence. The French and Italian Governments disagreed about the interpretation of Article 79 (6) (*c*) of the Peace Treaty, and more particularly about the interpretation to be given to ' permitted to reside within the territory of the country in which the property is located or to reside elsewhere in United Nations territory '. On this interpretation depended the answer to the question whether the property in Tunis belonging to a certain number of Italian nationals should or should not be allowed to benefit from the derogation from the rule of liquidation.

" By the Exchange of Notes of February 2, 1951, the two Governments ' agreed that all questions concerning the interpretation of Article 79 (6) (*c*) of the Treaty should be submitted to the arbitration of a representative of the Italian Government, designated as M. Antonio Sorrentino, *Président de section* of the *Conseil d'État*, and a representative of the French Government, designated as M. Périer de Féral, Prefect. These have requested that M. Plinio Bolla, Swiss Federal Judge, be invited as the Third Member chosen from the nationals of a third State '. The *Collège arbitral* gave two decisions: by the first, dated June 25, 1952, it established, in its preamble, certain principles of interpretation of the provision in dispute, which permitted the two Governments to agree, on December 2, 1952, that the property of twelve Italian nationals should be exempt from liquidation; by the second, dated July 6, 1954, the property of seven other Italian nationals was accorded the benefit of exemption from liquidation.[1]

" In the Exchange of *Notes verbales* of December 2, 1952, the French Government placed on record that it was disposed ' to return to these [12] nationals the property, rights and interests at present held, to their account, by the *Service de Liquidation des biens italiens en Tunis* ', and the Italian Government took note of that. The Notes exchanged on that date continued: ' It will, if necessary, be for the *Collège arbitral*, designated above, to decide, at the request of the Italian Government, on the position of the other Italian nationals mentioned in the Ambassador's Note of July 4 last, as well as on the amount of the eventual claims by those in whose

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[[1] *Re Rizzo and Others* (*International Law Reports*, 1952, p. 478) and *Re Rizzo and Others* (*No.* 2) (*infra*, p. 500).]

favour the arbitral decision is made '. It must be noted, in passing, that in its decision of July 6, 1954, the *Collège arbitral* did not deal with these ' eventual claims ' but confined itself to remitting them to separate proceedings. The ' eventual claims ' on which the *Collège arbitral* is called upon to decide and the successful ones of which it must fix the total, can only be demands on the part of the persons concerned for loss and damage sustained by the property, rights and interests to be restored, as a result of special measures which were taken by the French Government in regard to such property, rights and interests and which did not affect French property.

" Property, rights and interests are regarded by the Treaty as corporeal or incorporeal [*e.g.*, copyright or industrial property] parts of a person's patrimony. Damages for mental suffering have their origin in offences against the person and consequently they are outside the competence which the two Governments recognized in the *Collège arbitral.*

" On the other hand, the *Collège arbitral* are competent to deal with the requests of the Italian Government regarding compensation for loss and damage which as a result of discriminatory measures taken by the French Government may have been sustained by the property, rights and interests which the French Government ought to have restored to Italian nationals in pursuance of the Accord of December 2, 1952, or the arbitral decision of July 6, 1954.

" . . . In order to decide on claims with regard to which the competence of the *Collège arbitral* is recognized, a distinction must be made between losses and damage sustained up to the entry into force of the Treaty (September 15, 1947) and those which were sustained between that date and the restoration of the property. In fact, the basis and the extent of the responsibility of the French Government would, according to the arguments put forward by the Italian Government, be different for the two periods.

" A. *Loss and damage sustained up to September* 15, 1947.—The French Government does not deny its responsibility for such loss and damage, provided that they were due to gross negligence on the part of either the French Government or persons for whom it was answerable, and also provided that there was no question of loss of profits. The Italian Government does not admit these two restrictions, that is to say, neither the proof of negligence as a condition of responsibility nor the exclusion of loss of profit in the compensation. The *Collège arbitral* has to enquire into the basis of the responsibility of the French Government for the period in question, starting from these two points of divergence. There is no express mention of this responsibility either in the Treaty or in the successive Accords concluded between the two Governments.

" As regards the Accords, the Exchange of *Notes verbales* of December 2, 1952, gives the *Collège arbitral* the power to decide on the amount of the eventual claims ' without the French Government recognizing, even in principle, their basis '. As regards the Peace Treaty, the draftsmen of Article 79 did not think it was necessary to insert into its text provisions analogous to those of Article 78 and relating to the responsibility of the Allied and Associated Powers for loss and damage caused, by discriminatory war measures taken by them, to Italian property situate within their territory; the reason is probably that, while Article 78 established the obligation of Italy to restore all legal rights and interests in Italy of the United Nations and their nationals, Article 79 accorded to each of the Allied and Associated Powers the right to ' seize, retain, liquidate . . . all property, rights and interests which on the coming into force of the present Treaty are within its territory and belong to Italy or to Italian nationals ': it is for the Italian Government to compensate Italian nationals thus deprived of their property, rights and interests [Article 79 (3)]. The exemptions provided by Article 78 (6)[1] were evidently not considered to be sufficient to justify an express provision analogous to that in Article 78 (4) (*d*).[2]

" The responsibility of the French Government, which it has admitted before the *Collège arbitral*, derives, therefore, in fact, from the general principles of public international law. It is true that the putting of enemy property under sequestration—as distinct from requisition without compensation—and appropriation without compensation of foreign property (*cf.* Rousseau, *Droit International Public*, pp. 371 and 372) are recognized as legal by public international law by reason of their character of simple measures of conservation and administration (*cf.* Sibert, *Traité de Droit International Public*, vol. II, p. 323). But if sequestration in itself does not involve the responsibility of the seizing Government, the method in which it is effected, or in which the sequestrated property is administered, may constitute an act contrary to the law of nations; in such a case, if there results a loss to the owner, the seizing Government is bound to make the loss good. The Franco-Italian Conciliation Commission has on several occasions,[3] when interpreting Article 78 (4) (*d*) of the Treaty, decided in that sense when Italy has appeared as sequestrator of property of the United Nations or their nationals.

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[1] Article 78 (6) provides:
" 6. United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Italy by the Italian Government or any Italian authority between September 3, 1943, and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded."]

[2] Article 78 (4) (*d*) provides:
"(*d*) The Italian Government shall grant United Nations nationals an indemnity in lire at the same rate as provided in sub-paragraph (*a*) . . . to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Italian property. This sub-paragraph does not apply to a loss of profit."]

[3] See, for example, *Schappe Spinning Mill Company Claim*: *International Law Reports*, 1954, p. 141; and *Pertusola Claim*: *ibid.*, 1951, Case No. 129.]

" As regards measures of sequestration applied to Italian property in Tunis, ordered by the French Government up to the coming into force of the Peace Treaty (September 15, 1947) and their effects up to that date (the position subsequent thereto will be dealt with later on), a causal nexus between the said measure (the sequestration) and the loss or the damage, is not sufficient to give rise to responsibility on the part of the French Government; there must also be a causal nexus between the loss or the damage and the negligence of the French Government itself or negligence by one of its agencies. These may have committed an error (negligence or indiscretion) in the appointment of the administrator-sequestrator (*culpa in eligendo*) or in the control of the administration (*culpa in custodiendo*) or in giving the requisite instructions (*culpa in instruendo*), or in giving the authorizations required by municipal legislation (*cf.* Article 7 of the Residential Decree of March 8, 1943); on the other hand, the administrator-sequestrator, himself also an agency of the French Government, may have been guilty of negligence *in committendo* or *in omittendo*.

" In legal theory, the basis of the international responsibility of States is a matter of controversy. Traditional doctrine, which goes back to Grotius, requires that there be negligence, while Anzilotti and other modern writers are content with ' risk ' and speak of an objective responsibility founded on the causal connection between the activity in question and the act which is contrary to international law (*cf.* Rousseau, *Droit international public*, pp. 359 and 360; Verdross, *Völkerrecht*, 2nd ed., p. 285; Guggenheim, *Traité de Droit international public*, vol. II, pp. 49 *et seq.*; Morelli, *Nozioni di Diritto internazionale*, pp. 348 *et seq.*). The second opinion mentioned cannot in any way be admitted, for example, as concerns facts which consist of the omission of preventive or punitive measures with regard to individual activities, which prejudice given foreign interests; in such a case, the State is responsible in so far as its agencies have not exercised a certain degree of diligence (see Morelli, *op. cit.*, p. 350; Rousseau, *op cit.*, p. 360). In the present instance, the act contrary to international law is not the measure of sequestration, but an alleged lack of diligence on the part of the French State—or, more precisely, of him who was acting on its behalf—in the execution of the said measure, as the Italian Government has recognized even for the period under consideration.

" It follows that the loss to be compensated cannot consist in the difference between the total estate [*la situation patrimonial*] of the owner of the sequestrated property at the moment of restitution (or the moment when restitution ought to have taken place) and what it would have been if sequestration had not been imposed. The object of a sequestration is purely conservatory and, by definition, there is no room for the initiatives which the owner of the sequestrated property could have taken, and probably would have taken, at his own risk, if he had not been deprived of the powers of management and disposition. The so-called 'loss of profit' is therefore excluded from compensation so far as it goes beyond the idea of profits which could arise from an administration free from negligence on the part of the sequestrator, if the normal course of business had been pursued.

"On the other hand, it is not necessary that the negligence attributable to the French Government or its agencies, officials, agents or, in particular, the sequestrator, should be gross negligence. On behalf of the French Government, it is said that this proviso finds a justification in the provision of French civil law that when an agency is gratuitous, the responsibility of the agent is lighter (Article 1992, para. 2). It is contended that we here have a gratuitous agency, seeing that the Italian Government is claiming repayment of all sums paid to the administrator-sequestrator. But, on the one hand, it is here a question of the international responsibility of the French Government for the execution of measures which it has ordered; that responsibility has nothing to do with provisions of French municipal law about contractual agency. On the other hand, the Italian Government is wrong in claiming repayment of all sums paid to the sequestrator: the Franco-Italian Conciliation Commission held in its decision of July 6, 1954, in the case of the *Schappe Spinning Mill Company*[1] that 'The sequestration being also a measure of conservation, the owner of the sequestrated property ought, in principle, to bear the expenses, which are not a charge within the meaning of Article 78 (2) of the Treaty . . .' In that decision the Franco-Italian Conciliation Commission only reserved the right to examine the account for the expenses of the sequestration in case any of the charges were excessive; the *Collège arbitral* will not decide differently in the application of general principles of public international law.

"B. *Loss and damage sustained after September* 15, 1947.—The Italian Government maintains that other principles ought to form the basis of the responsibility of the French Government for loss and damage caused after September 15, 1947; in effect, with the coming into force of the Peace Treaty, the administrative sequestration put upon Italian estates which were not to be liquidated under Article 79 (6) of the Treaty ought to have ceased. Instead, those administrative sequestrations were maintained and judicial sequestrations were substituted for them. And now, after September 15, 1947, as regards these estates, the administrative sequestrations once transformed into judicial sequestrations, the French Government

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[[1] *Recueil des Décisions*, Part 5, p. 93; *International Law Reports*, 1954, p. 141 (at p. 146).]

has become guilty of an unlawful international act which involves its objective responsibility for any loss and damage which may result from it.

" The French Government, on the other hand, is of the opinion that the criteria applicable to loss and damage caused before September 15, 1947, are equally applicable to loss and damage sustained after that date. In any event, according to the French Government, the Italian Government has by the Franco-Italian Accord resulting from the Exchange of Notes of February 2, 1951, recognized the legitimacy of the sequestrations ordered by the French Government on Italian property in Tunis between September 15, 1947, and January 25, 1951, precisely the period in which there took place the transformation of administrative sequestrations into judicial sequestrations, out of which the present litigation arises. The examination of these arguments must be preceded by the consideration of certain facts.

" After the entry into force of the Treaty, a Residential Decree of December 4, 1947, provided that ' legislation concerning the declaration and the putting under sequestration of enemy property shall remain applicable to property, rights and interests which belong to Italy or to Italian nationals and which, under the Treaty with Italy, are liable to be seized, retained or liquidated '. This provision was modified by the French Law of September 28, 1948, which created the *Service de Liquidation des Biens italiens en Tunisie*. In applying this Law, for property to which Article 79 (6) (*c*) of the Treaty did not apply and of which the Resident-General had required the liquidation, there was substituted for administrative sequestration judicial sequestration by Order of the President of the [appropriate] Tribunal; and on the application of the Procureur de la République, the *Service de Liquidation* took the place of the administrative administrator-sequestrator. But, for property to which Article 79 (6) (*c*) of the Treaty applied, administrative sequestration had to be raised without more, and the property had to be restored to its various owners, as provided by a Beylical Decree of June 20, 1946.

" As has been seen, there were cases in which the applicability of Article 79 (6) (*c*) of the Treaty was the subject of controversy between the French Government and the Italian Government, as the result of divergent interpretations of the expression ' permission to reside '. In those cases, the appropriate Tribunal appointed the *Service de Liquidation* as judicial sequestrator, but the liquidation proceedings were halted whenever it appeared to the *Service* that there was a serious doubt regarding the rights of the interested parties."

In these circumstances, the Franco-Italian Accord of February 2, 1951, was concluded by an Exchange of Notes, which embodied an agreement to " settle pending questions in a spirit of amity " by means of a number of " solutions ": of these, the fourth and fifth are here relevant. *Solution* No. 4 provided:

> " 4.—By way of compromise and taking into account concessions obtained elsewhere, the Italian Government recognizes the validity of sequestrations imposed on properties in Italy after September 15, 1947, and before January 25, 1951. After that date, and not later than December 31, 1951, only properties which ought to have been made the object of measures provided by Article 79 of the Treaty and which have avoided such measures as the result of fraudulent action imputable to Italian nationals, shall be put under sequestration. Only positive acts resulting in concealment of the liability to liquidation of the properties in question shall be regarded as fraudulent action. The French authorities may convert administrative sequestrations in existence on January 25, 1951, into judicial sequestrations under the procedure provided by the French Law of September 28, 1948. The expression ' administrative sequestrations in existence on January 25, 1951 ' means sequestrations which were at that date the object of a *publication* and which have not been revoked."

The fifth *solution* constituted a reference of all questions concerning the interpretation of Article 79 (6) (*c*) of the Treaty to the arbitrament of the members of the present Conciliation Commission and an undertaking that the French authorities would do everything necessary to suspend every judicial decision relating to the interpretation and application of Article 79 (6) (*c*).

The *Collège arbitral* continued: " A true interpretation of the Exchange of Notes of February 2, 1951, requires that it be closely connected with the *Note verbale* of October 27, 1950, from the Italian Ambassador in Paris to the French Ministry of Foreign Affairs (which is expressly referred to in the preamble to the Accord of February 2, 1951). Despite the general terms used in drawing up *solution* No. 4 of the Accord of February 2, 1951, it does not appear that the Italian Government intended to waive their objection to the legitimacy of the continuation, even under judicial forms, of the sequestration of properties which were not susceptible of liquidation under the Treaty after September 15, 1947. The sole object of *solution* No. 4 was to overcome, within certain limits, the objection raised by the Italian Government to the liability to liquidation of certain Italian properties which had not been placed under sequestration, in view of the dispute between the two Governments on the question of the words ' permitted to reside ' in Article 79 (6) (*c*) of the Peace Treaty, a dispute which it was decided in *solution* No. 5 of the Note of February 2, 1951, to submit to arbitration.

" This *Collège arbitral* cannot accept the contention of the Italian Government that in not restoring to their owners the properties in question on September 15, 1947, the French Government incurred an objective responsibility by an unlawful international act and is in consequence bound, without exculpation, to make good all the damage which results therefrom.

" Article 79 (1) of the Peace Treaty gave each of the Allied and Associated Powers the right to ' seize, retain or liquidate ' all property, rights and interests which on the coming into force of the Treaty (September 15, 1947) were within its territory and belonged to Italy or Italian nationals, as well as the right to take any other action with respect to such property, rights and interests. Paragraph 6 of the same Article provides, first, that the property covered by para. 1 of the Article shall be deemed to include Italian property which had been subject to control by reason of the state of war existing between Italy and the Allied or Associated Power having jurisdiction over the property. Paragraph 6 goes on to impose a restriction on the right of the Allied or Associated Power to seize, detain, liquidate or utilize property of Italy or Italian nationals; from the exercise of that are excluded seven categories of property, including ' (*c*) property of natural persons who are Italian nationals permitted to reside within the territory of the country in which the property is located or to reside elsewhere in United Nations territory, other than Italian property which at any time during the war was subjected to measures not generally applicable to the property of Italian nationals resident in the same territory '. It was in the logic of things and, moreover, in the interests of the owners of Italian property sequestrated in Tunisia, that those sequestrations did not automatically cease to have effect on September 15, 1947, because otherwise that property would have been suddenly deprived of protection and would have been exposed to dangers of every kind. The Treaty itself, in Article 78 (2), allowed six months after it came into force for defeated Italy to restore property belonging to any of the United Nations or their nationals, even though hostile operations had come to an end in the spring of 1945.

" In order that restitution to Italy or Italian nationals might take place of property which had not been liquidated, under Article 79 (6) of the Treaty, it was first of all necessary for the owner of such property to appear, possibly by a duly authorized representative, and to claim it. In the second place, in order that restitution might be made to him, he must produce evidence that the property claimed fell within one of the seven exceptions in Article 79 (6) of the Treaty. Where, as in the present case, the exception invoked was (*c*), there was still required two things. On the one hand, the claimant must prove that he was on September 15, 1947, permitted to reside either in France or elsewhere in United Nations territory. A State cannot be expected to know of all the permissions to reside issued by its police authorities before a given date and still in force at that date. In particular, one of the United Nations cannot be expected to have, on September 15, 1947, knowledge of all the permissions to reside issued by any of the nineteen other United Nations and still in force at that date. On the other hand, the French Government must be allowed a reasonable time to ascertain whether, by any chance, the property claimed had not been the object, during the war, of measures which were not applied generally to the property of Italian nationals residing in France.

" Moreover, a difference arose between the French Government and the Italian Government with regard to the conception of ' permission to reside '. Having failed to reach agreement, the two Governments decided, in *solution* No. 5 of the Exchange of Notes of February 2, 1951, that the question should be submitted to an arbitral decision. In the same *solution*, the two Governments agreed upon the steps to be taken in the arbitral proceedings. The second part of No. 5 states: ' The French authorities will, so far as concerns them, take all necessary measures in order to suspend every judicial decision in litigation concerning the interpretation and the application of Article 79 (6) (*c*) of the Treaty.' The Exchange of Notes does not provide for any other measures being taken pending the outcome of the arbitration, nor does it give the *Collège arbitral* the power to make provisional orders. The intention of the parties to the Accord was therefore that during the arbitration proceedings, with respect to properties then the subject of litigation, the *status quo ante* should be maintained, that is to say, administrative sequestration (converted or to be converted into judicial sequestration under the French Law of January 25, 1951—*cf.* the second paragraph of *solution* No. 4 of the Accord of February 2, 1951). The Italian Government could not reasonably have believed that the French Government had formed the intention of restoring, before the award was given, properties which the award might have recognized as being liable to liquidation, in which event liquidation would have been or become impossible or illusory as the result of administrative measures or dispositions taken in the meanwhile by the persons interested. It must not be overlooked that the French Government had until then maintained that the French courts were competent to adjudicate on the question whether certain Italian property was or was not susceptible of liquidation in favour of the French Treasury, under Article 79 (2) of the Peace Treaty: they had envisaged the possibility of an international dispute on this subject with the Italian Government only after having exhausted all the means of recourse provided by French law . . .; in renouncing the right to exhaust local remedies and by accepting international arbitration the French Government was making a concession to the Italian Government in the spirit of amity referred to in the Exchange of Notes. That consideration allows the *compromis* to be interpreted in such a way that, except for the suspension of pending proceedings in French courts, expressly mentioned, the position of properties which are the subject of litigation must remain unaltered until the award of the *Collège arbitral* has been given, in order that the French Government shall not run the risk of losing the guarantees which were provided by the Treaty and which were preserved by the Franco-Italian Convention of November 29, 1947.

" It must be observed that, in effect, as the result of the two decisions of the *Collège arbitral* of June 25, 1952, and July 6, 1954,[1] only a small part of the properties which are regarded by the French Government as susceptible of liquidation were held to be not so susceptible; for the rest, if restitution had taken place at the request of the Italian Government, the latter would have become objectively responsible for any damage resulting from such restitution requested, obtained and in the event shown to have been unjustified—that is, at least, if the legal arguments put forward by the Italian Government are admitted. The latter had, then, in fact an interest in permitting the continuation of the *status quo* until the pronouncement of the arbitral award.

" The Italian Government have not demonstrated precisely and specifically enough to enable the enquiry to proceed on the point, that arbitral decisions had not been complied with within the required time so as to give rise to an unlawful international act.

" It follows that the responsibility of the French Government is governed, during the period between September 15, 1947, and the restitution of the properties, by the same principles as for the period preceding the coming into force of the Treaty. On the other hand, on February 2, 1951, the Italian Government did not recognize that the French Government had the right to liquidate, either wholly or in part, properties in respect of which the question had arisen whether or not the respective owners could claim the benefit of Article 79 (6) (*c*) of the Treaty. The French Government ought to have preserved these properties; to have liquidated them (except under *force majeure*) renders the Government liable to compensate the owners in a sum equal to the value which the property would now have if it had been kept up and managed in the ordinary way, less the cost of management and administration if these were greater than the profits or adding the balance of the profits if they were not. The fact that certain liquidations were carried out under orders of a French court makes no difference.

" Although it is true to say that in certain arbitral awards given in the twentieth century the opinion is expressed that the independence of the courts, in accordance with the principle of separation of powers as generally recognized in civilized countries, excludes the international responsibility of States for acts of the Judiciary which are contrary to law, yet that theory today appears to be universally and rightly repudiated by writers on and courts administering international law. The judgment or order of a court is something issuing from an agency of the State, just as is a law promulgated by the Legislature or a decision taken by the executive authorities. The non-observance by a court of a rule of international

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[[1] See *supra*, p. 319, n. 1.]

law creates international responsibility on the part of the collectivity of which the court is an organ, even if the court has applied municipal law in conformity with international law (*cf.* Guggenheim, *Traité de Droit international public*, vol. II, p. 11, n. 6; Cavoré, *Le Droit international public positif*, vol. II, p. 381; Charles Rousseau, *Droit international public*, pp. 370 and 374; Verdross, *Völkerrecht*, 2nd ed., p. 291).

" Now, either the French courts have ordered liquidations, in conformity with French municipal law but in violation of the Peace Treaty, in which case France is responsible for a legislative act which is contrary to her international obligations; or the French courts have ordered liquidations which infringed both French law and the Treaty, in which case France is responsible for a judicial act which is contrary to her international obligations.

" It goes without saying that the French Government must render an account in respect of each liquidation and pay the interested party any balance which he has not yet received. He is not entitled to a greater sum for profit, etc., except where there has been some negligence on the part of the French administration or of the administrator-sequestrator. The same applies to natural and juridical accretions to the properties.

" The properties must be restored in the state which appears on the *procès-verbal* of the sequestration, unless restitution has already been effected. We have dealt above with property liquidated by the French Government. For other property which may be missing there must be an enquiry to ascertain whether the failure to effect restitution results from negligence on the part of the French administration or on that of the administrator-sequestrator."

The *Collège arbitral* ordered the setting up of a *Commission d'Expertise* to examine all claims in order to ascertain whether or not the responsibility of the French Government was involved in the sense of the principles laid down in the above decision; and where such responsibility was involved, to draw up a judgment on the wrong done by the French Government or the administrator-sequestrator and on the amount of the loss sustained by the owner of the property in question; and draw up reasoned proposals for compensation.

[Report: *Recueil des Décisions*, Part 5, p. 260.]

State Responsibility—For Acts and Omissions of State Organs and Officials—Treatment of Goods in Transit at Outbreak of War—Whether a Discriminatory Measure—Causal Relationship between Damage and War.

See p. 626 (*Agache Claim*).

State Responsibility—Nature and Kinds of—Acts and Omissions of State Organs—Whether Responsibility of State Involved by Authorization of Judicial Sale.

See p. 945 (*Armstrong Cork Company Claim*).

State Responsibility—For Acts and Omissions of State Organs and Officials—Executive Action—Sequestration of Property—Distinction between Inherited and Other Property.

See p. 840 (*Montefiore Claim*).

ii.—Acts of Insurgents, Rioters and Private Individuals in General

State Responsibility—For Acts of Private Individuals—Theft by Organised Gang during Period Following Hostilities—Whether " as a result of the war "—Treaties—Interpretation of—Principles and Rules of—Construction in Light of Facts of Case.

Hoffman Claim.

Italian-United States Conciliation Commission. April 11, 1952.

(Sorrentino, Scanlan.)

The Facts.—The claimant, a United States national, was in 1946 a member of the United States Diplomatic Mission in Albania. In March 1946 the Mission was closed down and the claimant sent some of his personal effects to Italy for storage and safe-keeping. They were placed in the United States Army warehouse at Naples. In September 1946 persons unknown broke into the warehouse and stole the claimant's effects. A claim for compensation under Article 78 of the Treaty of Peace was submitted to the Commission on behalf of Mr. Hoffman. In support of the claim it was contended that the loss, while it might not bear the same direct relationship to an act of war as a loss sustained as a direct consequence of military operations, was nevertheless a loss attributable to the war and one which could properly be classified as occurring " as a result of the war ". It was further contended that the theft from a United States warehouse, carried out by a presumably well-organized band in the difficult times following the cessation of hostilities and in the period when criminal activities reached their highest point, was a theft that, in the absence of evidence to the contrary, could be logically linked to the war, so that the loss suffered thereby could be said to be one suffered " as a result of the war ".

On behalf of the Italian Government it was contended that the responsibility of the Italian Government under para. 4 (*a*) of Article 78 of the Treaty of Peace arose only in those cases in which it was shown that the loss suffered by a United Nations national was directly dependent upon an act of war; that the loss suffered by the claimant was the result of a common theft, and the fact that there was an increase in delinquency in Naples during 1946 could not give an act which was a common theft the characteristic of an act of war. It was further contended that since the theft was perpetrated on September 7, 1946, *i.e.*, some time after war operations had ceased, there was lacking any relationship with an act of war.

Held: that the claim must be rejected; the loss sustained by the claimant was not incurred " as a result of the war ".

The Commission said: " The Commission declares that the right to compensation in this case must be predicated upon three requisites, and that each of these requisites must be established:

" (1) that the claimant is a ' United Nations national ' within the meaning of this term as defined in paragraph 9 (*a*) of Article 78 of the Treaty of Peace;

" (2) that the claimant has suffered a loss by reason of injury or damage to property in Italy, as provided for in paragraph 4 (*a*) of Article 78 of the Treaty; and

" (3) that the loss is ' as a result of the war ' within the meaning of this phrase as used in paragraph 4 (*a*) of Article 78 of the Treaty of Peace.

" The Commission observes that the phrase ' as a result of the war ', as used in para. 4 (*a*) of Article 78 of the Treaty of Peace, could be subject to various interpretations and therefore must be construed in the light of all the facts in a particular case. The Commission finds that there must be a sufficiently direct causal relationship between the war and the occurrence which causes the loss. The obligation assumed by Italy is the payment of compensation for a loss sustained by reason of injury or damage to property in Italy which is attributable to the existence of a state of war; and a loss sustained as a result of an occurrence in which the war was not a determinate factor cannot be construed as creating an obligation under the provisions of para. 4 (*a*) of Article 78.

" In this case the claimant was the victim of a felonious taking by unknown persons of his property which had been stored in Naples in a United States Army warehouse under the control of American personnel. Hypothetically, the social conditions existing shortly after the cessation of hostilities may have resulted in an increase in the frequency of theft losses in Naples, but this is not the point which must be determined in this case. The Commission holds that the requests contained in the Petition must be rejected because the loss sustained by the claimant was the result of an occurrence which does not have a sufficiently direct causal relationship to the war as to be ' as a result of the war '."

[Report: Unpublished (Decision No. 7).]

B—CLAIMS

I.—In General

State Responsibility—Claims—Assessment of—Deduction for Inheritance Tax Charged on Property Taken.

TALIA CLAIM.

United States, International Claims Commission,[1], [2]

THE FACTS.—The claimant was the United States National Bank of Portland, Oregon, as executor and trustee of the estate of Stephen G. Talia, who at the time of his death owned certain real property (land) in Yugoslavia. By his will, Talia bequeathed the property to the Shriners' Hospital for Crippled Children of Portland, Oregon. After his death, the property was nationalized or taken by the Yugoslav Government. In connection with the assessment of the amount to be awarded on a claim under the Agreement of July 19, 1948, between the Governments of the United States of America and Yugoslavia regarding pecuniary claims of the United States and its nationals, the question arose whether the Yugoslav inheritance tax of ten per cent. should be taken into account.

Held: that in the circumstances of this case, no deduction should be made from the value of the property for inheritance tax.

The Commission said: " Under the laws of Yugoslavia, those who succeed to real property by inheritance are ordinarily obligated to pay inheritance taxes on the value of the property (see Law Concerning Direct Taxation, effective January 1, 1946, Article 24, Official Gazette No. 854 of November 20, 1954). The People's Court is prohibited from transferring title to the heirs unless and until such inheritance taxes are paid (Revised Law Concerning Direct Taxation of August 14, 1946, Article 64, Official Gazette No. 67 of August 20, 1946). Thus, the value under local law of an heir's interest in real property must be regarded as being the value of the property less the inheritance taxes charged against it and which must be paid before the transfer of title can be accomplished. As awards may be made only for the value of the property taken or, as in the case here, for the value of an interest in property, a deduction ordinarily must be made for inheritance taxes.

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[1] On July 19, 1948, the Governments of the United States of America and Yugoslavia concluded an Agreement for the " expeditious and equitable settlement " of claims of the United States and its nationals against Yugoslavia on account of the nationalization and other taking by Yugoslavia of property and of rights and interests in and with respect to property, which occurred between September 1, 1939, and the date of the Agreement.

Article 1 (*c*) of the Agreement provided for the adjudication by an agency established by the United States of claims submitted thereunder. The International Claims Commission of the United States was established by the International Claims Settlement Act, 1949 (Public Law, 455, 81st Cong., 2nd session (64 Stat. 12)). On August 21, 1948, the Government of Yugoslavia paid into the United States Treasury the sum of $17,000,000 in full settlement and discharge of all claims against Yugoslavia under the Agreement. (On July 1, 1954, the International Claims Commission was superseded by the Foreign Claims Commission of the United States.)

[2] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

" However, Article 6 of the Decree on Inheritance and Gift Taxes of March 18, 1947 (Official Gazette No. 25 of March 25, 1947), provides in paragraph 2:

> ' Domestic foundations established for scientific, artistic, educational, medical, social, cultural, or physical cultural purposes and equally companies and associations which work for such purposes are exempt from inheritance taxes.'

It is our opinion that this provision exempts from the levying of inheritance taxes all companies and associations which work for these purposes regardless of whether they are domestic or foreign, while the exemption for foundations exists only in the case of domestic foundations. We conclude, therefore, that no deduction should be made here for inheritance taxes, since the Shriners' Hospital for Crippled Children of Portland, Oregon, is not a foundation."

[Report: *Settlement of Claims*, 1949–1955, p. 89.]

NOTE.—There are a number of other decisions upon mortgages as a factor in the calculation of compensation: see pp. 92–97 of the Report.

State Responsibility—Claims—Assessment of—Whether Compulsory Mortgages to be Taken into Account.

CORN PRODUCTS REFINING COMPANY CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—The claimant Company was the owner of land in Yugoslavia upon which the Government of Yugoslavia had imposed two mortgages. One of them, a mortgage of 39,000,000 dinars in favour of the State Land Fund pursuant to a decision of the Tax Office of the People's Municipal Committee of Pancevo of March 22, 1946, No. 11075/46 for war profit taxes, was in the nature of a confiscatory measure. The other, a mortgage of 3,000,000 dinars with $4\frac{1}{2}$ per cent. interest and 300,000 dinars for expenses in favour of the Industrial Bank of Yugoslavia pursuant to a written authorization given by the Ministry of Industry in Belgrade, No. 403/1946, on June 21, 1946, had been placed on the property, after seizure by the

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.
For the establishment and the functions of the Commission see *supra*, p. 332, n. 1.

Government of Yugoslavia, without the consent of the former owner. The Company lodged a claim in respect of the property taken, under the Agreement of July 19, 1948, between the Governments of the United States of America and Yugoslavia regarding pecuniary claims of the United States and its nationals.[1]

Held: that the mortgages must be disregarded in assessing the value of the property taken by the Government of Yugoslavia.

The Commission said: "With respect to the mortgage of 39,000,000 dinars for taxes for war profits, this encumbrance clearly represents a confiscatory measure adopted by the Government of Yugoslavia prior to the nationalization of the enterprise, but after the enterprise was taken over for management purposes. It is not necessary to point out that the amount of 39,000,000 dinars is out of any proportion with respect to the alleged war profits, because the aforestated figures disclose that the plant had an average earning of not more than 3,000,000 dinars per year. However, should we assume that the profits were much higher during the war, we never would arrive at the amount of 39,000,000 dinars, because this amount represents approximately three times the prewar value of the plant and a taxation to such an extent is nothing else but a total confiscation of the entire property. This mortgage for war profits taxes must be, therefore, disregarded for the purposes of this valuation.

"The mortgage of 3,000,000 dinars put on the property on June 21, 1946, by the Ministry of Industry in Belgrade in favor of the (State-owned) Industrial Bank of Belgrade is an encumbrance for a loan which was never requested by claimant's subsidiary corporation nor used by it, in the interest of the corporation. It represents a security for a loan granted by a bank controlled by the Government, when the Government was itself in charge of the plant. It can be fairly stated that the loan was granted without knowledge or permission of the stockholders of the corporation, who had no control of the plant since March 8, 1945, when the State Administration of National Property of Yugoslavia seized the plant. Consequently, a mortgage granted after the seizure to the Government-appointed administration of the plant at the request of that administration is not binding upon the corporation nor can it impair the value of the enterprise for the purposes of this valuation."

[Report: *Settlement of Claims*, 1949–1955, p. 93.]

NOTE.—Claims of mortgagees of immovables in Yugoslavia were recognized by the Commission as coming under the Yugoslav Claims Agreement of 1948; see, for example, the *Klein Claim* (*ibid.*, p. 92), where the Commission said: "We find . . . that claimant was the owner of a recorded mortgage . . . in the sum of 49,140.18 dinars. We conclude that such a mortgage, duly recorded, is immovable or real property under the law of Yugoslavia and as such is within the terms of the Yugoslav Claims Agreement of 1948 (art. 1)."

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[1] For details of this Agreement see *supra*, p. 332, n. 1.

The cancelling of mortgages by the occupation authorities during the occupation of Yugoslavia, and the placing of mortgages on properties by those authorities, were *held* by the Commission to be null and void: *cf.* the *Sancer Claim* (*ibid.*), in which the Commission said: " In each land extract submitted by claimant, the sole entry in the encumbrance list is: ' The liens omitted as unnecessary.' Certified extracts covering these same properties have been filed by the Yugoslav Government in which a list of encumbrances is given. While all extracts show encumbrances, the only ones which affect the value of claimant's interests are those recorded in Docket No. 1203, the two others being referred to therein as ' subsidiary dockets ' in which mortgages are recorded as a ' superguaranty for the principal debt ' encumbering the realty recorded under Docket No. 1203. The latter shows the following entries, all in favor of the State Mortgage Bank of Belgrade:

"April 5, 1929: 300,000 dinars plus expenses.
"August 19, 1935: 850,000 dinars plus expenses.
" December 12, 1936: 850,000 dinars plus expenses."

While the extract shows cancellations and additional encumbrances during the occupation, such transactions were voided by article 6 of the Decree on the Transfer of Enemy Property into Ownership of the State (Official Gazette No. 2/45). According to a report of the National Bank, which succeeded the State Mortgage Bank, the encumbrances amounted to 2,026,260 dinars on December 30, 1942. No evidence is available as to any additional increase for interest or expenses. " No evidence has been filed indicating that the mortgages have been satisfied. In the circumstances, we are of the opinion that a deduction for the mortgages must be made...."

In the *Stock Claim* (*ibid.*, p. 95), the question arose whether mortgages should be disregarded if placed on properties prior to their seizure but at a time when the properties were under Government administration. The Commission *held* that such mortgages should be disregarded: ". . . It is clear that mortgages granted to the Government-appointed administrator of a plant, not at the request of and without either the knowledge or consent of the owners, are not binding upon the corporation nor can they impair the value of the enterprise for the purposes of this valuation."

Where, however, the mortgage had been imposed for unpaid inheritance taxes, and the claim was legally subject to such taxes, the mortgage was deducted from the award as an encumbrance for unpaid taxes due from the claimant under the general provisions of the tax laws. See, for example, the *Spitzer Claim* (*ibid.*, p. 96), where the Commission said: " The Yugoslav Government states that the mortgages recorded in favor of the People's Committees in 1950 were entered by a decision of the District Court of Novi Sad for unpaid inheritance taxes owed by the claimant. While these mortgages were not recorded on the dates of taking, claimant on such dates did not own the property, but rights and interests in the property through inheritance. The value of such rights and interests would be the value of the property, less a deduction for inheritance taxes. We conclude, therefore, that the amount of inheritance taxes recorded as encumbrances on the property constituted a lien on his interests therein on the date of taking. No evidence has been filed indicating that the mortgage has been satisfied."

In the same case, it appeared that the claimant's ancestors, who were Jews, had died in 1942 as a result of a massacre in occupied Yugoslavia. In 1944, mortgages were placed on certain property in favour of the State Land Fund of the occupying Power, Hungary. The Commission *held* that the mortgages must be disregarded, saying: ". . . in view of the facts that this property was considered as Jewish-owned; that the then record owners had been killed prior to entry of the mortgages; and that on the dates these two mortgages were entered the land was located in territory under the occupation of Hungary, it would not be in the interests of justice and equity to deduct them without evidence that they were not put on the property as a result of anti-Jewish legislation of the occupying power."

Payment off of mortgages subsequent to the date of the taking by the Yugoslav Government of the mortgaged property was *held* to have no bearing on the value of the claimant's interest in the property, in the *Huber Claim* (*ibid.*, p. 97), where the Commission said: " To show that the mortgages recorded on the Zagreb properties she inherited were not in existence, the claimant filed a certificate dated November 20, 1954, from the National Bank of the F.P.R.Y. This document recites: ' It is being certified herewith that the National Bank, Branch 406, in Zagreb, as successor to the former Gradska Stedionica Grada (City Savings Bank of the City of Zagreb) has no claim against Slavoljub and Serafina Deutsch of Zagreb.' But this document is merely evidence that the mortgages are currently extinguished. It is no evidence whatsoever that the mortgages were satisfied on August 17, 1947, the date of taking, and it is the value of claimant's interests on such date which is the measure of her compensation. Satisfaction of such a lien, subsequent to the date of taking, if such is the case here, would have no bearing on the value of claimant's interest on the date of taking and cannot be taken into consideration when computing that interest for the reasons set out in [the *Reichsman Claim*: *ibid.*, p. 97]."

State Responsibility—Claims—In General—Indemnity Agreement—Requisitioning of Vessel in Time of War—Vessel in Neutral Port—Requisition on Behalf of Another Government—Liability of Agent Government—The Law of the United States of America.

ZADEH *v.* UNITED STATES.

United States, Court of Claims. April 5, 1955.

THE FACTS.—The House of Representatives had in 1952 requested " findings of fact and conclusions " by the Court of Claims as to a claim submitted for legislative relief by Zadeh. Zadeh, a citizen of Iran and a resident of Turkey, was in 1941 the owner of the tanker *Oilshipper*, registered in Panama. The vessel, then lying in Istanbul harbour, became of strategic value to both the Axis and the Allied Powers. In order to forestall purchase of the vessel by German interests, the United States raised with Panama the question of requisitioning the vessel. Panama directed that the *Oilshipper* be requisitioned, and, since it maintained no diplomatic or consular representatives in Turkey, authorized the diplomatic and consular representatives of the United States in Turkey to act for Panama. The United States Ambassador to Panama advised the Minister for Foreign Affairs of Panama on February 19, 1942, that " . . . concerning the requisition by . . . Panama of the . . . *Oilshipper* . . . the Government of the United States will save the Panamanian Government harmless from the effects of any claims arising from the requisitioning of this vessel. . . ."

The *Oilshipper* was requisitioned by Panama on February 20, 1942, by the action of the United States Consul acting as Chargé d'Affaires for Panama. From that date until August 1942, Zadeh and the German to whom he purported to sell the ship engaged in litigation to recover the vessel. On August 6, 1942, the Turkish Government took possession and control of the vessel and placed it in operation under the Turkish flag. On August 20, 1942, the United States Ambassador to Panama again advised the Panamanian Government that " . . . the United States will, in connection with the sale of the vessel *Oilshipper*, to the Government of Turkey . . . save the Government of Panama harmless from any damage, injury, claim or expense which may arise therefrom." In 1942, Turkey and the United States agreed that Turkey would pay $300,000 to the United States as its maximum liability in the matter of the *Oilshipper*. The United States agreed to return to Turkey any portion of the $300,000 remaining after settlement with the owner.

Held: that the Court would recommend that the plaintiff be paid the sum of $170,000. Although no legal liability to pay for the vessel existed under the law of the United States since the statute of limitations had run, the vessel was taken at the request of and for the benefit of the United States. The United States had agreed to hold the Government of Panama harmless.

The Court said in its Conclusion: " In the light of the entire record plaintiff appears to be a man who had few attachments to any country. He was willing to trade with either, both or all sides, and was willing to play one against the other in order to exact the highest price obtainable. Nevertheless, the plaintiff was the owner of the vessel. Its strategic value lay largely in the fact that neither of the warring parties wanted it to fall into the hands of the other side. Any strategic enhanced value was largely offset by the fact that the vessel was located in critical waters and was in danger of being lost or sunk. In fact, some of the other vessels owned by plaintiff were sunk and others lost. In all the circumstances it is apparent that any payment should be limited to the normal or actual value.

" There is no legal liability due to the fact that the petition was filed in this court more than six years after the taking. But the vessel was taken at the instance and for the benefit of the United

States which has agreed to hold the government of Panama harmless. Panama has in effect passed to the United States the determination of what her obligation may be.

" We recommend therefore that plaintiff be paid the sum of $170,000.

" Apparently no provision is made in Panamanian law for the payment of interest as a part of just compensation. In the United States, under a rule established by the Supreme Court, interest is customarily allowed, usually at the rate of 4 per cent per annum. *United States* v. *Shoshone Tribe*, 304 U. S. 111.

" Whether on the basis of the facts which we have found, interest for the delay in payment should be allowed as a part of just compensation, is left to the judgment of the Congress."

[Report: 131 Ct. Cl. 182.]

State Responsibility—Claims—Death of Owner of Property at Time of Destruction—Claim by Heir—Rejection of Claim for Absence of Evidence of Condition of Property at Time of Inheritance.

CACCAMESE CLAIM.

Italian-United States Conciliation Commission. April 11, 1952.

(Sorrentino, Scanlan.)

THE FACTS.—This was a claim by a United States national in respect of the destruction by enemy action in 1943 of a building and its contents in Palermo, Italy. The building was the property of the claimant's brother, whose death was alleged to have been " due to the bombardment of the above described building, wherein he happened to be ". The claimant was the heir to his brother's estate.

On behalf of the claimant it was contended that having acquired by inheritance from Italian nationals [*sic*] the ownership of certain real and personal property at the same moment that such property was damaged, he was entitled to receive compensation under Article 78 of the Treaty of Peace with Italy of 1947.[1]

On behalf of the Italian Government it was contended (i) that the claimant was not entitled to any compensation under the Peace Treaty because his inheritance, if any, was an interest in damaged property and hence the claimant had not suffered a loss in Italy as a result of the war; (ii) that the inheritance, if any, included the right to submit a claim for war damage to the Italian Government, a right which was derived from Italian domestic law and not from the Peace Treaty.

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[1] Article 78, para. 4 (*a*), provides in part: ". . . In cases where . . . as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered."

Held: that the claim must be rejected. The property inherited by the claimant was damaged when he inherited it and he therefore had not suffered a loss which entitled him to compensation under the Treaty.

The Commission said: " The Commission finds that, in order to receive compensation under Article 78 of the Treaty of Peace, the claimant must prove that, as a result of the war, he [a United Nations national] has suffered a loss by reason of injury or damage to property in Italy. The claimant's brother, Rosolino Caccamese, was an Italian national; and therefore the claimant's right to compensation in this case hinges upon whether or not the claimant inherited an interest in the property in question before or after it was damaged during the aerial bombardment of July 18, 1943. The Commission further finds that the evidence presented in this case does not establish that the property involved here was in an undamaged condition at the time the claimant inherited an interest in said property."

" The Agent of the United States of America argues that 'In the absence of any evidence to the contrary, it can be presumed that the damage to the property and the death of the claimant's predecessor in interest occurred simultaneously.' While such a presumption of fact would fill a gap in the evidence, the Commission considers that there is no basis upon which it could entertain such presumption in favor of the claimant; and no basis for such presumption has been cited.

" The Agent of the Italian Republic argues that, even assuming that the evidence were sufficient to establish that the claimant's brother, Rosolino Caccamese, met his death within the subject building, the elements of time which are here involved have a relationship to each other; and no matter how small the increment of time between the occurrence of the damage to the building and the death of the claimant's brother, each occurrence involved a successive, separate and distinct element of time. The Agent of the Italian Republic also contends that it is contradictory to assert that the claimant was the owner of the property at the time the damage occurred, since the claim itself is based on the hypothesis that the damage to the property and the death of the claimant's brother occurred simultaneously. The validity of these arguments must be recognized.

" The Commission holds that the requests contained in the Petition must be rejected because the evidence submitted in this case does not establish that the property was in an undamaged condition when the claimant inherited an interest therein, and therefore that the claimant has not suffered a loss by reason of injury or damage to property in Italy for which he (a United Nations national) is entitled to compensation under the provisions of the Treaty of Peace or the Agreements supplemental thereto or interpretative thereof."

[Report: Unpublished (Decision No. 8).]

State Responsibility—Claims—In General—Retention, after Sale of Property, of Right to Claim Compensation for War Damage—Measure of Damages—Allowance for Inflation of Costs—Interest—Disallowance of Claim for Absence from Pleadings—Treaties—Interpretation of—Rules and Principles of—Construction of Definition Clauses—Comparison of Texts in Various Languages—Interpretation by Reference to Grammatical Construction—Reference to Logic—Retroactive Effect of Treaty Provisions—Rules of Procedure of Conciliation Commission.

CARNELLI CLAIM.

Italian-United States Conciliation Commission. March 4, 1952.

(Sorrentino, Scanlan.)

THE FACTS.—The claimant, a naturalized United States citizen, was the owner of certain real property in Nocera Inferiore, Italy. In September 1943, the property was heavily damaged and partially destroyed as a result of military operations. In December 1943, a war damage claim was lodged on behalf of the claimant with the Italian authorities; this claim, based on a survey by an expert, amounted to 179,000 lire. In July 1944, the claimant sold the property in its damaged condition to one Romolo, an Italian national. In the sale, the claimant " reserved unto herself the right to eventual indemnities which may be paid by the State for damages caused by the bombardment . . ."; and the instrument of sale continued " It is expressly agreed upon between the parties that eventual indemnities, which may be paid by the Italian Government for war damages resulting from the bombardment in September of last year, belong and are due exclusively to the seller, . . ."

In 1948, a claim for war damage, based on Article 78 of the Treaty of Peace, was submitted to the Italian Government, who rejected it on the ground that the claimant was not the owner of the damaged property on the date that the Treaty of Peace came into force (September 15, 1947) and hence was not entitled to compensation under Article 78. The claim was then submitted to the Conciliation Commission, coupled with a claim for interest.

The contentions of the parties appear from the *Held* below.

Held: that the claim for compensation must succeed. The claimant, as the transferor of damaged property, was entitled to 2,386,777 lire compensation under para. 4 (*a*) read in conjunction with para. 9 (*b*) of Article 78 of the Treaty. The claim for interest was dismissed.

I. *Retention of right to compensation after disposal of property. The meaning of " owner ".*—The Commission said: " None of the . . . facts with regard to the ownership of the property and the occurrence of the loss is controverted or denied by the Government of the Italian Republic; and the Commission finds that sufficient evidence has been submitted to substantiate them. The only question of fact which is controverted is the evidentiary value to be given to the survey made by Engineer Ruggiero Aniello and which the claimant states was attached to the claim filed on her behalf by Mrs. Olga Prota with the Fiscal Office—Technical Division (' Ufficio Tecnico Erariale ') of the Italian Ministry of the Treasury in the Province of Salerno in December of 1943. This question will be considered later in this opinion.

" It is the contention of the United States of America that the claimant is entitled to an indemnity for war damages from the Italian Government under Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof. Paragraph 4 (*a*) of Article 78 reads as follows:

> '. . . In cases . . . where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, . . . to make good the loss suffered. . . .'

" In paragraph 5 of the Answer the Agent of the Italian Republic states the position of his Government (in translation) as follows:

' There is no doubt that a citizen of the United Nations, who was the owner of property in Italy at the moment of entry into force of the Treaty of Peace (in which for the first time there is established the ground for the international obligation of the Italian State) has the right to indemnification for the damages to which reference is made.

' If, on the other hand, a national of the United Nations has legally ceased to be the owner of the property in question prior to the entry into force of the Treaty of Peace, the provisions that assure the indemnification can not find their application: there is lacking in fact the relation of ownership to the damaged goods which is an indispensable requisite for the application of Article 78.'

" In essence, therefore, the legal issue in this dispute is whether or not the claimant, whose property was damaged as a result of the war, is precluded from compensation under Article 78 of the Treaty of Peace because on a date prior to the entry into force of the Treaty of Peace she sold the property in its damaged condition to a third party who was not a United Nations national.

" It is not disputed that the claimant is a ' United Nations national,' within the meaning of this term as defined in para. 9 (*a*) of Article 78 of the Treaty of Peace; nor is there any question that,

' as a result of the war,' the claimant ' suffered a loss by reason of injury or damage to property in Italy '. Hence it would appear that the claimant is entitled to compensation from the Italian Government under para. 4 (*a*) of Article 78 unless the defense raised by the Italian Government is valid, namely, that since the claimant was not the owner of the real and personal property in question on September 15, 1947, the date when the Treaty of Peace went into force, she can not claim compensation under Article 78 for war damages to property owned by her at the time the damage was sustained in September, 1943.

" In paragraph 2 of the Answer, the Agent of the Italian Republic has propounded the question of law in this dispute as follows:

'. . . Whether the Government of the Italian Republic acted in conformity with the Treaty of Peace in refusing to take into consideration the claim based on Article 78, paragraph 4 (*a*), on the ground that the damaged property for which indemnity has been sought ceased to be the property of a national of the United States prior to the entry into force of the Treaty of Peace.'

" The answer to this question of law so clearly stated by the Italian Agent, and hence the conclusion of law which is determinative of the dispute in this case, is that the Government of the Italian Republic did not act in conformity with the Treaty of Peace when it refused to take into consideration this claim. In fact, the position taken by the Italian Government is contrary to the provisions of para. 9 (*b*) of Article 78 of the Treaty of Peace, which defines the word ' owner ', as used in Article 78, as follows:

> ' [9] (*b*) " Owner " means the United Nations national, as defined in sub-paragraph (*a*) above, who is entitled to the property in question, and includes a successor of the owner, provided that the successor is also a United Nations national as defined in sub-paragraph (*a*). *If the successor has purchased the property in its damaged state, the transferor shall retain his rights to compensation under this Article, without prejudice to obligations between the transferor and the purchaser under domestic law.*' (Emphasis supplied.)

"Although the word ' owner ' does not appear in para. 4 (*a*) of Article 78, which is a specific provision of Article 78 fixing the responsibility of the Italian Government for the restoration to complete good order of property returned to United Nations nationals or for the payment of compensation in cases where a United Nations national has suffered a loss by reason of injury or damage to property in Italy, the Commission has no doubt that the relation between the United Nations national and the property in Italy, as described in para. 4 (*a*) of Article 78, includes the relation of ownership; and hence the absence of the word ' owner ' itself in para. 4 (*a*) of Article 78 by no means signifies the absence of the *meaning* of the word ' owner ' in this paragraph. This is quite evident from a reading of the text of para. 4 (*a*) itself.

" The definition of ' owner ' included in para. 9 (*b*) of Article 78 was not inserted to define this word for the sake of the sole instance in which it is expressly used in Article 78, that is, in para. 8 of Article 78 which reads as follows:

> ' The owner of the property concerned and the Italian Government may agree upon arrangements in lieu of the provisions of this Article.'

but was inserted among the definition of terms as used in Article 78 in order that the definition might be applied in every instance throughout Article 78 in which the concept of ' owner ' was involved.

" In defining the meaning of ' owner ', para. 9 (*b*) of Article 78 also determines the United Nations national in whose name the claim for compensation or indemnity must be presented to the Italian Government where there has been a change in ownership of the property. In determining the effect, if any, of a change of ownership, it is necessary to consider the meaning of the word ' successor ' as used in this paragraph.

" In the first sentence of para. 9 (*b*) of Article 78, ' successor ' is used in the broadest sense of the word and includes a successor through inheritance, a successor through gift, or a successor through any other legal means of acquiring ownership of property. The second sentence of para. 9 (*b*) of Article 78 refers only to a ' successor ' by means of purchase. ' If the successor has purchased . . . , the transferor shall retain his rights . . .', and therefore the meaning of ' successor ' as used in the second sentence of this paragraph is by no means identical with the meaning of ' successor ' as used in the first sentence of the same paragraph. Moreover, the second sentence provides the one exception to the specific requirement contained in the first sentence of para. 9 (*b*), that the ' successor ' who has acquired the property must be a United Nations national within the meaning of this term as defined in para. 9 (*a*) of Article 78. The exception to this specific requirement occurs where the property in its damaged state has been transferred to another through purchase; it is immaterial to the right of the seller to compensation or indemnity under Article 78 whether the purchaser of the property in its damaged state was or was not a United Nations national.

" The Commission considers that the last sentence of para. 9 (*b*) of Article 78 is clear and unequivocal in its terms and that it leaves no reasonable basis for argument as to its construction. In the instant case, an Italian national purchased the property of the claimant on July 5, 1944; the property had sustained heavy damages during the military operations of September 3, 1943, and was in a damaged state on the date the sale was made. Therefore, the claimant, as the transferor of property in its damaged state, has the right to compensation under Article 78, para. 4 (*a*), because it is a right specifically retained to her in para. 9 (*b*) of Article 78.

" It should be particularly noted that the last sentence of para. 9 (*b*) of Article 78 reads ' If the successor *has purchased* . . .'

in the authentic English language version of the Treaty, ' Si le successeur *a acheté* . . .' in the authentic French language version of the Treaty, and ' Se il successore *ha acquistato* . . .' in the official but unauthentic Italian language version of the Treaty. In each language, the present perfect tense of the verb ' to purchase ' has been used. Thus it is clear from the text of the Treaty itself that at the moment the Treaty of Peace went into force, those United Nations nationals who might have sold their property in its damaged state prior to the entrance into force of the Treaty of Peace were not to lose their rights to compensation under Article 78.

" Moreover, the provisions of para. 9 (*b*) of Article 78 are entirely in accordance with logic. It cannot be presumed that the consideration paid by a purchaser of property in a damaged state would represent anything more than the value of the property in its damaged condition on the date the sale was made. In this case the selling price cannot be considered as representing the value of the undamaged building and land as it existed prior to the date on which the damage occurred. Since the selling price of the property in a damaged condition could not represent the value of the undamaged property, the seller would still have suffered a loss by reason of injury or damage to the property for which she had not been compensated.

" The Agent of the Italian Government contends that the retroactivity of a provision of law must always be expressly established in the law itself and argues the application of this legal principle to the provisions of Article 78 of the Treaty of Peace. The retroaction of the second sentence of para. 9 (*b*) of Article 78 is clear insofar as it provides that the right to compensation under Article 78 shall be retained by one who has sold his property in its damaged state. The Agent of the Italian Republic further contends that there are no elements to fix the limits to what he describes as the retroactive operation of Article 78. If it is proper to describe Article 78 as having retroactive operation, then the limits of the rights of the claimant in this case are fixed as of the date on which the damage occurred to the property which is the subject of this claim, a date which it should be noted is subsequent to June 10, 1940. If the property had been sold before it was damaged the seller who is the claimant here would not have met the conditions prescribed in the last sentence of para. 9 (*b*) of Article 78, namely, the seller would not have sold the property in its *damaged* state and hence would have no right to compensation.

" The Agent of the Italian Republic also argues that the rights of the claimant to receive compensation under Article 78 ceased to exist and are ' past ' and not ' present ' existing rights, since she sold her property in its damaged state prior to the entrance into force of the Treaty of Peace. There is here a confusion between the physical property and the rights of ownership in that physical property which the Commission cannot be induced to follow.

" The Bill of Sale by which the claimant transferred her interest in the property in its damaged state to a third party provided (in translation):

> ' It is expressly agreed upon between the parties that eventual indemnities, which may be paid by the Italian Government for war damages resulting from the bombardment in September of last year, belong and are exclusively due to the seller, Elena Iannone.'

" This provision of the Bill of Sale, while indicative of the intention of the buyer and the seller that the seller who is the claimant here reserved unto herself the right to claim indemnity for war damages from the Italian Government, is not determinative of her right to compensation under para. 4 (*a*) of Article 78. The right of the claimant is established by the provisions of para. 9 (*b*) of Article 78 (*supra*). Hence it is not necessary in reaching a decision here to determine the legal effect of the above-quoted reservation in the Bill of Sale.

" The Agent of the Italian Government has not cited any legal authorities which support his contentions. The Agent of the United States Government has cited certain cases decided by international and Italian tribunals which it is not deemed necessary to discuss, inasmuch as those cases do not deal with an interpretation of the Treaty of Peace with Italy and inasmuch as the Commission has been guided in its decision of this point by the clear language of the Treaty itself."

II. *The measure of damages.*—The Commission accepted the valuation of the property by the claimant's surveyor made in 1943, and continued: " The next question which must be resolved—and which presents certain technical difficulties—is the manner whereby the sum of one hundred seventy nine thousand (179,000) lire as of September 28, 1943, can properly be converted to 1952 values. This is necessary because para. 4 (*a*) of Article 78 of the Treaty of Peace provides that the United Nations national who has suffered a loss by reason of injury or damage to property in Italy '. . . shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, *at the date of payment*, to purchase similar property or to make good the loss suffered '. (Emphasis supplied.)

" Various intricate formulae could possibly be used to achieve the desired results. However, after due consideration of the arguments of the Agents of the two Governments and of available statistics issued by the Institute of Central Statistics, an Italian Government Agency (which for all regions of Italy are not considered complete for that period during which military operations were conducted in Italy), the Commission believes that substantial justice will be done in this case by applying a basic co-efficient of twenty (20) in order to reflect the impact of inflation in the cost of labor and materials between September 1943 and the date of this decision.

" The Commission therefore finds that the amount necessary to make good the loss suffered by the claimant at the date of this decision is one hundred seventy nine thousand (179,000) lire multiplied by twenty (20); that is three million five hundred and eighty thousand (3,580,000) lire. Under the provisions of para. 4 (*a*) of Article 78 of the Treaty of Peace, and the Agreements between the two Governments supplemental thereto and interpretative thereof, the claimant is entitled to receive as compensation two-thirds of this sum, namely, two million three hundred eighty six thousand six hundred and sixty seven (2,386,667) lire."

III. *The claim for interest.*—As regards the claim for interest, the Commission said: " The third request for relief contained in the Petition submitted in this case by the Agent of the United States of America is a general request for ' such further or other relief as may be just and equitable.' . . . In the Brief submitted at the conclusion of the case, and the Commission desires to emphasize the manner in which the request was raised for the first time in this case, the Agent of the United States requests a determination by the Commission that the giving of ' such further or other relief as may be just and equitable ' calls for the payment to the claimant by the Italian Government ' of an appropriate amount of interest '. The importance attached to the question thus raised by the Agent of the United States of America is apparent from the fact that over one-third of the lengthy Brief which he has submitted in this case is devoted to a discussion of the responsibility of the Italian Government for the payment of interest on the claim (to be distinguished from the allowance of interest on the award of the Commission) at the rate of five per cent. (5%) to run from the date on which the claim was presented to the Italian Government or at least from three months after the date on which the claim was presented to the Italian Government. . . .

" The request for interest contained in the Brief presented by the Agent of the United States must fail because the Commission does not believe that the question of interest on the claim is before it in the instant case; this is a preliminary question to any consideration of the more general question of the responsibility of the Italian Government for the payment of interest on the claim. [Article 7 (*a*) (v) of the Commission's Rules of Procedure provided that the Petition by which proceedings were initiated must contain " a complete statement setting forth the purpose of the Petition and the relief requested."]

" The Petition presented by the Agent of the United States of America on behalf of the claimant herein was deposited with the joint Secretariat on August 28, 1950, about two months after the promulgation of the Rules of Procedure. The relief requested in the Petition has been set out in full in the Statement of the Case . . . There is no direct or indirect reference to interest in the Petition. The request for ' such further or other relief as may be just and equitable ' contained in the Petition is not a statement which sets forth that one of the purposes of the Petition is the obtaining of interest on the claim or that one of the measures of relief requested is the granting of interest as part of the award.

" Inasmuch as the desire for clearly informing the Italian Government of the nature of the case and the relief requested by the Government of the United States was one of the reasons, if not the principal reason, for the requirement laid down in Article 7 (*a*) of the Rules of Procedure, including the specific requirement that the Petition shall contain a complete statement setting forth the purposes of the Petition and the relief requested, the request for ' such further or other relief as may be just and equitable ' contained in the Petition submitted in the instant case by no means achieves the purpose of informing the Italian Government of a request for interest.

" That the Italian Government did not infer from the request for ' such further or other relief as may be just and equitable ' that the Government of the United States was making a request for interest appears clearly from the Answer and the supplemental Answer submitted by the Agent of the Italian Government. When the Agent of the United States for the first time raised the question of interest in the Brief by specifically requesting that interest be allowed on the claim, the Reply Brief of the Italian Government denies vigorously the responsibility of the Italian Government for interests. If the Petition had included a clear request for interest, it is probable that the same vigorous denial would have been asserted by the Agent of the Italian Government in his Answer or supplemental Answer to the Petition, and the issue would have been clearly developed by the Agents of the two Governments prior to concluding the formal submission of proof. In any event, the Agent of the Italian Government denied the responsibility of his Government for the payment of interest as promptly as he could after the Agent of the United States had informed him in the Brief that interest was being requested.

" The Agent of the United States at no time requested this Commission to permit the amending of the Petition in this dispute in order to include an express request for interest. It was not until July 16, 1951, that the Commission issued an Order, as requested by the Agent of the United States, that the formal submission of proof had been concluded by the Agents of the two Governments. In that Order a period of time was granted to the Agent of the United States to file a Brief in support of his Petition.

"Article 11 of the Rules of Procedure of the Commission, entitled ' Briefs and Oral Arguments ', makes it clear that Briefs and oral arguments were not intended to include either amendments or additions to the Petitions, Answers, or any other pleadings. The request for interest contained in the Brief in this case is an addition to the request contained in the Petition and cannot be deemed to have been submitted in accordance with the Rules of Procedure of the Commission. It is, therefore, not a request which can be considered by the Commission.

"Although Article 18 of the Rules of Procedure reserves to the Commission the right to deviate from these Rules in individual cases, the Commission is satisfied that the Rules of Procedure are in conformity with justice and equity as required by the express provision of Article 83, para. 3, of the Treaty of Peace. Therefore, no reason is perceived in the instant case for any deviation under Article 18 of the Rules from the requirements established in Article 7 (*a*) of the Rules of Procedure, particularly since there is a lack of any evidence in the record that a request for interest on the claim has ever been raised between the two Governments either as a general question under Article 78 or in this specific case at any time prior to the presentation of the Brief in this case by the Agent of the United States of America."

[Report: Unpublished (Decision No. 5).]

NOTE.—See also the *Weidenhaus Claim*, decided by the same Commission on April 28, 1952 (Decision No. 9), where the facts were similar save that the claimant had been a Czechoslovak national in 1943 when her property in Italy was damaged. In 1946 she became a United States national. The Commission *held* that her claim must succeed.

State Responsibility—Claims—Exclusion of Claim Based on Refusal to Permit Transfer of Funds Out of the Country—Exclusion of Claim by Acceptance of Obligation by Debtor State.

See p. 394 (*Forster Claim*).

State Responsibility—Claims—In General—Evidence of Ownership of Property Destroyed—Relevance of Prior War Damage Claim under Municipal Legislation—Measure of Damages.

See p. 858 (*Steinway Claim*).

State Responsibility—Claims—Distinction between Right of Owner of Property to Claim and that of State from whose Territory Property was Taken.

See p. 953 (*Beaumont Claim*).

State Responsibility—Claims—Distinction between Right of Owner of Property to Claim and that of State from whose Territory Property Taken.

See p. 966 (*Grant-Smith Claim*).

State Responsibility—Claims—Burden of Proof as to Circumstances in which Property Subject of Claim was Lost.

See p. 966 (*Grant-Smith Claim*).

State Responsibility—Claims—In General—Evidence in Support of Claims—Admissibility, Nature and Sufficiency of.

See p. 843 (*Amabile Claim*).

II.—Nationality of Claims

State Responsibility—Claims—Diplomatic Protection—Nationality of Claims—Conferment of Nationality—Effect of—Extent of Obligation of Recognition by Other States—Nationality and Diplomatic Protection—Effective Nationality—International Requirements of Naturalization for the Purpose of Diplomatic Protection.

NOTTEBOHM CASE (LIECHTENSTEIN *v.* GUATEMALA).

(*Second Phase.*)

International Court of Justice. Judgment of April 6, 1955.

(Hackworth, President; Badawi, Vice-President; Basdevant, Zoričić, Klaestad, Read, Hsu Mo, Armand-Ugon, Kojevnikov, Sir Muhammad Zafrulla Khan, Moreno Quintana, Cordova, Judges; Guggenheim and Garcia Bauer, Judges *ad hoc.*)

THE FACTS[1] (as stated by the Court).—" By the Application filed on December 17th, 1951, the Government of Liechtenstein instituted proceedings before the Court in which it claimed restitution and compensation on the ground that the Government of Guatemala had ' acted towards the person and property of Mr. Friedrich Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law '. In its Counter-Memorial, the Government of Guatemala contended that this claim was inadmissible on a number of grounds, and one of its objections to the admissibility of the claim related to the nationality of the person for whose protection Liechtenstein had seised the Court.

" It appears to the Court that this plea in bar is of fundamental importance and that it is therefore desirable to consider it at the outset.

" Guatemala has referred to a well-established principle of international law, which it expressed in Counter-Memorial, where it is stated that ' it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection '. This sentence is taken from a Judgment of the Permanent Court of International Justice[2] (Series A/B, No. 76,

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[1] See also *Nottebohm Case* (Preliminary Objection), in *International Law Reports*, 1953, p. 567.

[[2] *Panevezys-Saldutiskis Railway Case* (*Annual Digest*, 1938-1940, Case No. 103).]

p. 16), which relates to the form of diplomatic protection constituted by international judicial proceedings.

" Liechtenstein considers itself to be acting in conformity with this principle and contends that Nottebohm is its national by virtue of the naturalization conferred upon him.

" Nottebohm was born at Hamburg on September 16th, 1881. He was German by birth, and still possessed German nationality when, in October 1939, he applied for naturalization in Liechtenstein.

" In 1905 he went to Guatemala. He took up residence there and made that country the headquarters of his business activities, which increased and prospered; these activities developed in the field of commerce, banking and plantations. Having been an employee in the firm of Nottebohm Hermanos, which had been founded by his brothers Juan and Arturo, he became their partner in 1912 and later, in 1937, he was made head of the firm. After 1905 he sometimes went to Germany on business and to other countries for holidays. He continued to have business connections in Germany. He paid a few visits to a brother who had lived in Liechtenstein since 1931. Some of his other brothers, relatives and friends were in Germany, others in Guatemala. He himself continued to have his fixed abode in Guatemala until 1943, that is to say, until the occurrence of the events which constitute the basis of the present dispute.

" In 1939, after having provided for the safeguarding of his interests in Guatemala by a power of attorney given to the firm of Nottebohm Hermanos on March 22nd, he left that country at a date fixed by Counsel for Liechtenstein as at approximately the end of March or the beginning of April, when he seems to have gone to Hamburg, and later to have paid a few brief visits to Vaduz where he was at the beginning of October 1939. It was then, on October 9th, a little more than a month after the opening of the second World War marked by Germany's attack on Poland, that his attorney, Dr. Marxer, submitted an application for naturalization on behalf of Nottebohm.

" The Liechtenstein Law of January 4th, 1934, lays down the conditions for the naturalization of foreigners, specifies the supporting documents to be submitted and the undertakings to be given and defines the competent organs for giving a decision and the procedure to be followed. The Law specifies certain mandatory requirements, namely, that the applicant for naturalization should prove: (1) ' that the acceptance into the Home Corporation (*Heimatverband*) of a Liechtenstein commune has been promised to him in case of acquisition of the nationality of the State '; (2) that he will lose his former nationality as a result of naturalization, although this requirement may be waived under stated conditions. It further makes naturalization conditional upon compliance with the requirement of residence for at least three years in the territory of the

Principality, although it is provided that ' this requirement can be dispensed with in circumstances deserving special consideration and by way of exception '. In addition, the applicant for naturalization is required to submit a number of documents, such as evidence of his residence in the territory of the Principality, a certificate of good conduct issued by the competent authority of the place of residence, documents relating to his property and income and, if he is not a resident in the Principality, proof that he has concluded an agreement with the Revenue authorities, ' subsequent to the revenue commission of the presumptive home commune having been heard '. The Law further provides for the payment by the applicant of a naturalization fee, which is fixed by the Princely Government and amounts to at least one half of the sum payable by the applicant for reception into the Home Corporation of a Liechtenstein commune, the promise of such reception constituting a condition under the Law for the grant of naturalization.

" The Law reveals concern that naturalization should only be granted with knowledge of all the pertinent facts, in that it expressly provides for an enquiry into the relations of the applicant with the country of his former nationality, as well as into all other personal and family circumstances, and adds that ' the grant of nationality is barred where these relations and circumstances are such as to cause apprehension that prejudice of any kind may enure to the State by reason of the admission to nationality '.

"As to the consideration of the application by the competent organs and the procedure to be followed by them, the Law provides that the Government, after having examined the application and the documents pertaining thereto, and after having obtained satisfactory information concerning the applicant, shall submit the application to the Diet. If the latter approves the application, the Government shall submit the requisite request to the Prince, who alone is entitled to confer nationality of the Principality.

" Finally, the Law empowers the Princely Government, within a period of five years from the date of naturalization, to withdraw Liechtenstein nationality from any person who may have acquired it if it appears that the requirements laid down in the Law were not satisfied; it likewise provides that the Government may at any time deprive a person of his nationality if the naturalization was fraudulently obtained.

" This was the legal position with regard to applications for naturalization at the time when Nottebohm's application was submitted.

" On October 9th, 1939, Nottebohm, ' resident in Guatemala since 1905 (at present residing as a visitor with his brother, Hermann Nottebohm, in Vaduz) ', applied for admission as a national of Liechtenstein and, at the same time, for the previous conferment of citizenship in the Commune of Mauren. He sought dispensation from the condition of three years' residence as prescribed by law, without indicating the special circumstances warranting such waiver. He submitted a statement of the *Crédit Suisse* in Zurich concerning his assets, and undertook to pay 25,000 Swiss francs to the Commune of Mauren, 12,500 Swiss francs to the State, to which was to be added the payment of dues in connection with the proceedings. He further stated that he had made ' arrangements with the Revenue Authorities of the Government of Liechenstein for the conclusion of a formal agreement to the effect that he will pay an annual tax of naturalization amounting to Swiss francs 1,000, of which Swiss francs 600 are payable to the Commune of Mauren and Swiss francs 400 are payable to the Principality of Liechtenstein, subject to the proviso that the payments of these taxes will be set off against ordinary taxes which will fall due if the applicant takes up residence in one of the Communes of the Principality '. He further undertook to deposit as security a sum of 30,000 Swiss francs. He also gave certain general information as to his financial position and indicated that he would never become a burden to the Commune whose citizenship he was seeking.

" Lastly, he requested ' that naturalization proceedings be initiated and concluded before the Government of the Principality and before the Commune of Mauren without delay, that the application be then placed before the Diet with a favourable recommendation and, finally, that it be submitted with all necessary expedition to His Highness the Reigning Prince '.

" On the original typewritten application which has been produced in a photostatic copy, it can be seen that the name of the Commune of Mauren and the amounts to be paid were added by hand, a fact which gave rise to some argument on the part of Counsel for the Parties. There is also a reference to the ' *Vorausverständnis* ' of the Reigning Prince obtained on October 13th, 1939, which Liechtenstein interprets as showing the decision to grant naturalization, which interpretation has, however, been questioned. Finally, there is annexed to the application an otherwise blank sheet bearing the signature of the Reigning Prince, ' Franz Josef ', but without any date or other explanation.

"A document dated October 15th, 1939, certifies that on that date the Commune of Mauren conferred the privilege of its citizenship upon Mr. Nottebohm and requested the Government to transmit it to the Diet for approval. A certificate of October 17th, 1939, evidences the payment of the taxes required to be paid by Mr. Nottebohm. On October 20th, 1939, Mr. Nottebohm took the oath of allegiance and a final arrangement concerning liability to taxation was concluded on October 23rd.

" This was the procedure followed in the case of the naturalization of Nottebohm.

"A certificate of nationality has also been produced, signed on behalf of the Government of the Principality and dated October

20th, 1939, to the effect that Nottebohm was naturalized by Supreme Resolution of the Reigning Prince dated October 13th, 1939.

" Having obtained a Liechtenstein passport, Nottebohm had it visa-ed by the Consul General of Guatemala in Zurich on December 1st, 1939, and returned to Guatemala at the beginning of 1940, where he resumed his former business activities and in particular the management of the firm of Nottebohm Hermanos.

" Relying on the nationality thus conferred on Nottebohm, Liechtenstein considers itself entitled to seise the Court of its claim on his behalf, and its Final Conclusions contain two submissions in this connection. Liechtenstein requests the Court to find and declare, first, ' that the naturalization of Mr. Frederic Nottebohm in Liechtenstein on October 13th, 1939, was not contrary to international law ', and, secondly, ' that Liechtenstein's claim on behalf of Mr. Nottebohm as a national of Liechtenstein is admissible before the Court '.

" The Final Conclusions of Guatemala, on the other hand, request the Court ' to declare that the claim of the Principality of Liechtenstein is inadmissible ', and set forth a number of grounds relating to the nationality of Liechtenstein granted to Nottebohm by naturalization.

" Thus, the real issue before the Court is the admissibility of the claim of Liechtenstein in respect of Nottebohm. Liechtenstein's first submission referred to above is a reason advanced for a decision by the Court in favour of Liechtenstein, while the several grounds given by Guatemala on the question of nationality are intended as reasons for the inadmissibility of Liechtenstein's claim. The present task of the Court is limited to adjudicating upon the admissibility of the claim of Liechtenstein in respect of Nottebohm on the basis of such reasons as it may itself consider relevant and proper.

" In order to decide upon the admissibility of the Application, the Court must ascertain whether the nationality conferred on Nottebohm by Liechtenstein by means of a naturalization which took place in the circumstances which have been described, can be validly invoked as against Guatemala, whether it bestows upon Liechtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala and therefore entitles it to seise the Court of a claim relating to him. In this connection, Counsel for Liechtenstein said: ' the essential question is whether Mr. Nottebohm, having acquired the nationality of Liechtenstein, that acquisition of nationality is one which must be recognized by other States '. This formulation is accurate, subject to the twofold reservation that, in the first place, what is involved is not recognition for all purposes but merely for the purposes of the admissibility of the Application, and, secondly, that what is involved is not recognition by all States but only by Guatemala.

" The Court does not propose to go beyond the limited scope of the question which it has to decide, namely whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before the Court. It must decide this question on the basis of international law; to do so is consistent with the nature of the question and with the nature of the Court's own function.

Held (by eleven votes to three—Judges Klaestad and Read, and Guggenheim, Judge *ad hoc*, dissenting): that the claim submitted by the Government of Liechtenstein was inadmissible. Guatemala was under no obligation to recognize a nationality granted in circumstances such as those before the Court, and Liechtenstein, consequently, was not entitled to extend its protection to Nottebohm *vis-à-vis* Guatemala.

The Court said: " In order to establish that the Application must be held to be admissible, Liechtenstein has argued that Guatemala formerly recognized the naturalization which it now challenges and cannot therefore be heard to put forward a contention which is inconsistent with its former attitude.

" Various documents, facts and actions have been relied upon in this connection.

" Reliance has been placed on the fact that, on December 1st, 1939, the Consul General of Guatemala in Zurich entered a visa in the Liechtenstein passport of Mr. Nottebohm for his return to Guatemala; that on January 29th, 1940, Nottebohm informed the Ministry of External Affairs in Guatemala that he had adopted the nationality of Liechtenstein and therefore requested that the entry relating to him in the Register of Aliens should be altered accordingly, a request which was granted on January 31st; that on February 9th, 1940, a similar amendment was made to his identity document, and lastly, that a certificate to the same effect was issued to him by the Civil Registry of Guatemala on July 1st, 1940.

" The acts of the Guatemalan authorities just referred to proceeded on the basis of the statements made to them by the person concerned. The one led to the other. The only purpose of the first, as appears from Article 9 of the Guatemalan law relating to passports, was to make possible or facilitate entry into Guatemala, and nothing more. According to the Aliens Act of January 25th, 1936, Article 49, entry in the Register ' constitutes a legal presumption that the alien possesses the nationality there attributed to him, but evidence to the contrary is admissible '. All of these acts have reference to the control of aliens in Guatemala and not to the exercise of diplomatic protection. When Nottebohm thus presented himself before the Guatemalan authorities, the latter had before them a private individual: there did not thus come into being any relationship between governments. There was nothing in all this to show that Guatemala then recognized that the naturalization conferred upon Nottebohm gave Liechtenstein any title to the exercise of protection.

" Although the request sent by Nottebohm Hermanos to the Minister of Finance and Public Credit on September 13th, 1940, with reference to the inclusion of the firm on the British Statutory List, referred to the fact that only one of the partners was ' a national of Liechtenstein/Switzerland ', this point was only made incidentally, and the whole request was based on the consideration that the firm ' is a wholly Guatemalan business ' and on the interests of the ' national economy '. It was on this basis that the matter was discussed, and no reference whatsoever was made to any intervention by the Government of Liechtenstein at that time.

" Similarly unconnected with the exercise of protection was the Note addressed on October 18th, 1943, by the Minister of External Affairs to the Swiss Consul who, having understood that the registration documents indicated that Nottebohm was a Swiss citizen of Liechtenstein, requested, in a Note of September 25th, 1943, that this matter might be clarified. He received the reply that there was no such indication of Swiss nationality in the documents and, although the Consul had referred to the representation of the interests of the Principality abroad by the representatives of the Swiss Government, the reply sent to him made no allusion to the exercise, by or on behalf of Liechtenstein, of protection in favour of Nottebohm.

" When, on October 20th, 1943, the Swiss Consul asked that ' Mr. Walter Schellenberg of Swiss nationality and Mr. Federico Nottebohm of Liechtenstein ', who had been transferred to the United States Military Base for the purpose of being deported, should, ' as citizens of neutral countries ', be returned home, the Minister of External Affairs of Guatemala replied, on October 22nd, that the action taken was attributable to the authorities of the United States, and made no reference to the nationality of Nottebohm.

" In a letter of the Swiss Consul of December 15th, 1944, to the Minister of External Affairs, reference is made to the entry on the Black Lists of ' Frederick Nottebohm, a national of Liechtenstein '. Neither the text of these lists nor any extract therefrom has been produced, but this is not germane to the present discussion. The important fact is that Guatemala, in its reply dated December 20th, 1944, expressly stated that it could not ' recognize that M. Nottebohm, a German subject habitually resident in Guatemala, has acquired the nationality of Liechtenstein without changing his habitual residence '. The Court has not at present to consider the validity of the ground put forward for disputing Nottebohm's nationality, which was subsequently put forward to justify the cancellation of his registration as a citizen of the ' Condado ' of Liechtenstein. It is sufficient for it to note that there is here an express denial by Guatemala of Nottebohm's Liechtenstein nationality.

" Nottebohm's name having been removed from the Register of Resident Aliens, his relative Karl Heinz Nottebohm Stoltz, on July 24th, 1946, requested the cancellation of the decision and the restoration of Nottebohm's name to the Register as a citizen of Liechtenstein, putting forward a number of considerations, essentially based on the exclusive right of Leichtenstein to decide as to the nationality in question and the duty of Guatemala to conform to such decision. Far from accepting the considerations thus put forward, the Minister of External Affairs rejected the request, on August 1st, 1946, merely saying that it was pointless, since Nottebohm was no longer a resident of Guatemala.

" There is nothing here to show that before the institution of proceedings Guatemala had recognized Liechtenstein's title to exercise protection in favour of Nottebohm and that it is thus precluded from denying such a title.

" Nor can the Court find any recognition of such title in the communication signed by the Minister of External Affairs of Guatemala, addressed to the President of the Court, on September 9th, 1952. In this communication reference is made to measures taken against Nottebohm ' who claims to be a national of the claimant State ' (' *quien se alega ser ciudadano del Estado reclamante* '). Then, reference having been made to the claim presented by the Government of the Principality of Liechtenstein with regard to these measures, it is stated that the Government of Guatemala ' is quite willing to begin negotiations with the Government of the said Principality with a view to arriving at an amicable solution, either in the sense of a direct settlement, an arbitration or judicial settlement '. It would constitute an obstacle to the opening of negotiations for the purpose of reaching a settlement of an international dispute or of concluding a special agreement for arbitration and would hamper the use of the means of settlement recommended by Article 33 of the Charter of the United Nations, to interpret an offer to have recourse to such negotations or such means, consent to participate in them or actual participation, as implying the abandonment of any defence which a party may consider it is entitled to raise or as implying acceptance of any claim by the other party, when no such abandonment or acceptance has been expressed and where it does not indisputably follow from the attitude adopted. The Court cannot see in the communication of September 9th, 1952, any admission by Guatemala of the possession by Nottebohm of a nationality which it clearly disputed in its last official communication on this subject, namely, the letter of December 20th, 1944, to the Swiss Consul, still less can it find any recognition of Liechtenstein's title, based on such nationality, to exercise its protection and to seise the Court in the present case.

" Since no proof has been adduced that Guatemala has recognized the title to the exercise of protection relied upon by Liechtenstein as being derived from the naturalization which it granted to Nottebohm, the Court must consider whether such an act of granting nationality by Liechtenstein directly entails an obligation on the part of Guatemala to recognize its effect, namely, Liechtenstein's right to exercise its protection. In other words, it must be determined whether that unilateral act by Liechtenstein is one which can be relied upon against Guatemala in regard to the exercise of protection. The Court will deal with this question without considering that of the validity of Nottebohm's naturalization according to the law of Liechtenstein.

" It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.

" But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seise the Court.

" The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration.

" International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions: this is the case, for instance, of a judgment given by the competent court of a State which it is sought to invoke in another State.

" In the present case it is necessary to determine whether the naturalization conferred on Nottebohm can be successfully invoked against Guatemala, whether, as has already been stated, it can be relied upon as against that State, so that Liechtenstein is thereby entitled to exercise its protection in favour of Nottebohm against Guatemala.

" When one State has conferred its nationality upon an individual and another State has conferred its own nationality on the same person, it may occur that each of these States, considering itself to have acted in the exercise of its domestic jurisdiction, adheres to its own view and bases itself thereon in so far as its own actions are concerned. In so doing, each State remains within the limits of its domestic jurisdiction.

" This situation may arise on the international plane and fall to be considered by international arbitrators or by the courts of a third State. If the arbitrators or the courts of such a State should confine themselves to the view that nationality is exclusively within the domestic jurisdiction of the State, it would be necessary for them to find that they were confronted by two contradictory assertions made by two sovereign States, assertions which they would consequently have to regard as of equal weight, which would oblige them to allow the contradiction to subsist and thus fail to resolve the conflict submitted to them.

" In most cases arbitrators have not strictly speaking had to decide a conflict of nationality as between States, but rather to determine whether the nationality invoked by the applicant State was one which could be relied upon as against the respondent State, that is to say, whether it entitled the applicant State to exercise protection. International arbitrators, having before them allegations of nationality by the applicant State which were contested by the respondent State, have sought to ascertain whether nationality had been conferred by the applicant State in circumstances such as to give rise to an obligation on the part of the respondent State to recognize the effect of that nationality. In order to decide this question arbitrators have evolved certain principles for determining whether full international effect was to be attributed to the nationality invoked. The same issue is now before the Court: it must be resolved by applying the same principles.

" The courts of third States, when confronted by a similar situation, have dealt with it in the same way. They have done so not in connection with the exercise of protection, which did not arise before them, but where two different nationalities have been invoked before them they have had, not indeed to decide such a dispute as between the two States concerned, but to determine whether a given foreign nationality which had been invoked before them was one which they ought to recognize.

" International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

" Similarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality.

" The same tendency prevails in the writings of publicists and in practice. This notion is inherent in the provisions of Article 3, paragraph 2, of the Statute of the Court. National laws reflect this tendency when, *inter alia*, they make naturalization dependent on conditions indicating the existence of a link, which may vary in their purpose or in their nature but which are essentially concerned with this idea. The Liechtenstein Law of January 4th, 1934, is a good example.

" The practice of certain States which refrain from exercising protection in favour of a naturalized person when the latter has in fact, by his prolonged absence, severed his links with what is no longer for him anything but his nominal country, manifests the view of these States that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation. A similar view is manifested in the relevant provisions of the bilateral nationality treaties concluded between the United States of America and other States since 1868, such as those sometimes referred to as the Bancroft Treaties, and in the Pan-American Convention, signed at Rio de Janeiro on August 13th, 1906, on the status of naturalized citizens who resume residence in their country of origin.

" The character thus recognized on the international level as pertaining to nationality is in no way inconsistent with the fact that international law leaves it to each State to lay down the rules governing the grant of its own nationality. The reason for this is that the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State. On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.

" The requirement that such a concordance must exist is to be found in the studies carried on in the course of the last thirty years upon the initiative and under the auspices of the League of Nations and the United Nations. It explains the provision which the Conference for the Codification of International Law, held at The Hague in 1930, inserted in Article 1 of the Convention relating to the Conflict of Nationality Laws, laying down that the law enacted by a State for the purpose of determining who are its nationals ' shall be recognized by other States in so far as it is consistent with . . . international custom, and the principles of law generally recognized with regard to nationality '. In the same spirit, Article 5 of the Convention refers to criteria of the individual's genuine connections for the purpose of resolving questions of dual nationality which arise in third States.

" According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.

" Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State. As the Permanent Court of International Justice has said and has repeated, ' by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law ' (P.C.I.J., Series A, No. 2, p. 12,[1] and Series A, Nos. 20–21, p. 17[2]).

" Since this is the character which nationality must present when it is invoked to furnish the State which has granted it with a title to the exercise of protection and to the institution of international

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[[1] *Mavrommatis Palestine Concessions* (*Greece* v. *Great Britain*) : see *Annual Digest*, 1923–1924, Case No. 220.]

[[2] *Serbian Loans* and *Brazilian Federal Loans* Cases : *ibid.*, 1929–1930, Case No. 278.]

judicial proceedings, the Court must ascertain whether the nationality granted to Nottebohm by means of naturalization is of this character or, in other words, whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter.

" Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far-reaching consequences and involve profound changes in the destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of its repercussions with regard to his property would be to misunderstand its profound significance. In order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him.

" At the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State ?

" The essential facts appear with sufficient clarity from the record. The Court considers it unnecessary to have regard to the documents purporting to show that Nottebohm had or had not retained his interests in Germany, or to have regard to the alternative submission of Guatemala relating to a request to Liechtenstein to produce further documents. It would further point out that the Government of Liechtenstein, in asking in its Final Conclusions for an adjournment of the oral proceedings and an opportunity to present further documents, did so only for the eventuality of the Application being held to be admissible and not for the purpose of throwing further light upon the question of the admissibility of the Application.

" The essential facts are as follows:

"At the date when he applied for naturalization Nottebohm had been a German national from the time of his birth. He had always retained his connections with members of his family who had remained in Germany and he had always had business connections with that country. His country had been at war for more than a month, and there is nothing to indicate that the application for naturalization then made by Nottebohm was motivated by any desire to dissociate himself from the Government of his country.

" He had been settled in Guatemala for 34 years. He had carried on his activities there. It was the main seat of his interests. He returned there shortly after his naturalization, and it remained the centre of his interests and of his business activities. He stayed there until his removal as a result of war measures in 1943. He subsequently attempted to return there, and he now complains of Guatemala's refusal to admit him. There, too, were several members of his family who sought to safeguard his interests.

" In contrast, his actual connections with Liechtenstein were extremely tenuous. No settled abode, no prolonged residence in that country at the time of his application for naturalization: the application indicates that he was paying a visit there and confirms the transient character of this visit by its request that the naturalization proceedings should be initiated and concluded without delay. No intention of settling there was shown at that time or realized in the ensuing weeks, months or years—on the contrary, he returned to Guatemala very shortly after his naturalization and showed every intention of remaining there. If Nottebohm went to Liechtenstein in 1946, this was because of the refusal of Guatemala to admit him. No indication is given of the grounds warranting the waiver of the condition of residence, required by the 1934 Nationality Law, which waiver was implicitly granted to him. There is no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein, and no manifestation of any intention whatsoever to transfer all or some of his interests and his business activities to Liechtenstein. It is unnecessary in this connection to attribute much importance to the promise to pay the taxes levied at the time of his naturalization. The only links to be discovered between the Principality and Nottebohm are the short sojourns already referred to and the presence in Vaduz of one of his brothers: but his brother's presence is referred to in his application for naturalization only as a reference to his good conduct. Furthermore, other members of his family have asserted Nottebohm's desire to spend his old age in Guatemala.

" These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.

" Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations—other than fiscal obligations—and exercising the rights pertaining to the status thus acquired.

" Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala and its claim must, for this reason, be held to be inadmissible.

" The Court is not therefore called upon to deal with the other pleas in bar put forward by Guatemala or the Conclusions of the Parties other than those on which it is adjudicating in accordance with the reasons indicated above.

" For these reasons,

" THE COURT,

" by eleven votes to three,

" Holds that the claim submitted by the Government of the Principality of Liechtenstein is inadmissible."

[Report: *I.C.J. Reports*, 1955, pp. 12-26.[1]]

Judge Klaestad delivered the following Dissenting Opinion:

" I consider that the case should have been adjourned for the following reasons:

" The present Judgment deals with one of the three pleas in bar which, in this second phase of the proceedings, have been invoked by the Government of Guatemala. This plea in bar by that Government is based on the ground that the naturalization granted to Mr. Nottebohm by Liechtenstein is invalid because it is inconsistent with the national law of Liechtenstein as well as with international law.

" I. As to the national law of Liechtenstein, it is argued that the authorities of that State, in applying their Nationality Law of 4th January, 1934, have not observed its provisions, but in various respects departed therefrom, particularly with regard to the prescribed order in which Government, Diet and Commune were to deal with the application for naturalization. On this ground, the Court is invited to declare that Mr. Nottebohm has not properly acquired Liechtenstein nationality in accordance with the law of the Principality.

" It is generally recognized that questions of naturalization of aliens are, in the absence of conventional rules, in principle within the exclusive competence of States, and that international law has left it to the States themselves to regulate in what manner and under what conditions their nationality may be conferred upon aliens. But if a State has in principle the exclusive competence to regulate questions of nationality by its own legislation without interference by other States, it is difficult to see on what ground its own interpretation and application of this same legislation could be open to challenge by other States. Such a challenge is possible in theory on the ground that the legislation or the application thereof is inconsistent with international law; but the question now under consideration is only whether the authorities of Liechtenstein have applied their local law in a manner consistent with the provisions of that local law.

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[1] The French text of the Judgment is authoritative.

" The Permanent Court of International Justice has on several occasions considered what attitude the Court should take with regard to the national law of States, such as in Judgments No. 7 concerning *German Interests in Polish Upper Silesia*[1] and Nos. 14 and 15 in the *Serbian* and *Brazilian Loans* Cases.[2] In accordance with the view expressed in those Judgments, it may be said that it would not be in conformity with the function for which the Court is established if it proceeded to examine and decide whether the competent authorities of Liechtenstein have applied the various provisions of their Nationality Law of 1934 in a correct manner. The Court is not deemed to know the national law of the different States. It would hardly be possible for it to place its own construction upon the provisions of the Liechtenstein Nationality Law and to disregard the interpretation and application made by the competent local authorities. By so doing, the Court would substitute itself for these local authorities and pronounce upon matters which have no bearing on international law, and which therefore are solely within the competence of these authorities.

" What the Court, in my opinion, can and must do with regard to the application of the Liechtenstein Nationality Law, is to ascertain whether the naturalization in question was in fact granted by the authority to which that law has attributed this competence. Article 12 prescribes that it is the Reigning Prince who alone is entitled to grant the nationality of the Principality. On the evidence submitted to the Court, I am satisfied that the Prince did in fact give his consent to the naturalization of Mr. Nottebohm.

" II. The Government of Guatemala further contends that the naturalization was not granted in accordance with international law. It invokes the fact that Mr. Nottebohm had not established his residence in Liechtenstein before he applied for naturalization, and that he left the country soon after it was granted. Apart from conventional rules, international law does not, however, require previous residence in the country as a condition for naturalization, nor does it presuppose a subsequent residence there. This is shown by the fact that the national laws of a great number of States have—though generally providing for previous residence in the country—allowed dispensation from that requirement. The national law of Liechtenstein equally requires such previous residence (para. 6 (*d*) of the Nationality Law of 1934) but provides that this requirement may be dispensed with, as in fact it was in the present case. To exercise this discretionary power of dispensation is a matter solely within the competence of the Government of Liechtenstein.

" The validity of the naturalization of Mr. Nottebohm is also contested on the ground that the Government of Liechtenstein has not proved the loss of his German nationality, as required by paragraph 6 (*c*) of the same Law of 1934. But this requirement also may be dispensed with according to that provision. It appears, however, that such dispensation was considered unnecessary in view of the provisions of Article 25 of the German Nationality Law of 1913, according to which he would lose his German nationality by acquiring the nationality of Liechtenstein. That he thereby in fact lost his

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[[1] See *Annual Digest*, 1925–1926, Case No. 4.]

[[2] *Ibid.*, 1929–1930, Case No. 278.]

German nationality was, on 15th June, 1954, certified by the Senate of Hamburg.

" III. The view has been expressed that the relationship established between State and individual by naturalization must presuppose the existence of a physical or real link or a substantial connection attaching the individual to the State. It is thereby implied that a mere common and effective will, not vitiated by fraud, is not sufficient for the creation of the relationship of nationality. It may be questioned whether this view is a true expression of a binding rule of international law.

" When the Court, in the *Asylum* case,[1] was confronted with a contention relating to an alleged right of a unilateral and definitive qualification of the offence committed by the refugee, it based itself on the principle of State sovereignty and held that a party which relies on a custom derogating from that principle must prove that the rule invoked is in accordance with a constant and uniform State practice accepted as law. The same method would seem to be applicable in the present case. Having to base oneself on the ground that questions of naturalization are in principle within the exclusive competence of States, one should, as in the *Asylum* case, enquire whether a rule derogating from that principle is established in such a manner that it has become binding on Liechtenstein. The Government of Guatemala would have to prove that such a custom is in accordance with a constant and uniform State practice ' accepted as law ' (Article 38, para. 1 (*b*) of the Court's Statute). But no evidence is produced by that Government purporting to establish the existence of such a custom.

" IV. The present Judgment does not decide the question, in dispute between the Parties, whether the naturalization granted to Mr. Nottebohm was valid or invalid either under the national law of Liechtenstein or under international law. Leaving this question open, it decides that the Government of Liechtenstein is not, under international law, entitled to extend its protection to him as against Guatemala.

" A solution upon these lines—severance of diplomatic protection from the question of nationality, and restriction of the right of protection—was never invoked by the Government of Guatemala, nor discussed by the Government of Liechtenstein. It does not conform with the argument and evidence which the Parties have submitted to the Court, and the Government of Liechtenstein has had no occasion to define its attitude and prove its eventual contentions with regard to this solution, whereby its claim is now dismissed. In such circumstances, it is difficult to discuss the merits of such a solution except on a theoretical basis; but I shall mention some facts which show how necessary it would have been, in the interest of a proper administration of justice, to afford to the Parties an opportunity to argue this point before it is decided.

" Mr. Nottebohm went to Liechtenstein in 1946 after having been liberated from his internment in the United States of America. It is seen from Annex 5, paragraph 18, and Annex 6, paragraph 20, of the Memorial, and paragraph 106 of the Rejoinder, that he must have arrived in Liechtenstein before May 6th, 1946. He established his residence in that country and has lived there ever since.

" The record of this case shows that a number of measures were taken by the Government of Guatemala against property of Mr. Nottebohm at a time when he was permanently residing in Liechtenstein. When expropriation measures were taken against his property by virtue of the Legislative Decree No. 630 of 25th May, 1949, he had been living in Liechtenstein for more than three years.

" As the Judgment has not decided that the naturalization granted to Mr. Nottebohm on 13th October, 1939, is invalid under Liechtenstein law, one must, for the purpose of deciding the present plea in bar, assume that it is valid. In such circumstances, it is difficult to see on what legal basis the Government of Liechtenstein could be considered as being debarred from affording diplomatic protection to him in respect of measures taken by the Government of Guatemala against his property at a time when he was a permanent resident in Liechtenstein. His link or connection with that country was at that time of such a character that the reasons relied on in the Judgment should constitute a solid ground for the recognition of the right of the Government of Liechtenstein to extend its protection to him as against Guatemala in respect of all measures taken against his property during his permanent residence in Liechtenstein.

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[1] [See *International Law Reports*, 1950, Case No. 90.]

" V. It is alleged by the Government of Guatemala that the Government of Liechtenstein, by granting its nationality to a German national at a time when Germany was at war, has committed an abuse of right or a fraud. For the purpose of the present case, it is unnecessary to express any views as to the possible applicability of the notion of abuse of right in international law. All I need say is that it would, if so applicable, in my view presuppose the infliction of some kind of injury upon the legitimate interests of Guatemala by the naturalization of Mr. Nottebohm. But it is not shown that an injury of any kind was thereby inflicted upon Guatemala, which at that time was a neutral State.

" As to the contention that fraud was committed by the Government of Liechtenstein, it suffices to say that no evidence has been produced in support of such a contention. The various irregularities in the naturalization procedure of which the Government of Guatemala has complained, and the financial conditions fixed for the grant of naturalization, cannot be considered as involving a fraud.

" VI. The Government of Guatemala has finally contended that fraud was committed by Mr. Nottebohm when he applied for and obtained Liechtenstein nationality. It was argued that he fraudulently sought this naturalization solely for the purpose of escaping from the consequences of his German nationality under the shield of the nationality of a neutral State. As no documentary evidence in support of this contention was produced in the course of the written proceedings, the Agent of Guatemala, after the closure of those proceedings and a few days before the oral hearing, submitted to the Court a considerable number of new documents. The Agent of Liechtenstein having objected to the production of these documents, the Court on February 14th, 1955, decided to permit the production of all these new documents, stating that it:

> ' Reserves to the Agent of the Government of Liechtenstein the right, if he so desires, to avail himself of the opportunity provided for in the second paragraph of Article 48 of the Rules of Court, after hearing the contentions of the Agent of the Government of Guatemala based on these documents, and after such lapse of time as the Court may, on his request, deem just.'

" On the basis of these new documents, Counsel for Guatemala submitted at the oral hearing the new allegation that part of the property of the firm Nottebohm Hermanos of Guatemala, which the Government of Liechtenstein now claims on behalf of Mr. Nottebohm, in reality belonged to the firm Nottebohm & Co. of Hamburg, and that Mr. Nottebohm, by obtaining Liechtenstein nationality, attempted in a fradulent manner to protect German property from the consequences of the war. Counsel qualified the case as a ' cloaking case '.

" These allegations of fraud, which now appear to constitute the main aspect of this case, affect the plea in bar concerning nationality as well as the merits. In its final Submissions as to the merits, the Government of Liechtenstein requests the Court:

> ' (5) to adjourn the oral pleadings for not less than three months in order that the Government of Liechtenstein may obtain and assemble documents in support of comments on the new documents produced by the Government of Guatemala.'

" A consideration of the merits would render previous compliance with this request necessary. Not only has the Government of Liechtenstein acquired a right, by virtue of Article 48, paragraph 2, of the Rules of Court, to submit documents in support of its comments upon the new documents produced by the Agent of Guatemala, but this right was expressly reserved to the Agent of Liechtenstein by the Court's decision of February 14th. A finding on the plea in bar concerning nationality (diplomatic protection) presupposes, in my opinion, a consideration of the merits; it depends, as I have attempted to show, on the question whether Mr. Nottebohm committed a fraud when he applied for and obtained Liechtenstein nationality. This question of fraud is so closely connected with the merits of the case that it cannot be decided apart from them and without any appraisal of the various relevant facts which may be disclosed by a consideration of the merits, including the new documents produced by the Government of Guatemala and the documents which the Government of Liechtenstein has become entitled to produce.

" This procedural situation also affects the two other pleas in bar invoked by the Government of Guatemala. The plea as to the alleged necessity of previous diplomatic negotiations could only arise if it were held that Mr. Nottebohm has validly acquired Liechtenstein nationality. Only in that case would the Government of Liechtenstein be qualified to present his claim to the Court. Only then could a relevant question arise as to negotiations between the two Governments concerning the claim. Similar considerations apply to the plea in bar as to the exhaustion of local remedies. If it were held that Mr. Nottebohm has not validly acquired the nationality of Liechtenstein, the question whether he has exhausted remedies in Guatemala could not arise before the Court.

" For these reasons I have voted for the adjournment of the case."

Judge Read delivered the following Dissenting Opinion:

" I am unable to concur in the Judgment of the Court, which holds that the claim submitted by the Principality of Liechtenstein is inadmissible. It is, therefore, necessary for me to indicate my conclusions as to the proper disposition of the plea in bar, and to give my reasons. In doing so, I must examine certain of the grounds which were relied on by Counsel, in the Pleadings and during the Oral Proceedings, but which were not adopted as a basis for the Judgment.

" At the outset, I consider that the very nature of a plea in bar controls the examination of the issues. The allowance of a plea in bar prevents an examination by the Court of the issues of law and fact which constitute the merits of the case. It would be unjust to refuse to examine a claim on the merits on the basis of findings of law or fact which might be reversed if the merits were considered and dealt with.

" Accordingly, it is necessary, at this stage, to proceed upon the assumption that all of Liechtenstein's contentions on the merits, fact and law, are well-founded; and that Guatemala's contentions on the merits may be ill-founded.

" There is another aspect of this case which I cannot overlook. Mr. Nottebohm was arrested on October 19th, 1943, by the Guatemalan authorities, who were acting not for reasons of their own but at the instance of the United States Government. He was turned over to the armed forces of the United States on the same day. Three days later he was deported to the United

States and interned there for two years and three months. There was no trial or inquiry in either country and he was not given the opportunity of confronting his accusers or defending himself, or giving evidence on his own behalf.

" In 1944 a series of fifty-seven legal proceedings was commenced against Mr. Nottebohm, designed to expropriate, without compensation to him, all of his properties, whether movable or immovable. The proceedings involved more than one hundred and seventy one appeals of various kinds. Counsel for Guatemala has demonstrated, in a fair and competent manner, the existence of a network of litigation, which could not be dealt with effectively in the absence of the principally interested party. Further, all of the cases involved, as a central and vital issue, the charge against Mr. Nottebohm of treasonable conduct.

" It is common ground that Mr. Nottebohm was not permitted to return to Guatemala. He was thus prevented from assuming the personal direction of the complex network of litigation. He was allowed no opportunity to give evidence of the charges made against him, or to confront his accusers in open court. In such circumstances I am bound to proceed on the assumption that Liechtenstein might be entitled to a finding of denial of justice, if the case should be considered on the merits.

" In view of this situation, I cannot overlook the fact that the allowance of the plea in bar would ensure that justice would not be done on any plane, national or international. I do not think that a plea in bar, which would have such an effect, should be granted, unless the grounds on which it is based are beyond doubt.

" With these considerations in mind, it is necessary to examine the single issue that the Court must decide in order to reject or allow the plea in bar based on the ground of nationality. The issue for decision is: *whether, in the circumstances of this case and vis-à-vis Guatemala, Liechtenstein is entitled, under the rules of international law, to afford diplomatic protection to Mr. Nottebohm.*

" It is necessary to deal with the different grounds which have been relied on in the Pleadings and in the Oral Proceedings.

" The first ground for holding that the claim is inadmissible, which is contained in paragraph 2 (*a*) of the Final Conclusions of Guatemala, may be stated shortly: that Mr. Nottebohm did not acquire Liechtenstein nationality in accordance with the law of the Principality. While the Judgment of the Court does not rely on this ground, I must state my position, in order to justify my conclusion that the plea in bar as a whole should be joined to the merits.

" Here, the production of the certificate of naturalization, and the adoption of the claim by Liechtenstein, established a *prima facie* case. The Court can go back of the certificate and disregard it on proof of fraud in the application for or grant of the naturalization, or in the obtaining or issuing of the certificate. But there has been no such proof.

" It has been argued that the Court can and should examine the Liechtenstein law and the procedure followed by the Liechtenstein authorities when the naturalization was granted. It has been contended that they did not comply with the law and that, as a result of their defaults, the naturalization granted was a nullity.

" I have reached the conclusion that the claim cannot be rejected on the ground of non-compliance with the national law, and shall give my reasons in summary form.

" To begin with, it is necessary to take into account the jurisprudence of the Permanent Court. Two principles of law have been established. The judgment in *The Mavrommatis Jerusalem Concessions*—Series A, No. 5, at page 30[1]—settled the rule that the burden of proof is on the party, that alleges the nullity of a legal act under the national law, to prove it.

"The other principle is to be found in a long series of decisions, which applied the principle: that 'municipal laws are merely facts which express the will and constitute the activities of States' and that the Court does not interpret the national law as such.

Polish Upper Silesia—Series A, No. 7, page 19[2].

Serbian Loans—Series A, Nos. 20/21, page 46[3].

Brazilian Loans—Series A, Nos. 20/21, page 124[3].

Lighthouses Case (France/Greece)—Series A/B, No. 62, page 22[4].

Panevezys-Saldutiskis Railway Case—Series A/B, No. 76, page 19[5].

"In the present case, Guatemala has alleged the invalidity or nullity of the legal act of naturalization under the national law. The burden of proof is on Guatemala to prove it. But Guatemala has not furnished any admissible evidence; such as the testimony of a jurist learned and experienced in Liechtenstein law, or an opinion from the Highest Court in that country. The case has been presented as if this Court was competent to interpret the Liechtenstein law as such, and to pass upon its application to the special circumstances of this case. It has been argued without consideration of the provisions of the Liechtenstein law regarding the interpretation of statutes or of the decisions of its courts.

"Accordingly, the contention of the respondent Government, as regards invalidity under the national law, fails through lack of evidence to support it.

"But this is not merely a case of failure of proof. Even if the Liechtenstein Law of 1934 is interpreted without regard to the rules of interpretation, procedure and administrative law in force in that country, it is impossible to reach the conclusion that the naturalization was a nullity. There is a fundamental error in the method of interpretation adopted by Counsel, both in the Pleadings and in the Oral Proceedings.

"It has been argued that the Liechtenstein authorities disregarded the provisions of the Law of 1934 in two respects: it is said that they inverted the order in which the different steps in the procedure were to be carried out. It is also said that they did not comply with certain essential requirements laid down in the Law. The conclusion was reached that the naturalization was invalid, because of non-conformity with the laws of the Principality.

"This interpretation was based on consideration of particular provisions, without taking into account the Law as a whole. In particular, it ignored a provision which is of crucial importance, Article 21, which contains the following paragraph:

'*Section 21*

> 'The Princely Government may, within five years from the date of acquisition thereof, deprive a foreign national of the citizenship of the Principality which has been granted to him, if it appears that the requirements laid down in this law as governing the grant thereof were not satisfied. It is entitled, however, at any time, to deprive a person of the citizenship of the Principality if the acquisition thereof has come about in a fraudulent manner.'

"It is clear that the naturalization of Mr. Nottebohm could have been revoked at any time within five years of the grant, if it had appeared that any of 'the requirements laid down in this law were not satisfied'. It is equally clear that, after the expiration of the five-year period—i.e. in

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[1] See *Annual Digest*, 1925–1926, Case No. 148.]
[2] *Ibid.*, Case No. 4.]
[3] *Ibid.*, 1929–1930, Case No. 278.]
[4] *Ibid.*, 1933–1934, Case No. 36.]
[5] *Ibid.*, 1938–1940, Case No. 103.]

October 1944—the naturalization became indefeasible, apart from fraud. In such circumstances, it is not open to me, nearly sixteen years after the event and in the absence of fraud, to find that the naturalization was invalid under the Liechtenstein law.

" The second ground for holding that the claim is inadmissible, which is contained in paragraph 2 (*b*) of the Final Conclusions of Guatemala, may be stated shortly: that naturalization was not granted to Mr. Nottebohm in accordance with the generally recognized principles in regard to nationality.

" Conclusion 2 (*b*) is obviously defective. The Court cannot determine ' generally recognized principles ' or decide cases on the basis of such principles. Its competence is limited by the peremptory and mandatory provisions of Article 38 of the Statute, to decision ' in accordance with international law '.

" However, the position taken by Counsel makes it clear that the Final Conclusion 2 (*b*) was intended to raise the issue of abuse of right.

" Abuse of right is based on the assumption that there is a right to be abused. In the present case it is based upon the assumption that Liechtenstein had the right under international law to naturalize Mr. Nottebohm, but that, in view of the special circumstances and the manner in which the right was exercised, there was an improper exercise of the right—an exercise so outrageous and unconscionable that its result, i.e. the national status conferred on Mr. Nottebohm, could not be invoked against Guatemala.

" The doctrine of abuse of right cannot be invoked by one State against another unless the State which is admittedly exercising its rights under international law causes damage to the State invoking the doctrine.

" As this ground is not relied upon in the Judgment of the Court, it is unnecessary for me to examine the particular grounds relied on by Counsel. It is sufficient to point out that Liechtenstein caused no damage to Guatemala, and that it is therefore necessary to reject the Final Conclusion 2 (*b*).

" The third ground for holding that the claim is inadmissible, which is contained in paragraph 2 (*c*) of the Final Conclusions of Guatemala, is based on fraud.

" It is impossible to separate the aspects of fraud which are relevant to the plea in bar from those which concern the merits. The greater part of the evidence adduced in support of the charge of fraud was contained in considerably more than one hundred documents. From these documents a few were selected and brought to the attention of the Court. The remaining documents were not placed at the disposition of the Court.

" In these circumstances, it is not possible for me to found any conclusion based on fraud at this stage in the case. I am therefore of the opinion that the Guatemalan Final Conclusion 2 (*c*) should be joined to the merits.

" There is another aspect of the question, which must be considered. The Judgment of the Court is based upon the ground that the naturalization of Mr. Nottebohm was not a genuine transaction. It is pointed out that it did not lead to any alteration in his manner of life; and that it was acquired, not for the purpose of obtaining legal recognition of his membership in fact of the population of Liechtenstein, but for the purpose of obtaining neutral status and the diplomatic protection of a neutral State.

" This ground, to which I shall refer as the link theory, as it is based on the quality of the relation between Mr. Nottebohm and Liechtenstein, cannot be related to the Final Conclusions of Guatemala, or to the argument in the Pleadings and Oral Proceedings.

" Accordingly, the matter is governed by the principle which was applied by this Court in the *Ambatielos* case (Jurisdiction),[1] Judgment of July 1st, 1952, *I.C.J. Reports 1952*, at page 45:

> ' The point raised here has not yet been fully argued by the Parties, and cannot, therefore, be decided at this stage.'

[[1] See *International Law Reports*, 1952, Case No. 96.]

Indirectly, some aspects were discussed as elements of abuse of right, but not as a rule of international law limiting the power of a sovereign State to exercise the right of diplomatic protection in respect of one of its naturalized citizens.

" As the Judge of this Court, I am bound to apply the principle of international law, thus declared by this Court. I cannot concur in the adoption of this ground—not included in the Conclusions and not argued by either Party—as the basis for the allowance of the plea in bar, and for the prevention of its discussion, consideration and disposition on the merits.

" Nevertheless, in view of the course followed by the majority, I must examine this ground for holding that the grant of naturalization did not give rise to a right of protection, and indicate some of the difficulties which prevent my concurrence.

" To begin with, I do not question the desirability of establishing some limitation on the wide discretionary power possessed by sovereign States: the right, under international law, to determine, under their own laws, who are their own nationals and to protect such nationals.

" Nevertheless, I am bound, by Article 38 of the Statute, to apply international law as it is—positive law—and not international law as it might be if a Codification Conference succeeded in establishing new rules limiting the conferring of nationality by sovereign States. It is, therefore, necessary to consider whether there are any rules of positive international law requiring a substantial relationship between the individual and the State, in order that a valid grant of nationality may give rise to a right of diplomatic protection.

' Both Parties rely on Article 1 of The Hague Draft Convention of 1930 as an accurate statement of the recognized rules of international law. Commenting on it, the Government of Guatemala stated in the Counter-Memorial (p. 7) that ' there can be no doubt that its Article 1 represented the existing state of international law '. It reads as follows:

> ' It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.'

" Applying this rule to the case, it would result that Liechtenstein had the right to determine under its own law that Mr. Nottebohm was its own national, and that Guatemala must recognize the Liechtenstein law in this regard *in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality*. I shall refer to this quality, the binding character of naturalization, as opposability.

" No ' international conventions ' are involved and no ' international custom ' has been proved. There remain ' the principles of law generally recognized with regard to nationality ', and it is on this qualification of the generality of the rule in Article 1 that Guatemala has relied both in the Pleadings and in the Oral Proceedings.

" In this regard the Government of Guatemala stated in paragraph 16 of the Counter-Memorial:

> ' As to the first point, it is necessary in the first place to determine what, in the absence of general international conventions binding upon the Principality of Liechtenstein, is the content of international law in the light of which the international validity of that State's law must be examined.
>
> ' It must be acknowledged that in this connection there is no system of customary rules nor any rigid principles by which States are bound.
>
> ' As M. Scelle has indicated, it is rather in the realm of " abuse of power " (or of competence or of right) that the courts must consider in each case

whether there has been a breach of international law (Scelle—*Cours de Droit international public*, Paris, 1948, p. 84).'

" This position was maintained in the Oral Proceedings.

" It is therefore clear that the Government of Guatemala considers that there are no firm principles of law generally recognized with regard to nationality, but that the right of Liechtenstein to determine under its own law that Mr. Nottebohm was its own national, and the correlative obligation of Guatemala to recognize the Liechtenstein law in this regard—opposability—are limited not by rigid rules of international law, but only by the rules regarding abuse of right and fraud.

" I have mentioned that no ' international conventions ' are involved and that no ' international custom has been proved '. It has been conceded by Guatemala that ' there is no system of customary rules ', but the link theory is supported by the view that certain international conventions suggest the existence of a trend. I must deal with this point before considering whether the firm view of the law on which the two Parties are in complete agreement should be rejected.

" The first international convention is Article 3 (2) of the Statute, which deals with the problem of double nationality. It has nothing to do with diplomatic protection and is not in any sense relevant to the problem under consideration. It is true that it accepts as a test in the case of double nationality the place in which the person ' ordinarily exercises civil and political rights '. Even if this test can be dragged from an entirely different setting and applied to the present case, it does not contribute much to the solution. Mr. Nottebohm has, in the course of the last fifty years, been linked with four States. He was a German national during thirty-four years, but exercised neither civil or political rights in that country. He was ordinarily resident in Guatemala for nearly forty years, but exercised no political rights at any time in that country and has been prevented from exercising important civil rights for twelve years. He was a prisoner in the United States of America for more than two years, where he exercised neither civil nor political rights. Since his release, he has been accorded full civil rights in the United States and has exercised them freely, but he has had no political rights in that country. He has had full civil rights in Liechtenstein for nearly sixteen years, and has exercised full political rights for nine. Article 3 (2) certainly does not weaken the Liechtenstein position.

" The United States of America, between the years 1868 and 1928, concluded bilateral conventions with about eighteen countries, not including Liechtenstein, which limited the power of protecting naturalized persons who returned to their countries of origin. The same sort of restriction on the opposability of naturalization was incorporated in a Pan-American Convention concluded at Rio de Janeiro in 1906. Liechtenstein was precluded from participation. Venezuela refused to sign the Convention. Bolivia, Cuba, Mexico, Paraguay, Peru and Uruguay signed the Convention but did not ratify it. Brazil and Guatemala have both denounced its provisions.

" The fact that it was considered necessary to conclude the series of bilateral conventions and to establish the multilateral Convention referred to above indicates that the countries concerned were not content to rely on the possible existence of a rule of positive international law qualifying the right of protection. Further, even within that part of the Western hemisphere which is South of the 49th Parallel, the ratifications of the multilateral Convention were not sufficiently general to indicate consensus of the countries concerned. Taking them together, the Conventions are too few and far between to indicate a trend or to show the general consensus on the part of States which is essential to the establishment of a rule of positive international law.

" It is suggested that the link theory can be justified by the application to this case of the principles adopted by arbitral tribunals in dealing with cases of double nationality.

" There have been many instances of double nationality in which international tribunals have been compelled to decide between conflicting claims. In such cases, it has been necessary to choose; and the choice has been determined by the relative strength of the association between the individual concerned and his national State. There have been many instances in which a State has refused to recognize that the naturalization of one of its own citizens has given rise to a right of diplomatic protection, or in which it has refused to treat naturalization as exempting him from the obligations incident to his original citizenship, such as military service.

" But the problems presented by conflicting claims to nationality and by double nationality do not arise in this case. There can be no doubt that Mr. Nottebohm lost his German nationality of origin upon his naturalization in Liechtenstein in October 1939. I do not think that it is permissible to transfer criteria designed for cases of double nationality to an essentially different type of relationship.

" It is noteworthy that, apart from the cases of double nationality, no instance has been cited to the Court in which a State has successfully refused to recognize that nationality, lawfully conferred and maintained, did not give rise to a right of diplomatic protection.

" There are other difficulties presented by the link theory. In the case of Mr. Nottebohm, it relies upon a finding of fact that there is nothing to indicate that his application for naturalization abroad was motivated by any desire to break his ties with the Government of Germany. I am unable to concur in making this finding at the present stage in the case. He had no ties with the Government of Germany, although there is abundant evidence to the effect that he had links with the country, as distinct from the Government. There are substantial difficulties which need to be considered.

" In the first place, I do not think that international law, apart from abuse of right and fraud, permits the consideration of the motives which led to naturalization as determining its effects.

" In the second place, the finding depends upon the examination of issues which are part of the merits and which cannot be decided when dealing with the plea in bar.

" In the third place, the breaking of ties with the country of origin is not essential to valid and opposable naturalization. International law recognizes double nationality and the present trend in State practice is towards double nationality, which necessarily involves maintenance of the ties with the country of origin. It is noteworthy that in the United Kingdom the policy of recognizing the automatic loss of British nationality on naturalization abroad, which had been adopted in 1870, was abandoned in 1948. Under the new British legislation, on naturalization abroad, a British citizen normally maintains his ties with his country of origin.

" In the fourth place, I am unable to agree that there is nothing to indicate that Mr. Nottebohm's naturalization was motivated by a desire to break his ties with Germany. There are three facts which prove that he was determined to break his ties with Germany. The first is the fact of his application for naturalization, the second is the taking of his oath of allegiance to Liechtenstein, and the third is his obtaining a certificate of naturalization and a Liechtenstein passport.

" The link theory is based, in part, on the fact that Liechtenstein waived the requirement of three years' residence. At the time of the naturalization, Mr. Nottebohm was temporarily resident in Liechtenstein; but he had not established domicile, and had no immediate intention to do so. But I have difficulty in regarding lack of residence as a decisive factor in the case.

" It has been conceded by Counsel for Guatemala that ' the majority of

States, in one form or another, either by their law or in their practice, allow for exceptional cases in which they exempt the applicant for naturalization from the requirement of proof of long-continued prior residence '. This is another point on which both Parties are in agreement, and the position has been fully established in the case.

" Counsel for Guatemala proceeded to contend that the lack of residence, in the circumstances, might be taken into account in determining whether there had been an abuse of right by Liechtenstein, but I have already dealt with that aspect of the case.

" I am of the opinion that the parties were right, and that, under the rules of positive international law, Liechtenstein had the discretionary right to dispense with the residential requirement. That being so, I cannot—in the absence of fraud or injury—review the factors which may have influenced Liechtenstein in the exercise of a discretionary power. It is not surprising that no precedent has been cited to the Court in which—in the absence of fraud or injury to an adverse party—the exercise of a discretionary power, possessed by a State under the principles of positive international law, has been successfully questioned. If there had been such precedent, it would certainly have been brought to the attention of the Court.

" It is also suggested that the naturalization of Mr. Nottebohm was lacking in genuineness, and did not give rise to a right of protection, because of his subsequent conduct: that he did not abandon his residence and his business activities in Guatemala, establish a business in Liechtenstein, and take up permanent residence. Along the same lines, it is suggested that he did not incorporate himself in the body politic which constitutes the Liechtenstein State.

" In considering this point, it is necessary to bear in mind that there is no rule of international law which would justify me in taking into account subsequent conduct as relevant to the validity and opposability of naturalization. Nevertheless I am unable to avoid consideration of his conduct since October 1939.

" I have difficulty in accepting the position taken with regard to the nature of the State and the incorporation of an individual in the State by naturalization. To my mind the State is a concept broad enough to include not merely the territory and its inhabitants but also those of its citizens who are resident abroad but linked to it by allegiance. Most States regard non-resident citizens as a part of the body politic. In the case of many countries such as China, France, the United Kingdom and the Netherlands, the non-resident citizens form an important part of the body politic and are numbered in their hundreds of thousands or millions. Many of these non-resident citizens have never been within the confines of the home State. I can see no reason why the pattern of the body politic of Liechtenstein should or must be different from that of other States.

" In my opinion Mr. Nottebohm incorporated himself in the non-resident part of the body politic of Liechtenstein. From the instant of his naturalization to the date of the Judgment of this Court, he has not departed in his conduct from the position of a member of the Liechtenstein State. He began by obtaining a passport in October 1939 and a visa from the Consulate of Guatemala. On his arrival in Guatemala in January 1940, he immediately informed the Guatemalan Government and had himself registered as a citizen of Liechtenstein. Upon his arrest in October 1943, he obtained the diplomatic protection of Liechtenstein through the medium of the Swiss Consul. On the commencement of the confiscation of his properties, he obtained diplomatic protection from the same source and channel. After his release from internment he was accorded full civil rights by the Government of the United States of America and instituted and successfully maintained proceedings and negotiations in Washington with a view to obtaining the release of assets which had been blocked, upon the ground that he was a national of Liechtenstein. During the last nine years he has been an active and resident member of the body politic of that State.

" As regards residence and business, there is no rule of international law requiring a naturalized person to undertake business activities and to reside in the country of his allegiance. However, considering the question of subsequent conduct, I am unable to disregard what really did happen.

" To begin with, Mr. Nottebohm was 58 years of age at the time—or within two years of the normal retirement age in the type of business activity in which he was engaged. The evidence shows that he was actually contemplating retirement. In October 1939 he was largely occupied with plans to save the business but I find it hard to believe that he was not also thinking in terms of retirement and Vaduz was in his mind. Out of the 15½ years which have elapsed since naturalization, Mr. Nottebohm has spent less than four in Guatemala, more than two in the United States, and nine years in Vaduz.

" It is true that, in the applications which were made in 1945 on his behalf with a view to his return to Guatemala, it was stated that he intended to resume his domicile in that country. But I am unable to overlook the fact that his return was absolutely essential in order to conduct the 57 law suits to which I have referred above and to clear his own good name from the charges of disloyalty which had been made against him. I do not think that too much weight can be given to the statements made by his kinsfolk in Guatemala with the view to obtaining the right of re-admission to that country.

" The essential fact is that when, in 1946, he was released in mid-winter in North Dakota, deprived of all that he possessed in Guatemala and with all of his assets in the United States blocked, he went back to the country of his allegiance. In my opinion, the fact of his return to Liechtenstein and of his admission to Liechtenstein is convincing evidence of the real and effective character of his link with Liechtenstein. It was an unequivocal assertion by him through his conduct of the fact of his Liechtenstein nationality, and an unequivocal recognition of that fact by Liechtenstein.

" Further, I have difficulty in accepting two closely related findings of fact. The first is that the naturalization did not alter the manner of life of Mr. Nottebohm. In my opinion, a naturalization which led ultimately to his permanent residence in the country of his allegiance altered the manner of life of a merchant who had hitherto been residing in and conducting his business activities in Guatemala.

" The second finding is that the naturalization was conferred in exceptional circumstances of speed and accommodation. There are many countries, beside Liechtenstein, in which expedition and good will are regarded as administrative virtues. I do not think that these qualities impair the effectiveness or genuineness of their administrative acts.

" The link theory has been based on the view that the essential character of naturalization and the relation between a State and its national justify the conclusion that the naturalization of Mr. Nottebohm, though valid, was unreal and incapable of giving rise to the right of diplomatic protection. I have difficulty in adopting this view and it becomes necessary to consider the nature of naturalization and diplomatic protection and the juridical character of the relationships which arose between Guatemala and Liechtenstein on Mr. Nottebohm's return in 1940.

" Nationality, and the relation between a citizen and the State to which he owes allegiance, are of such a character that they demand certainty. When one considers the occasions for invoking the relationship—emigration and immigration; travel; treason; exercise of political rights and functions; military service and the like—it becomes evident that certainty is essential. There must be objective tests, readily established, for the existence and recognition of the status. That is why the practice of States has steadfastly rejected vague and subjective tests for the right to confer nationality—sincerity, fidelity, durability, lack of substantial connection—and has clung to the rule of the almost unfettered discretionary power of the State, as embodied in Article 1 of The Hague Draft Convention of 1931.

" Nationality and diplomatic protection are closely inter-related. The general rule of international law is that nationality gives rise to a right of diplomatic protection.

" Fundamentally the obligation of a State to accord reasonable treatment to resident aliens and the correlative right of protection are based on the consent of the States concerned. When an alien comes to the frontier, seeking admission, either as a settler or on a visit, the State has an unfettered right to refuse admission. That does not mean that it can deny the alien's national status or refuse to recognize it. But by refusing admission, the State prevents the establishment of legal relationships involving rights and obligations, as regards the alien, between the two countries. On the other hand, by admitting the alien, the State, by its voluntary act, brings into being a series of legal relationships with the State of which he is a national.

" As a result of the admission of an alien, whether as a permanent settler or as a visitor, a whole series of legal relationships come into being. There are two States concerned, to which I shall refer as the receiving State and the protecting State. The receiving State becames subject to a series of legal duties vis-à-vis the protecting State, particularly the duty of reasonable and fair treatment. It acquires rights vis-à-vis the protecting State and the individual, particularly the rights incident to local allegiance and the right of deportation to the protecting State. At the same time the protecting State acquires correlative rights and obligations vis-à-vis the receiving State, particularly a diminution of its rights as against the individual resulting from the local allegiance, the right to assert diplomatic protection and the obligation to receive the individual on deportation. This network of rights and obligations is fundamentally conventional in its origin—it begins with a voluntary act of the protecting State in permitting the individual to take up residence in the other country, and the voluntary act of admission by the receiving State. The scope and content of the rights are, however, largely defined by positive international law. Nevertheless, the receiving State has control at all stages because it can bring the situation to an end by deportation.

" The position is illustrated by what actually happened in the present case. Mr. Nottebohm went to Guatemala 50 years ago as a German national and as a permanent settler. Upon his admission as an immigrant, the whole series of legal relationships came into being between Guatemala and Germany. Guatemala was under a legal obligation vis-à-vis Germany to accord reasonable and fair treatment. Guatemala had the right to deport Mr. Nottebohm to Germany and to no other place. Germany had the right of diplomatic protection and was under the legal obligation to receive him on deportation.

" As a result of the naturalization in October 1939, the whole network of legal relationships between Guatemala and Germany as regards Mr. Nottebohm came to an end.

" Mr. Nottebohm returned to Guatemala in January 1940, having brought about a fundamental change in his legal relationships in that country. He no longer had the status of a permanently settled alien of German nationality. He was entering with a Liechtenstein passport and with Liechtenstein protection.

" The first step taken by him was the obtaining of a visa from the Guatemalan Consul before departure. On arrival in Guatemala he immediately brought his new national status to the attention of the Guatemalan Government on the highest level. His registration under the Aliens' Act as a German national was cancelled and he was registered as a Liechtenstein national. From the end of Junary 1940 he was treated as such in Guatemala.

" In my opinion, as a result of Mr. Nottebohm's admission to Guatemala and establishment under the Guatemalan law as a resident of Liechtenstein nationality, a series of legal relationships arose between Guatemala and Liechtenstein, the nature of which has been sufficiently indicated above. From that time on Guatemala had the right to deport Mr. Nottebohm to Liechtenstein, and Liechtenstein was under the correlative obligation to receive him on deportation. Liechtenstein was entitled as of right to furnish diplomatic protection to Mr. Nottebohm in Guatemala, and when that right was exercised in October 1943, it was not questioned by Guatemala.

" I am unable to concur in the view that the acceptance of Mr. Nottebohm by the Guatemalan authorities as a settler of Liechtenstein nationality did not bring into being a relationship between the two Governments. I do not think that the position of Guatemala is in any way different from that of other States and I do not think that it was possible for Guatemala to prevent the coming into being of the same kind of legal relationships which would have taken place if Mr. Nottebohm had landed as a settler in any other country.

" When a series of legal relationships, rights and duties exists between two States, it is not open to one of the States to bring the situation to an end by its unilateral action. In my opinion such relationships came into being between Guatemala and Liechtenstein when the former State accepted Mr. Nottebohm in 1940. It was open to Guatemala to terminate the position by deportation but not to extinguish the right of Liechtenstein under international law to protect its own national without the consent of that country.

" There is one more aspect of this question to which I must refer. It is suggested that Mr. Nottebohm obtained his naturalization with the sole motive of avoiding the legal consequences of his nationality of origin. He was a German and Germany was at war, but not with Guatemala. There can be little doubt that this was one of his motives, but whether it was his sole motive is a matter of speculation.

" There is apparently abundant evidence on this aspect of the case to which I have not had access; evidence which would prove or disprove the contention that the naturalization was part of a fraudulent scheme. But it is not permissible for me to look at that evidence in dealing with a plea in bar. I must proceed at this stage on the assumption that the naturalization was obtained in good faith and without fraud.

" It has been complained that the purpose of the naturalization was to avoid the operation of war-time measures in the event that Guatemala ultimately became involved in war with Germany. In October 1939, if Mr. Nottebohm read the newspapers—which is highly probable—he knew that Guatemala, in concert with the other Pan-American States, was making every effort to maintain neutrality. It is far more likely that, remembering the experience of Nottebohm Hermanos during the first World War, he was seeking to protect his assets in the United States. The suggestion that he foresaw Guatemalan belligerency is not supported by any evidence and I cannot accept it.

" Further, even if his main purpose had been to protect his property and business in the event of Guatemalan belligerency, I do not think that it affected the validity or opposability of the naturalization. There was no rule of international law and no rule in the laws of Guatemala at the time forbidding such a course of action. Mr. Nottebohm did not conceal the naturalization and informed the Government of Guatemala on the highest level on his return to the country.

" I do not think that I am justified in taking Mr. Nottebohm's motives into consideration—in the absence of fraud or injury to Guatemala—but even if this particular motive is considered, it cannot be regarded as preventing the existence of the right of diplomatic protection.

" In view of the foregoing circumstances it is necessary for me to reach the conclusion that the two Parties before the Court were right in adopting the position that the right of Liechtenstein to determine under its own law that Mr. Nottebohm was its own national, and the correlative obligation of Guatemala to recognize the Liechtenstein law in this regard are limited not by rigid rules of international law, but only by the rules regarding abuse of right and fraud."

Professor Guggenheim, Judge *ad hoc,* delivered the following Dissenting Opinion:

" [*Translation*]

" In my view, the submission of the Government of Guatemala that the claim of Liechtenstein should be declared inadmissible on the ground that F. Nottebohm does not possess Liechtenstein nationality should have been joined to the Merits and the proceedings adjourned to enable the Government of Liechtenstein to obtain and collect documents in support of its observations on the new documents produced by Guatemala. I have reached this conclusion for the following reasons:

I

" 1. Every legal system itself lays down the requisite conditions for the validity of municipal legal acts. This also applies to the legal system of Liechtenstein with respect to the grant of its nationality; from the point of view of the Court, that is a procedure under municipal law. Naturalization is a fact which has to be proved for the purposes of international proceedings and the Court is entitled to ascertain, at least up to a certain point, whether the facts relied upon correspond to the real and effective situation, that is to say whether the naturalization is genuine and effective from the point of view of municipal law. The power of enquiring into the circumstances of a naturalization is not therefore limited to an examination of certain conditions, as was maintained, for example, in the *Salem* case in the dissenting opinion of the American arbitrator, Nielsen, who considered that the researches of an international tribunal should be confined exclusively to the question whether the certificate of naturalization was obtained by fraud or favour (*see Reports of International Arbitral Awards*, United Nations, Volume II, pp. 1204 *et sqq.*[1]). According to the prevailing view in international judicial decisions, there is no doubt that an international tribunal is entitled to investigate the circumstances in which a certificate of nationality has been granted. This view was adopted in the decision of the German-Rumanian Mixed Arbitral Tribunal, of November 6th, 1924, in the case of *Meyer Wildermann* v. *Stinnes heirs and others* (*Reports of the Decisions of the Mixed Arbitral Tribunals,* Volume IV, p. 842[2]). Indeed the Tribunal in this case expressly reserved its right to investigate the circumstances of the official recognition of nationality. Among the many decisions supporting the right of international courts and arbitral tribunals to examine certificates of nationality, reference may also be made to the decision of Commissioner Nielsen in the case of *Hatton* v. *United Mexican States* (*Reports of International Arbitral Awards,* United Nations, September 26th, 1928, Volume IV, p. 331) which rightly places emphasis on the obligation to furnish proof of nationality. ' Convincing proof of nationality is necessary not only from the standpoint of international law, but as a jurisdictional requirement.[3]

" These decisions are in accordance with a more general rule: the rule requiring proof of nationality is only a particular application of the rule that an international tribunal is competent to decide upon the validity of a rule or an act under municipal law if such rule or act is relevant to the international

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[[1] And see *Annual Digest*, 1931–1932, Case No. 98.]
[[2] *Ibid.*, 1923–1924, Case No. 120.]
[[3] See also *Annual Digest*, 1927–1928, Case No. 335.]

dispute under examination. The rule or act under municipal law is to be regarded merely as a fact but such facts may be proved ' by means of any researches which the Court may think fit to undertake or to cause to be undertaken '. (P.C.I.J., *Brazilian Loans* case, Series A 20/21, p. 124). Moreover the same decision states: ' all that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied '. *Cf.* also P.C.I.J., Series A, No. 7, p. 19; Series A, Nos. 20/21, p. 46; Series A/B, No. 62, p. 22; Series A/B, No. 76, p. 19.

" 3. An international tribunal is not therefore bound to confine itself to the statements of national authorities relating to their application of the rules of municipal law. Accordingly it may consider the facts in a manner different from that of municipal courts. But an international tribunal must never lose sight of the fact that it is called upon to consider municipal law for the purpose of exercising a competence conferred on it by international law. It is not its function to decide upon the domestic validity of municpal law, that is to say, to exercise the powers of a court of appeal with regard to municipal law. What then is its function ? An international tribunal must only be concerned with municipal law and, in particular, with nationality, as a fact determining the admissibility of a claim brought before an international judicial organ. The plaintiff must therefore *prove* that nationality has been conferred by means of a valid act in accordance with the municipal law of the claimant State; and the defendant, if he disputes this, must establish the contrary (P.C.I.J., Series A, No. 5, p. 30 [*Mavrommatis Jerusalem Concessions*: *Annual Digest*, 1925–1926, Case No. 148.]).

" 4. I have reached the conclusion that it was for the Court to determine whether F. Nottebohm validly and effectively acquired nationality in accordance with the municipal law of Liechtenstein in such a manner that the validity and effectiveness of the naturalization cannot be the subject of any doubt.

" In this connexion, however, the Court must confine itself within certain clearly defined limits. This limitation upon the competence of the Court is based on two entirely different considerations: on the one hand, when investigating the application of the municipal law by the municipal authorities, the Court must confine itself to examining whether such application is in accordance with the obligations which international law imposes on the State in question; on the other hand, having regard to the fact that, according to the practice of international law, municipal law does not form part of the body of legal rules which it applies directly, the Court is obliged to reach a decision in regard to municipal law on the basis of evidence submitted to it in the proceedings. It cannot *freely* examine the application and interpretation of municipal law but can merely enquire into the application of municipal law as a question of fact, alleged or disputed by the parties, and in the light of its own knowledge, in order to determine whether the facts are correct or incorrect.

" 5. Since the law of Liechtenstein applies primarily within the national sphere, it is the competent State authorities, and these authorities alone, which are entitled to determine whether the law relating to naturalization has been correctly applied, that is to say, whether, in the present case, sufficient reasons existed for waiving the requirement that the applicant must have ' ordinarily resided in the territory of the Principality of Liechtenstein at least three years ' and whether the application for naturalization was ' deserving [of] special consideration ' and also whether the applicant could be exempted from this requirement ' by way of exception ' (see Art. 6 of the Liechtenstein Law on the Acquisition and Loss of Nationality of 4th January, 1934). Even the State Court of Liechtenstein is incompetent to review the considerations of expediency upon which legal acts, decided upon and applied by virtue of a discretionary power of the administrative authorities, are based. This is in accordance with the generally recognized principles of Swiss and German administrative law. It has, moreover, received confirmation in the judicial decisions of the State Court of the Principality, as is shown by its decision of 20th July, 1950, concerning the grant of a concession for a hotel (*Gastbewerbehaus-Konzession*). (See *Rapport de Gestion* of the Princely Government to the Diet for the year 1950, pp. 83 *et sqq.*) It was there stated that, in accordance with Article 40 of the Law relating to the State Court, the latter could only give decisions on questions of law and not with regard to the discretionary power of administrative authorities. In my opinion the Court is not entitled to assumed the functions of a supervisory judicial body which does not exist under the domestic law.

" 6. If the question of F. Nottebohm's acquisition of Liechtenstein nationality is considered from this angle, it is beyond doubt that he must be regarded as a national of the Principality. A naturalization to which the supreme organs of the Principality, the Reigning Prince and the Diet, have given their consent, in accordance with Article 12 of the Law on the Acquisition and Loss of Nationality—as they did in the case of F. Nottebohm—is a valid naturalization. Moreover there is also a presumption *juris* and *de jure* in favour of the validity of the acts of these supreme authorities, since Liechtenstein law does not provide for the judicial control of acts performed by these authorities in the exercise of their discretionary power.

" 7. Moreover, in order to determine the validity of a naturalization, an international tribunal must also bear in mind that, from the moment of his naturalization, Liechtenstein has never ceased to regard F. Nottebohm as one of its nationals; this attitude was likewise adopted by Switzerland, the Power representing Liechtenstein interests abroad, as appears from the Certificate of the Swiss Clearing Office of 24th July, 1946 (Reply, Annex 18, p. 90), and probably also by Guatemala, at least until a date which it is difficult to determine from the documents. Finally, F. Nottebohm, who in fact lost his German nationality in consequence of his naturalization, has never invoked the protection of any State other than Liechtenstein; he returned to Liechtenstein in 1946 and never changed his residence thereafter.

II

" 1. In addition to the question whether Liechtenstein nationality was validly and effectively granted to F. Nottebohm according to Liechtenstein law, a further question arises, as is stated in one of the Conclusions of Guatemala, namely, whether Liechtenstein nationality was granted to F. Nottebohm in accordance with the generally recognized principles in regard to nationality. In my opinion, however, it is not this abstract problem which calls for consideration in the present case, but rather the more concrete problem of determining whether diplomatic protection resulting from the grant of Liechtenstein nationality can be relied upon as against Guatemala in virtue of the general rules of international law.

" 2. For this diplomatic protection by Liechtenstein might be inoperative for two different reasons which must be clearly distinguished. In the first place, the nationality of F. Nottebohm may not in itself be valid on the international level and this would entail its invalidity, with the result that Liechtenstein could not exercise its right of diplomatic protection. Alternatively, it is possible that the nationality of F. Nottebohm might, in itself, be valid from the international standpoint but could not be relied upon as against States in regard to which Liechtenstein might seek to exercise diplomatic protection in the same circumstances as in regard to Guatemala.

" 3. International law furnishes examples of situations in which the grant of nationality is invalid, with the direct consequence that it cannot form the basis of diplomatic protection. The inadmissibility of a claim on the ground that diplomatic protection cannot be invoked is then merely the result of the absence of the effects of nationality on the international level. This also gives rise to other consequences, such as the non-recognition of the personal status which, being claimed on the basis of the grant of nationality, is held to be null and void, or the loss of the right to claim the benefit of treaty rights reserved to nationals of the State concerned. If, on the international level, we examine the cases in which the absence of a valid bond between the State and the individual to whom the State has granted its nationality has been recognized in practice, it will be found that such a bond has only been held to be lacking when the person concerned possessed a second nationality or when his State of adoption has granted its nationality by compulsion, that is to say, without the consent of the person concerned, or without the State whose nationality is to be lost having consented to the withdrawal of its own nationality.

" It is in such circumstances and in such circumstances alone, where the bond between the State and the individual is lacking to so great an extent, that third States are not bound to recognize the naturalization nor to accede to a claim to the right to exercise protection. Thus third States are not bound to consider the children of foreign diplomats born in the territory of a State which attributes its nationality to them as nationals of that State (*cf.* Article 12 of The Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws). The ownership of land is not by itself a sufficient legal title for the grant of nationality (*cf.* the awards of the German-Mexican Claims Commission, *American Journal of International Law*, 1933, p. 69[1]). The Ordinance of the German Reich of August 23rd, 1942, which authorized the grant of German nationality to certain classes of the population in territories not subject to German sovereignty but occupied by Germany, was not bound to be recognized by third States because it was contrary to certain obligations binding on Germany under general international law (*cf. Annuaire suisse de droit international*, Vol. I, 1944, pp. 79 *et sqq.*). The compulsory reintegration of a former national resident abroad is unlawful if the person concerned has lost his nationality by its withdrawal and if a new bond has not been created between him and the State wishing to reintegrate him in his former nationality (Judgments of the Swiss Federal Court, Vol. 72, I, p. 410; Vol. 74, I, pp. 346 *et sqq.* [see *Annual Digest*, 1946, Case No. 58 and Note]).

" All these situations are, however, somewhat exceptional. In the case of F. Nottebohm, the grant of Liechtenstein nationality did not fall within any of these categories, all the more so since he voluntarily acquired Liechtenstein nationality and by so doing automatically lost his German nationality by virtue of Article 25 of the German Nationality Law of 22nd July, 1913, a fact which is, in my opinion, of vital importance for determining the ' effectiveness ' of Liechtenstein naturalization on the international level. No proof has been furnished in the proceedings to the effect that F. Nottebohm availed himself of the right granted by this Article, according to which nationality was not lost by a person who, before acquiring a foreign nationality, obtained from the competent authorities of his State a written authorization to retain his original nationality. On the contrary, the certificate of the Senate of the Free Hanseatic City of Hamburg of 15th June, 1954, attests the loss of German nationality by F. Nottebohm in consequence of his naturalization in Liechtenstein (Reply, Annex 19, p. 91).

" 4. Are there other situations, apart from those which have been referred to, in which third States are entitled to regard the naturalization of a foreign national as inoperative when the foreign national has agreed to the grant of nationality and when his former nationality has not been retained ? To be justified in saying so, it would be necessary to point to repeated and recurrent acts on the international level, which would establish that, in circumstances identical with or similar to those in which naturalization was granted to F. Nottebohm by Liechtenstein, third States have refused to recognize the naturalization so that it can be said that an established usage has developed displaying the characteristics of a general practice accepted as law (Article 38, paragraph 1 (*b*), of the Statute of the Court and P.C.I.J., Series A, No. 10, p. 28[1]; I.C.J. *Asylum* case, *Reports 1950*, pp. 276 *et sqq.*[2]). No evidence of such a custom, which would forbid the grant of nationality in the circumstances in which Liechtenstein granted her nationality to F. Nottebohm, has been given in these proceedings. It is not sufficient for this purpose merely to affirm—without any evidence—that there is no other State law permitting naturalization in the circumstances in which it was granted to F. Nottebohm.

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[1] [See *In re Rau*: *Annual Digest*, 1931–1932, Case No. 124.]

" 5. Moreover, none of the attempts made to define the ' bond of attachment ' according to criteria other than those which have just been mentioned and which are in accordance with existing international law, has succeeded. This failure to arrive at such a definition is not fortuitous. It arises from the fact that in order to define the bond necessary to make naturalization binding, it is sought to supplement the objective criteria (absence of compulsion in relation to the applicant; dual nationality; the grant of nationality without withdrawal of nationality by the State to which the naturalized person formerly belonged) by subjective considerations such as the ' genuineness of the application ', ' loyalty to the new State ', ' creation of a centre of economic interests in the new State ', ' the intention to become integrated in the national community '; or, again, rules are stated which are in no way in accordance with present international practice, or vague principles are formulated which would open the door to arbitrary decisions. International law does not, for example, in any way prohibit a State from claiming as its nationals, at the moment of their birth, the descendants of its nationals who have been resident abroad for centuries and whose only link with the State which grants its nationality is to be found in descent, without the requirement of any other element connecting them with that State, such as religion, language, social conceptions, traditions, manners, way of life, etc. (see, for example, Swiss Civil Code, Art. 263, para. 1, 270, 324, para. 1; and Art. 10 of the Federal Law on the Acquisition and Loss of Swiss Nationality of September 29th, 1952; Art. 4 of the Liechtenstein Law on the Acquisition and Loss of Nationality). It is difficult to see how it can be maintained that the conditions necessary to render naturalization valid and effective on the international level have only been complied with if at the time of application for naturalization there existed one of those subjective bonds of attachment which have just been referred to.

" 6. In order to judge, as to the bond between the State and its national, that is to say, in order to ascertain whether this bond is real and effective and not merely fictitious, international law only has regard to the external elements of legal facts to which it attaches certain consequences, without concerning itself with the mental attitude of the legal person responsible for a juridical act such as the act of naturalization, and without considering the motives (which it is very difficult to determine), which have led the individual to apply for naturalization. This view is in no way inconsistent with the provisions of Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws adopted by the Conference for the Codification of International Law, held at The Hague in 1930. According to this Article, the law enacted by a State for determining who are its nationals ' shall be recognized by other States in so far as it is consistent with . . . international custom and the principles of law generally recognized with regard to nationality '. This rule, the correct interpretation of which has been the subject of dispute among writers, contains no criterion requiring an ' effective ' bond in the case of nationality. It merely refers to the rules of international custom and the principles of law generally recognized with

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[[1] *The Lotus*: see also *Annual Digest*, 1927–1928, Cases No. 2 and 98.]
[[2] *International Law Reports*, 1950, Case No. 90.]

regard to nationality, principles which do not forbid the grant of nationality in the circumstances in which Liechtenstein granted its nationality to F. Nottebohm.

" 7. Nor is it possible to maintain that the bond established between a State and its national is in all circumstances closer than that existing between a State and an individual connected with it by some other link, as, for example, permanent residence. When the development of modern law in civilized States is closely considered, it is even possible to affirm that the rights and duties of an individual vis-à-vis the State of his permanent residence, are frequently more numerous than those which link him to the State of which he is a national. There are certain rules of private law governing conflicts of law which clearly illustrate this situation. In these circumstances, the assertion that there exists an especially close link between the State and its national can hardly bear the absolute character which is frequently attributed to it. This link is, in any case, weakened when nationality becomes dissociated from permanent residence as well as in the case of dual nationality, where two or several States claim a right to the attachment of the individual in question and require him to fulfil the duties inherent in nationality, a situation which is in no way contrary to general international law. Moreover, international law contains no rule which makes the effectiveness of nationality dependent upon a sentimental bond between the naturalizing State and the naturalized individual.

" 8. It has, however, been asserted, both in the written and oral proceedings, that it is necessary to consider the problem of the validity of the act of naturalization apart from the existence of a specific rule of customary law prohibiting Liechtenstein from naturalizing F. Nottebohm in such circumstances, but that a more general complaint could be levelled against Liechtenstein on the one hand and Nottebohm on the other, namely, the absence of a real and genuine intent which is a condition for the validity of legal acts in international law. Nevertheless, it cannot be contended that the naturalization of F. Nottebohm was vitiated by the absence of a genuine intent on the part of Liechtenstein to naturalize him or on the part of F. Nottebohm himself. The reality of the naturalization cannot be called in question. There was no question of a fictitious marriage between Liechtenstein and Nottebohm. In this connexion it is necessary to have regard to the subsequent conduct of Nottebohm, which never varied after naturalization. He always behaved exclusively as a Liechtenstein national and, in taking up the case of its national, the Principality has shown the serious character of the bond linking it with its national. The extent to which the Court can consider the ' genuineness ' of naturalization as an element of proof in regard to the reality and effectiveness of naturalization, is confined within the limits which have just been stated.

" Since F. Nottebohm was not himself subject to any duties based on the principles of international law, it is also unnecessary to consider whether he acted in ' good faith ' when he applied for naturalization. No rule of general international law—that is to say, no customary rule nor general principle of law recognized by civilized nations within the meaning of Article 38, 1 (*b*) and (*c*), of the Statute of the Court—lays down such a requirement and no international responsibility can be incurred by the Principality for not having considered the application for naturalization from this point of view, which would render the naturalization wholly or partly inoperative as against Guatemala, a neutral country at the time of the naturalization of Nottebohm. It would be inadmissible to seek to impose a requirement in this respect, that the naturalizing State or applicant for naturalization should foresee uncertain events which might take place in the future with a greater or lesser degree of probability.

" 9. Even if it were admitted that the Court is entitled to enquire into the motives which led F. Nottebohm to apply for Liechtenstein nationality, it is necessary to point out that F. Nottebohm in no way failed to observe the principles of good faith as defined by the municipal law of civilized States and in particular by Article 2 of the Civil Code of Liechtenstein of 1926. F. Nottebohm did not conceal any essential or subordinate element for the consideration of his application by the Liechtenstein authorities which could therefore decide upon the application with full knowledge of the facts. There was therefore no ' lack of loyalty ' on the part of F. Nottebohm, no failure to keep his word which, in certain circumstances, could render the legal act irregular for the purposes of the application and interpretation of the Liechtenstein Law on the Acquisition and Loss of Nationality. Only if it could be proved that F. Nottebohm acted in a fraudulent manner, for example by concealing German property with the help of the naturalization, might it be possible, if certain conditions were fulfilled, to speak of a failure on the part of F. Nottebohm to observe the principle of good faith vis-à-vis the Principality and perhaps also vis-à-vis Guatemala. Such concealment might, as I shall show, justify the non-recognition of Liechtenstein nationality. In such a case, however, it would not be the absence of good faith which would be the decisive element in the fact that Liechtenstein nationality could not be invoked, but the wrongful character of the fraudulent transaction of concealment of which the acquisition of Liechtenstein nationality would only be *one* of the constituent elements.

" 10. Is it possible to accept the validity of F. Nottebohm's nationality for the purposes of the municipal law of Liechtenstein and yet to affirm that this nationality does not deploy all its international effects and that Liechtenstein is not, therefore, entitled to exercise diplomatic protection should the latter be disputed by Guatemala ? International law is indeed conversant with situations in which the municipal effects and even some of the international effects of nationality are recognized but in which *diplomatic protection* exercised on the basis of the acquired nationality may be successfully disputed. Thus, the individual who possesses two nationalities can only avail himself of the diplomatic protection of *one* of the States of which he is a national vis-à-vis the other and this is so wherever he may be resident. According to the prevailing view, a State can only grant its diplomatic protection to an individual who possessed its nationality at the time when the event giving rise to the diplomatic protection took place, and who has retained such nationality uninterruptedly up to the time when the claim is presented. This dissociation of nationality from diplomatic protection is normally confined to situations in which the individual has two nationalities—either cumulatively or in succession—with the result that the right of protection may always be exercised by *one* State, thus preserving the possibility of a claim being asserted on the international level.

" 11. Nor is this statement of the position inconsistent with the fact that the courts of third States and international tribunals have, on many occasions, had to settle disputes in which two States claimed the same individual as their national and that in such cases the prevailing tendency has been to give preference to the real and effective nationality, a view which forms the basis of Article 5 of the Convention of 1930 relating to the Conflict of Nationality Laws. The test of *effective connection* with respect to nationality has only been laid down for the purpose of resolving conflicts arising out of dual nationality, in regard to which third States must choose between one nationality, held to be the more real and effective one, and a second nationality held to be the less real and effective. The test has also been applied between two States each of which wishes to exercise diplomatic protection on behalf of the same person.

" As for the Bancroft Treaties, which were invoked during the course of the proceedings, I consider it incorrect to regard these Treaties as constituting a precedent for the case of F. Nottebohm. Apart from the fact that these were bilateral treaties concluded in 1868 between the United States of America on the one hand and the States of Wurtemberg, Bavaria, Baden, Hesse and the North German Confederation on the other, they were abrogated on 6th April, 1917 (see Hackworth, *Digest of International Law*, Vol. III, p. 384), at the time of the entry of the United States of America into the first World War and cannot therefore be regarded as reflecting the rules of general international law, since these provisions were mainly concerned with the loss of nationality and the American diplomatic protection of persons of German origin, naturalized in the United States and taking up their residence again in Germany without the intention of returning to the United States. The main purpose of these treaties was to annul the effects of American nationality granted to persons who had no wish to reside in the United States and who returned to their country of origin frequently in order to evade the obligations of military service. As regards persons possessing dual nationality—American nationality and the nationality of one of the German States in question—the Bancroft Treaties sought to give effect to the nationality of the country of habitual residence (*cf.* Moore, *A Digest of International Law*, Vol. III, pp. 358 *et sqq.*).

" The present case is entirely different. F. Nottebohm was not a Liechtenstein national who went to Guatemala and was naturalized in that country and thereafter returned to Liechtenstein in order to take up residence there. Moreover, no conflict of dual nationality arises in his case. To allow Guatemala to hold that Liechtenstein's claim to exercise diplomatic protection is inadmissible against Guatemala would lead to the consequence that F. Nottebohm, having lost his German nationality by acquiring the nationality of Liechtenstein, would no longer be able to invoke the diplomatic protection of any State. Such a dissociation of nationality from diplomatic protection is not supported by any customary rule nor by any general principle of law recognized by civilized nations, within the meaning of Article 38 (1) (*b*) and (*c*) of the Statute of the Court. I consider that such a rule of international law could only be applied, in the present case, especially on consideration of a preliminary objection, with the consent of both parties, in accordance with Article 38 (2) of its Statute.

" 12. Moreover, to dissociate the question of the validity of nationality from that of diplomatic protection leaves a further problem unsolved. Is the question one of the general non-validity of the naturalization on the international level, thus going beyond the limited right of third States to deny the claim to exercise diplomatic protection, or does such non-validity merely affect the right of Liechtenstein to exercise diplomatic protection as against Guatemala ?

" Since the reasons invoked for the purpose of denying the claim to exercise diplomatic protection are inevitably based on the manner in which F. Nottebohm acquired Liechtenstein nationality, and not on any special reasons which Guatemala may have had for refusing to recognize the effects of the nationality in the field of diplomatic protection, any third State will be in a position to draw conclusions going beyond the narrow limits of the right to exercise diplomatic protection and will thus be led to disregard other consequences, other effects of nationality on the international level. There would, for example, be nothing to prevent them from saying that the personal status of F. Nottebohm is that of a stateless person, Nottebohm having in fact lost German nationality without having validly acquired Liechtenstein nationality for international purposes. The fact that the Judgment only applies to the particular case and that the *res judicata* is not binding on third States in no way detracts from the force of these considerations. The scope of the judicial decision extends beyond the effects provided for in Article 59 of the Statute.

" 13. On the other hand, the reasons relied on—namely the absence of a sufficient bond of attachment, which debarred Liechtenstein from exercising diplomatic protection as against Guatemala—affect the claims relating to damage caused at the time when F. Nottebohm had not yet established a permanent residence in the Principality. Even if these grounds are admitted, however, I consider that there is nothing to prevent Liechtenstein from putting forward claims relating to the period when F. Nottebohm took up permanent residence at Vaduz as from 1946 (see Rejoinder, p. 45). Since the events giving rise to the damage suffered by F. Nottebohm in respect of his property—as to which damage, claims have been put forward against Guatemala—occurred within the period subsequent to 1946, and in particular since Liechtenstein's application was presented to the Court on 17th December, 1951, and since the expropriation measures in regard to which reparation is claimed by the Principality were only applied after the year 1949, and in particular after the enactment of Legislative Decree No. 630 of 13th July, 1949, relating to the Law on the Liquidation of Matters arising out of the War (see Counter-Memorial, Annex 39, p. 126), there is nothing to prevent F. Nottebohm's nationality deploying its ordinary effects as against Guatemala, even if it is considered that factual ties stronger than those created in 1939 by naturalization, are essential for the purpose of enabling a State to exercise diplomatic protection on behalf of its nationals.

" It cannot be denied, if this reasoning, which I consider goes beyond the requirement of general international law, is adopted, that F. Nottebohm, after a permanent residence of more than three years in Liechtenstein, is entitled to put forward certain of his claims against Guatemala, and that Liechtenstein is entitled to take up the case of its national. Since F. Nottebohm certainly had Liechtenstein nationality, which was supported by a ' bond ' of residence at the time when the claim was addressed to Guatemala (1951), Liechtenstein, in this connexion, fulfils all the requirements which, in international practice, have been the subject of dispute, as to the date which is to be preferred, that is to say, the date when the national Government espouses the claim, the date when the claim is presented to a representative of the defendant Government, the date when it is brought before an international tribunal, or even the date when the claim is settled (cf. E. Borchard, *Protection diplomatique des Nationaux à l'Étranger*, Annuaire de l'Institut de droit international, 1931, Vol. I, p. 284).

" On the other hand there is no doubt that the events giving rise to the dispute, that is to say, the damage suffered in respect of expropriated property, occurred at a time subsequent to the final establishment of F. Nottebohm in Liechtenstein. In this connexion it is also necessary to point out that all the strict tests laid down for the purpose of determining the national character of a claim, which were considered during the preliminary discussions for the 1930 Conference on the Codification of International Law, were complied with in the present case (cf. League of Nations, Doc. C.75.M.69.1929.V., pp.140 *et sqq.*).

" The fact that the Guatemalan Law of 1949 on the Liquidation of Matters arising out of the War, in accordance with Article 7 of Legislative Decree No. 630, regarded as enemy nationals those persons who possessed the nationality of any of the States with which Guatemala was at war or who had such nationality on 7th October, 1938, although they claimed to have acquired another nationality after that date, does not further modify the essential elements of the question under consideration, that is to say, that the events giving rise to the dispute occurred at a time when F. Nottebohm was a Liechtenstein national. It is not for a third State to decide the validity of a foreign nationality for the purpose of rendering inoperative the exercise of diplomatic protection, with the possible exception of the special case of concealment of enemy property, which will be dealt with under III below and which, being a matter concerned with the merits of the case, cannot be considered in connexion with a plea in bar.

" Since no final measure of expropriation, in respect of which a claim for reparation has been put forward by Liechtenstein, was adopted before F. Nottebohm's return to the State, of which he was a national, in 1946, and since all these measures were only carried out after he took up permanent residence in Liechtenstein, I fail to see how it is possible to invoke the absence of any bond of attachment between Liechtenstein and F. Nottebohm (even if in this connexion one were to admit the existence of requirements going beyond what is laid down by general international law on this question) for the purpose of denying that Liechtenstein had the right to take up the case of its national in 1951 with respect to unlawful acts alleged to have been committed after 1946.

" 14. A decision that Liechtenstein's application is inadmissible on the ground that F. Nottebohm does not possess effective nationality, and that therefore the applicant State is not entitled to exercise the right of diplomatic protection as against Guatemala would involve three important consequences:

" (*a*) The rule of international law that nationality should not be dissociated from diplomatic protection in cases where the protected person has only *one* nationality, and where the facts giving rise to the dispute have occurred after the grant of such nationality, would be modified retroactively sixteen years after F. Nottebohm's naturalization in Liechtenstein. This situation is all the more serious since the main facts giving rise to the dispute only occurred after 1949, three years after F. Nottebohm finally established himself in Liechtenstein and, by prolonged residence there, created solid bonds of attachment, the absence of which has been relied upon by the respondent party in the written and oral proceedings as a ground for the view that Liechtenstein is not entitled to exercise diplomatic protection in favour of F. Nottebohm against Guatemala. I consider that even if one shared this view, one must at least recognize the right to exercise diplomatic protection as regards the injury suffered by F. Nottebohm after 1946, especially the injury resulting from the measures taken following the enactment of Legislative Decree No. 630 of July 13th, 1949.

" (*b*) Even if it be admitted that nationality can be dissociated from diplomatic protection in the present case, there remains the question as to what are the consequences of the total or partial invalidity under international law of a nationality validly acquired under municipal law. Is the invalidity confined to the sphere of diplomatic protection, or does it extend to the other effects of nationality on the international level, for example, treaty rights enjoyed by the nationals of a particular State in regard to monetary exchange, establishment and access to the municipal courts of a third State, etc. ?

" (*c*) A refusal to recognize nationality and therefore the right to exercise diplomatic protection, would render the application of the latter—the only protection available to States under general international law enabling them to put forward the claims of individuals against third States—even more difficult than it already is.

" If the right of protection is abolished, it becomes impossible to consider the merits of certain claims alleging a violation of the rules of international law. If no other State is in a position to exercise diplomatic protection, as in the present case, claims put forward on behalf of an individual, whose nationality is disputed or held to be inoperative on the international level and who enjoys no other nationality, would have to be abandoned. The protection of the individual which is so precarious under existing international law would be weakened even further and I consider that this would be contrary to the basic principle embodied in Article 15 (1) of the Universal Declaration of Human Rights adopted by the General Assembly of the United

Nations on December 8th, 1948, according to which everyone has the right to a nationality. Furthermore, refusal to exercise protection is not in accordance with the frequent attempts made at the present time to prevent the increase in the number of cases of stateless persons and to provide protection against acts violating the fundamental human rights recognized by international law as a minimum standard, without distinction as to nationality, religion or race.

" 15. The finding that the Application is not admissible on the grounds of nationality prevents the Court from considering the merits of the case and thus from deciding whether the respondent State is or is not guilty of an unlawful act as regards Liechtenstein and its national, who has no other legal means of protection at his disposal. Moreover, a preliminary objection must be strictly interpreted. It must not prevent justice from being done.

III

" As regards the criticism made during the written and oral proceedings, that F. Nottebohm had sought Liechtenstein nationality for the purpose of changing his status from a subject of a belligerent State to that of a subject of a neutral State, it is necessary to make the following observations:

" 1. There is no rational principle or judicial decision in either private or public international law to justify the view that a new nationality which has been acquired for the purpose of avoiding, in the future, certain effects of a former nationality should be regarded as invalid. Even if it were admitted, although this has not been proved, that F. Nottebohm became a Liechtenstein national with the object of evading the consequences of his German nationality, it is necessary to point out that this change in his status was not effected during the War between Guatemala and Germany but long before that time. It is therefore impossible to speak of a change in the status of a person from that of an enemy national to that of a neutral national which might, in certain circumstances, have been the case had the naturalization taken place while Guatemala and Germany were in a state of war.

" 2. On the other hand, could it be said that Nottebohm's nationality was fraudulent and defective if it had been proved that he applied for naturalization in Liechtenstein, for the purpose of using such naturalization as a cloak for the property of enemy nationals in Guatemala ? It might be considered that a nationality acquired for the sole purpose of claiming the diplomatic protection of a neutral State cannot be invoked vis-à-vis the belligerent State against which the acts of concealment of enemy property were directed, on the ground that a legal act may be vitiated by fraud and that the respondent party is therefore justified in alleging that it is a nullity.

" The acquisition of nationality in such cases forms part of a transaction which is to be regarded as generally fraudulent, with the possible result that the injured belligerent State may refuse to recognize the change of nationality, and not merely that diplomatic protection cannot be relied upon. Nevertheless, it will always be difficult to prove the existence of such a fraudulent operation.

" 3. Moreover, whatever the solution of this problem may be, it would have been necessary, for the purpose of examining it and of arriving at a solution, to consider the merits of the dispute. In this connexion, the Court should have given the applicant party the opportunity of collecting all the evidence with the object of enabling the Court to ascertain whether, in the particular case, the allegation of concealing property was justified and that therefore Guatemala was not bound to recognize the Liechtenstein nationality of F. Nottebohm. Since proof of concealment of property has not been adduced, I consider that the Court should have joined the objection to the admissibility on the ground of nationality to the merits. This should also have been the case as regards the two other grounds of inadmissibility, since their fate is bound up with the objection based on nationality. Indeed, if the latter objection is upheld, it becomes unnecessary to consider Guatemala's objection to the admissibility on the ground of prior diplomatic negotiations and non-exhaustion of local remedies.

"4. Moreover, the decision of the Court given at the public sitting of February 14th, 1955, expressly reserved the right of Liechtenstein, under Article 48, paragraph 2, of the Rules of Court, to submit documents in support of its comments on the new documents produced by the other Party. The Court should therefore have granted the application for an adjournment made by the Government of the Principality of Liechtenstein."

State Responsibility—Claims—Nationality of—Sequestration of "Jewish Property" in Italy—Owner Naturalized Subsequent to Date of Peace Treaty—Whether State of Naturalization Entitled to Submit Claim on Her Behalf.

Menkes Claim.

Italian-United States Conciliation Commission. January 9, 1953.

(Sorrentino, Scanlan.)

The Facts.—This was a claim for compensation for the loss of certain personal property owned by the claimant which was sequestrated by the Italian authorities in 1943. The claimant had originally been an Austrian national after the annexation of Austria by Germany in 1938; she emigrated to the United States of America where she became naturalized in 1948. Before leaving Austria she forwarded her household goods and personal effects in a lift van to America via Trieste. Owing to the outbreak of war, however, it became impossible to tranship the lift van from Trieste, where it was stored in a warehouse. By Decree No. 1100/12409, dated May 11, 1943, the Prefect of Trieste provided that all of the transit goods stored in certain warehouses in Trieste and owned by Jews emigrating to enemy countries were to be placed under sequestration, since the chattels belonging to such emigrating Jews were to be considered as enemy property. This decree of sequestration was issued under the Italian War Law and designated the sequestrator and fixed his powers, duties and responsibilities. Attached to the decree was a list of the property which was to be sequestrated; the property was already known by the Italian authorities to belong to emigrating Jews. Shown on this list was the claimant's lift van, which was also on a list compiled by the sequestrator appointed under Decree No. 1100/12409. On January 12th, 1944, the German High Commissioner in the operation zone "Adriatic Coast Territory" issued an order (Order No. III/4/81) to storage warehousemen in the Free Port of Trieste, which ran as follows:

"*SUBJECT:* Removal of transit goods from Free Port of Trieste.

"The High Commissioner has ordered, on security grounds, because of war conditions, the clearing of the Free Port. In the course of this clearing the transit goods stored in the Free Port will be removed. The removed goods owned by Jews are sequestered and will be held for disposal in accordance with orders of the High Commissioner. . . ."

On April 18, 1944, in compliance with the aforesaid Order, the lift van containing the personal property owned by the claimant was delivered to the German authorities, who issued on that date an official receipt therefor. There was no trace of what happened to the claimant's property thereafter.

In support of her claim, the claimant submitted that as her property had been sequestrated as enemy property by the Italian authorities under the Decree of the Prefect of Trieste of May 11, 1943, she was an individual treated as an enemy under the laws in force in Italy during the war within the meaning of Article 78 of the Treaty of Peace of 1947 and therefore a "United Nations national" within the meaning of that Article.

Held: that the claim must succeed. The claimant had been treated by the Italian authorities as an enemy and was entitled to compensation as a United Nations national.

The Commission said: "The Commission . . . finds that the claimant is a 'United Nations national' within the meaning of this term as used in para. 9 (*a*) of Article 78 of the Treaty of Peace; the second sentence of this paragraph reads as follows:

> 'The term "United Nations nationals" also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy.'

It is clear from the evidence that the lift van containing the claimant's property was sequestered on May 11, 1943, by the Decree of the Prefect of Trieste, and that this sequestration was made under the Italian War Law. The sequestration alone of the claimant's personal property is sufficient to show that the claimant was 'treated as enemy' within the meaning of this phrase as used in the second sentence of para. 9 (*a*) of Article 78; and, since [the claimant] is a national of the United States of America, it follows that the claiming Government is entitled to submit a claim in her behalf under the provisions of Article 78 of the Treaty of Peace."

[Report: Unpublished (Decision No. 13).]

State Responsibility—Claims—Nationality of—Sequestration of "Jewish Property" in Italy—Whether Owner, Stateless at Time of Taking, Entitled to Claim as "United Nations National"—Owner Naturalized Subsequent to Date of Peace Treaty—Whether State of Naturalization Entitled to Submit Claim on His Behalf.

BARTHA CLAIM.

Italian-United States Conciliation Commission. *March* 30, 1953.

(Sorrentino, Scanlan.)

THE FACTS.—This was a claim under Article 78 of the Treaty of Peace with Italy of 1947, for compensation for the loss of personal property in Italy during the war. The claimant, then an Austrian national, in 1939 forwarded a lift van containing his household effects from Vienna to Trieste en route for America to which he was emigrating as a result of anti-Jewish legislation which followed the annexation of Austria by Germany in 1938. With Italy's entry into the war on June 10, 1940, it became impossible for the claimant's property to be forwarded to the United States. The Italian War Law[1] entered into force with respect to the United States of America on the outbreak of war between the two countries. The effect of the coming into force of that Law was that a national of the United States or a stateless person residing in the United States was to be considered by Italy as a person of enemy nationality (Articles 3 and 6); that property owned or reasonably suspected of being owned by an enemy national was subject to sequestration (Article 295); and that the holder in Italy of property owned by an enemy national must make a written declaration thereof to the Prefect within thirty days from the date of coming into force of that Law.

By letter No. 253695/DA dated April 12, 1943, the Office of Requisitions of the Italian Ministry of Exchange and Currencies issued instructions to " general warehouses " in Trieste regarding the chattels of emigrating Jewish refugees which was stored in the Free Port of Trieste. These instructions stated that the chattels of Jews who were emigrating from Germany and other countries and were residing in enemy countries were to be considered as property suspected of enemy ownership and therefore subject to sequestration under the provisions of the Italian War Law (*supra*). The general warehouses were requested to declare to the Prefect of Trieste, in accordance with Article 309 of the Italian War Law, all such chattels stored with them and to issue instructions to all shipping agents and private individuals operating warehouses in the Free Port of Trieste to make similar declarations of Jewish property.

By letter No. 254944/DA dated May 6, 1943, the Office of

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[1] Royal Decree No. 1415 of July 8, 1938, Published in *Gazzette Ufficiale* No. 211 of September 15, 1938.

Requisitions of the Ministry of Exchange and Currencies requested the Prefect of Trieste to sequestrate the chattels of emigrating Jewish refugees which were stored in general warehouses in Trieste. On May 11, 1943, by Decree No. 1100/12409, issued in accordance with the Italian War Law, the Prefect of Trieste placed under sequestration the said chattels and designated a sequestrator of them.

By circular letter No. 1100/12948 dated May 19, 1943, the Prefect of Trieste also ordered all shipping agents and private individuals operating private and public warehouses in Trieste to declare chattels stored with them which were owned by Jews emigrating from Germany and other countries.

The claimant's lift van was duly reported to the sequestrator but on January 12, 1944, the German High Commissioner in the Operation Zone "Adriatic Coast Territory" issued his Order No. III/4/81 to warehousemen in the Free Port of Trieste (set out in the report of the *Menkes Claim, supra*, p. 389). On March 6, 1944, in compliance with that order, the five cases containing the claimant's property were delivered by the claimant's forwarding agents to the German authorities, who issued a receipt for it. There was no further trace of the claimant's property.

No evidence was adduced as to what nationality the claimant possessed prior to June 4, 1945, the date on which he acquired United States nationality, and more particularly whether the claimant was "Austrian or stateless" prior to that date. The claimant may have acquired German nationality when Austria was annexed in 1938, but by the "Eleventh Regulation" (enacted on November 25, 1941) of the German Reich Citizenship Law it was provided that all Jews possessing German nationality and residing outside the German Reich *ipso facto* lost their German nationality (*Reichsgesetzblatt Jahrgang* 1941, Part I, No. 133, *Erste Verordnung zum Reichsburgersetz*, of November 25, 1941).

On behalf of the claimant it was contended that his claim was meritorious; because the Italian authorities blocked the shipment of the claimant's household goods and personal effects as enemy property on May 22, 1943, the claimant, who was originally Austrian and thereafter presumably stateless, was included in the term "United Nations nationals" as used in para. 9 (*a*) of Article 78[1] since he was an individual who under the laws in force in Italy during the war had been treated as enemy.

Held: that the claim must succeed. The claimant's property had been treated as enemy property, and that alone entitled him to bring a claim under the Peace Treaty as a " United Nations national".

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[1] The second sentence of para. 9 (*a*) of Article 78 of the Treaty of Peace reads as follows:

"The term 'United Nations nationals' also includes all individuals, associations or corporations which under the laws in force in Italy during the war have been treated as enemy."

The Commission said: " It is clear from the evidence that, acting under the Italian War Law, the competent Ministries of the Italian Government in Rome, the Prefect of Trieste, and the Sequestrator of Jewish property in Trieste issued instructions to the ' General Warehouses ', the private warehousemen and the shipping agents, who held in storage in the Free Port of Trieste the chattels of Jewish refugees suspected of residing in enemy countries, that such chattels were to be considered as enemy property, subject only to the orders of the Italian authorities. The effect of these measures was to deny to the claimant any control over his property which was stored in the Free Port of Trieste.

" That the [claimant's forwarding agents] declared the claimant's household goods and personal effects as enemy property in accordance with Article 309 of the Italian War Law, and submitted the pertinent documents to the Sequestrator for his examination, cannot be doubted. The evidence establishes that the claimant's property was included on the list of Jewish property lying in private warehouses in the Free Port of Trieste, and that such list was prepared by the Sequestrator named in accordance with the Italian War Law. The Commission finds that this fact alone is sufficient to establish that the claimant's property was treated as enemy property under the laws in force in Italy during the war and to bring the claimant within the meaning of the term ' United Nations nationals ' as defined in the second sentence of para. 9 (*a*) of Article 78. Since Mr. Alexander Bartha is now a national of the United States of America, it follows that the claiming Government is entitled to submit a claim in his behalf under the provisions of Article 78 of the Treaty of Peace."

[Report: Unpublished (Decision No. 14).]

State Responsibility—Claims—Nationality of Claims—Claimant Naturalized While Instalments of Debt Accruing—Claim for Pension—Exclusion of Claim by Statement that Pension May be Claimed in Administrative Proceedings in Defendant State—Refusal to Permit Transfer of Funds Out of Country—Whether Amounting to Nationalization.

FORSTER CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—This was a claim in respect of a pension payable by a Yugoslav corporation nationalized or taken over by the Yugoslav Government. The claimant, who acquired United States nationality in 1945, entered the employ of the corporation in 1917, when it was located in Austria-Hungary. When Yugoslavia was created in 1918, the main office of the corporation was transferred to Ljubljana and all its pension funds were transferred to the State Insurance Fund. Its pensioners were paid by the corporation, which was then reimbursed by the Government of Yugloslavia.

In 1929, the claimant left the employ of the corporation. Under the pensions plan and agreement then in force, he became entitled to receive a monthly sum of 356 Austrian shillings, guaranteed in gold, which was equivalent to 70 U.S. dollars. Payments were made regularly until 1939. After that date and until October 1941, only 3,100 dinars (equivalent to $30) per month was paid, resulting in a loss to the claimant of $1,080. After October 1941, nothing was paid (resulting in a further loss of some $8,500). He valued his claim in respect of future payments on a basis of an expectation of life of 8 years, which at a monthly rate of $70 would have a value of $6,720. The sum of these figures totalled $15,000, which was now claimed under the Agreement of July 19, 1948, between the Governments of the United States and Yugloslavia[2] regarding pecuniary claims of the United States and its nationals, by reason of the fact that the corporation of which the claimant was a pensioner was nationalized on December 6, 1946.

In reply to the claim, the Government of Yugoslavia reported that " pensions not received until the end of World War II represent ' war damage, which will be realized then, when and how the question of compensating the war damage done to Yugoslavia will be settled.' " In this regard, Article 7 of the Agreement of 1948 provided:

> " Claims of nationals of the United States for war damage to property which has not been nationalized or otherwise taken prior to the

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and the functions of the Commission see *supra*, p. 332, n. 1.

[2] For details of this Agreement see *supra*, p. 332, n. 1.

> date hereof shall be treated not less favorably than those of nationals of Yugoslavia, but in no event less favorably than those of the nationals of any other country."

The claimant's pension subsequent to the end of the war could be claimed from the Yugoslav pension authorities in the ordinary way.

Held: that the claim must fail. Instalments of pension due before the claimant became a national of the United States were in any event not within the scope of the Agreement of 1948. The Yugoslav Government had not repudiated the obligation to pay the claimant his pension for the period since he became a United States national, so that there was, in effect, nothing left for him to claim.

The Commission said: " The claimant has furnished a photostatic copy and a verified translation of a letter dated March 28, 1946, and addressed to him from the company which reads as follows:

> " ' In reference to your letter of February 3, 1936, we inform you that we acknowledge your claims up to the day on which the company has been sequestrated but we are unable to transfer money at the present time because of lack of currency regulations.
>
> " ' Regarding your claims for the time since the company has been sequestrated and for the present time we cannot prejudicate ourselves until a final settlement for such claims has been made.'

" While this letter refers to the sequestration of the company, the evidence shows that it was subsequently nationalized on December 5, 1946, under the Nationalization Law of December 5, 1946 (Official Gazette No. 98 of December 6, 1946).

" Postwar Yugoslav legislation with respect to workers' pensions commenced with the Law Regarding Social Insurance of Workers, Employees and Wage Earners of July 26, 1946 (Official Gazette No. 65 of August 13, 1946), which established a central ' Government Institute for Social Insurance ' and prescribed who and under what conditions a person is entitled to Government insurance in cases of illness, accident, disability, old age and death. Article 53 (f) provided for the liquidation of all independent pension funds theretofore established for the care of workers and employees and for their integration into the Government Institute for Social Insurance. Article 55 provided that pension funds which were theretofore dependent on contractual relations with enterprises and which did not have a separate administration should cease to operate on the effective date of the law, which was August 20, 1946. The Ministers of Finance and of Labor were authorized to prescribed the liquidation procedure.

" On April 4, 1947, these two Ministers issued the Decree on the Liquidation of Non-Independent Pension Funds and on the Settlement of Rights and Obligations of these Funds (Official Gazette No. 40 of May 13, 1947), providing for the liquidation of these pension funds by the Government Institute for Social Insurance.

While Article 12 provided that the pension funds became Government property, Article 6 required that the Government take over all the obligations of the funds to persons entitled to pensions, provided, however, that the pension rights were to be computed under the provisions of the Law Regarding the Social Insurance of Workers, Employees and Wage Earners of July 26, 1946, *supra*, as amended. It may be observed in this connection that the latter law is generally liberal in giving workers early rights to pensions, but cuts down the amount of pensions for higher-paid executives.

" With respect to this claim, the Government of Yugoslavia reports that pensions not received until the end of World War II represent ' war damage, which will be realized then, when and how the question of compensating the war damage done to Yugoslavia will be settled.' Article 7 of the Yugoslav Claims Agreement provides that claims of United States nationals for war damage to property which has not been taken shall be treated not less favorably than those of Yugoslav nationals but in no event less favorably than those of nationals of any other country.

" Regardless of the position of the Government of Yugoslavia in this respect, no claim may be allowed by this Commission in any event for the nonpayment of increments of claimant's pension prior to December 20, 1945. The agreement of July 19, 1948, between the Governments of the United States and Yugoslavia settled ' all claims of nationals of the United States ' for the ' nationalization or other taking by Yugoslavia of property ' (Article 1), provided they were nationals of the United States ' at the time of nationalization or other taking ' (Article 2). It expressly excluded nationals of the United States ' who did not possess such nationality at the time of the nationalization or other taking ' (Article 3). Assuming, therefore, that accruing installments of the pension were ' taken ' by the Government of Yugoslavia prior to December 20, 1945, claimant was not a national of the United States at the time of taking and his claim was not settled by the agreement of July 19, 1948, and is not, therefore, within the jurisdiction of this Commission.

" As to claimant's pension subsequent to the end of World War II, the Government of Yugoslavia states that the claimant may claim it under the Decree of April 4, 1947, from the Social Insurance Institute of the Peoples Republic of Slovenia in Ljubljana in regular administrative proceedings.

" It thus appears that the Government of Yugoslavia has not repudiated any obligation to pay claimant his pension during a period which includes the time he has been a citizen of the United States. With respect to the letter of March 28, 1946, to claimant from the company which refers to an inability to transfer funds because of ' lack of currency regulations ', it is noted that this letter antedates both the nationalization of the company and the Yugoslav legislation respecting workers' pensions described above. Furthermore, we have held that refusal or failure to permit a transfer of funds to the United States does not constitute a nationalization or other taking of property or of the rights and interests in and with respect to property (Decision No. 803, *In the Matter of the Claim of Mary Nartnick*, Docket No. Y-1550[1]). However, claimant's position in this regard may well be mitigated by Article 11 of the agreement under which the Government of Yugoslavia agrees to give sympathic consideration to applications for transfers to the United States of deposits in banks of Yugoslavia ' and other forms of capital ' owned by United States nationals, where the amounts involved are small but which, in view of the circumstances, are of substantial importance to the persons requesting the transfers.

" We find that claimant has not shown that he owned property or a right and interest in and with respect to property which was taken by the Government of Yugoslavia during the period in which he was a citizen of the United States. As has been indicated, the Government of Yugoslavia affirmatively recognizes claimant's right to a pension during such time."

[Report: *Settlement of Claims*, 1949–1955, p. 86.]

State Responsibility — Claims — Nationality of — Right of Dual National to Claim under Treaty—Rule of Non-protection of Individual against State of Nationality—Test of Dominant or Effective Nationality—Criteria of Test.

See p. 443 (*Mergé Claim*).

State Responsibility—Claims—Nationality of—Sequestration of " Jewish Property in Italy "—Owner Naturalized " United Nations National " Subsequent to Date of Peace Treaty.

See p. 642 (*Feldman Claim*).

[[1] See *International Law Reports*, 1954, p. 149.]

IV.—State Control Over Private Claims

State Responsibility—Claims—State Control over Private Claims—Agreement to Settle Claims and to Guarantee Another State against Such Claims—Effect on Claims of Nationals of State to which Guarantee Runs—International Agreements, other than Treaties, which Impair Constitutional Rights—The Law of the United States of America—Austria—Whether Occupied or Liberated Territory—Requisition of Property in Territory Subject to Belligerent Occupation.

SEERY *v.* UNITED STATES.

United States, Court of Claims. January 11, 1955.

THE FACTS.—The plaintiff, a resident and naturalized citizen of the United States, owned several houses in Austria. These premises and their furnishings were requisitioned by the United States Army in July 1945 for use as an officers' club. By 1948, the plaintiff's real property had been greatly damaged, and practically all of her personal property had disappeared. When the claim which she filed with the Department of the Army was rejected, she brought this action against the United States. She contended that her property had been taken by the United States for a public use and that she was therefore entitled to just compensation for the taking. The Government defended on the ground that Austria was at the time enemy territory, that her property was " enemy property " which was subject to requisition under the law of war, and that, in any event, Austria had agreed to settle such claims and to guarantee the United States full protection against such claims.

On the Government's motion for summary judgment,

Held: that the motion of the Government must be denied. Austria was not at the time in question enemy territory but a nation liberated from German occupation. The property of the plaintiff was therefore not subject to uncompensated taking. Even if Austria were to be regarded as enemy territory, the premises were not such as could lawfully have been appropriated by the Occupant. The Executive Agreement between the United States and Austria could not prevail over the right of the plaintiff, under the Fifth Amendment to the United States Constitution, to compensation for the taking of her property.

The Court said: " The Government contends that because the property was not in the United States when it was taken, the Constitutional guaranty of just compensation, contained in the Fifth Amendment is inapplicable. We have recently held to the contrary. *Turney* v. *United States*, 115 F.Supp. 457, 126 Ct.Cl. 202, 215. We recognized that there were no precedents upon the question, but it seemed to us that, since the Constitutional provision could be applied, without inconvenience, to such a situation, it ought to be so applied. In the *Turney* case, *supra*, the plaintiff was an alien corporation, whereas the instant plaintiff is an American citizen. If that fact is material, it is to her advantage.

" The Government contends that the plaintiff's property, probably meaning her real property, was ' enemy property ' within the meaning of those words in international law, and was therefore subject to temporary appropriation by our armed forces. It cites Chief Justice Marshall's opinion in *The Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cranch 191, 3 L.Ed. 701, to the effect that a sugar plantation in a Danish island seized by England in the War of 1812 was enemy property, and that the sugar produced therefrom was likewise enemy property, subject to seizure as a prize, when found on board a British ship. It cites *Young* v. *United States*, 97 U.S. 39, 60, 24 L.Ed. 992, which concerned cotton located in Confederate territory, but belonging to a British citizen. It quotes this language from the opinion in that case:

> ' All property within enemy territory is in law enemy property, just as all persons in the same territory are enemies. A neutral, owning property within the enemy's lines, holds it as enemy property, subject to the laws of war; and, if it be hostile property, subject to capture.'

" The Government cites *The Juragua Iron Co., Ltd.* v. *United States*, 42 Ct.Cl. 99; Id., 212 U.S. 297, 306, 29 S.Ct. 385, 388, 53 L.Ed. 520, and quotes the following language from the Supreme Court's opinion:

> ' The plaintiff, although an American corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted; indeed, subject, under the laws of war, to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy.'

It cites *Green* v. *United States*, 10 Ct.Cl. 466, a case of a landlord of a building in Nashville, Tennessee, who, before the capture of the city by Union Troops, voluntarily went into and remained in Confederated territory. The court approved the confiscation of rents due him.

" In response to the Government's argument on this point, the plaintiff insists that Austria was not, in July 1945, and thereafter, which was after the surrender of the German Army, enemy territory. She refers us to the Moscow-Conference Agreement, the text of which appears in a Department of State publication dated November 1, 1943, which is reproduced in Document No. 351 of the House of Representatives, 78th Congress, 1st Session. The Agreement said:

> ' The Governments of the United Kingdom, the Soviet Union and the United States of America are agreed that Austria, the first free country to fall a victim to Hitlerite aggression, shall be liberated from German domination.
>
> ' They regard the annexation imposed upon Austria by Germany on March 15, 1938, as null and void. They consider themselves as in no way bound by any changes effected in Austria since that date. . . . '

The plaintiff cites us to Office of Public Affairs, Department of State Publication 5012, European and British Commonwealth Series 43, Released May, 1953, which contains the following statements on the pages indicated:

' (p. 2) The Moscow Pledge:

' In the Moscow Declaration of November 1, 1943, the Four Powers pledged themselves to regard, and so treat, Austria as a liberated, not an enemy country. . . .

' When the United States entered the war, President Roosevelt, December 9, 1941, named the countries which had been invaded by the Axis Powers and which must be liberated. Austria was included. . . . '

" Later, August 1945, the Potsdam Agreement provided that ' reparations should not be exacted from Austria. . . .'

' (p. 3) It was pointed out to the Soviets that Austria had never been considered as an enemy state, that Austria had never declared war against any member of the United Nations, that no U. N. nation had ever declared war against Austria, and that the position of Austria, both during the war and later, had been explicitly defined in the Moscow Declaration as that of a liberated country.'

' (p. 5) The avowed purpose of the occupation was, first to divorce Austria completely from German control—to undo the Anschluss of 1938. It was, second, to root out Austrian nazism and to punish war criminals. Lastly, it was to aid in the restoration of a free Austria in the spirit of the Moscow Declaration.'

" The plaintiff cites Department of State Bulletin Vol. XV, No. 384, November 10, 1946, which says, at the pages indicated:

' (p. 864) United States Policy on Status of Austria (released to the press October 28):

' The Department of State considers that the visit to the United States of Dr. Karl Gruber, Foreign Minister of the Austrian Federal Republic, represents an appropriate occasion to reaffirm United States policy with respect to the status of Austria.

' During the period following the first World War, the United States Government steadily encouraged the development of a free and independent Austrian state based on democratic principles, and viewed with strong disapproval all Nazi attempts to force Austria into the German Reich.

The attitude of the United States toward the military occupation of Austria by Germany and its formal incorporation in the German Reich in 1938 was guided by this consideration and by the well established policy of the United States toward the acquisition of territory by force. While, as a practical matter, the United States was obliged in its effort to protect American interests to take certain administrative measures based upon the situation created by the Anchluss, this Government consistently avoided any step which might be considered to constitute *de jure* recognition of the annexation of Austria by Germany.

'In his radio address on May 27, 1941 President Roosevelt referred repeatedly to the seizure of Austria, and described the Austrians as the first of a series of peoples enslaved by Hitler in his march of conquest.[1] Secretary Hull stated at a press conference on July 27, 1942, that "this Government has never taken the position that Austria was legally absorbed into the German Reich."[2] . . .'

'(p. 865) The United States has accordingly regarded Austria as a country liberated from forcible domination by Nazi Germany, and not as an ex-enemy state or a state at war with the United States during the second World War. The Department of State believes that this view has received diplomatic recognition through the Moscow Declaration on Austria.[3] . . . In accordance with the objectives set forth in the Moscow Declaration to see reestablished a free and independent Austria, an Austrian Government was formed after free elections were held on November 25, 1945.[4] This Austrian Government was recognized by the four powers represented on the Allied Council, as announced simultaneously on January 7, 1946 in Vienna and the capitals of these states.[5] In its meeting of April 25, 1946 the Allied Council, moreover, considered a statement of the United States Government's policy in Austria made by General Mark Clark, and expressed its general agreement with section I, "Status of Austria," in which the United States maintained that since Austria had been liberated from Nazi domination it should be treated as a liberated area. . . .

'In order to clarify the attitude of the United States Government in this matter, the United States recognizes Austria for all purposes, including legal and administrative, as a liberated country. . . .'

"On the question, then, of whether the property in question was subject to confiscation as enemy property, or as property in enemy territory, it seems to us that the precedents cited do not support the Government's contention. Assuming, for the moment, that Austria was, at the time in question, enemy territory, the personal property taken was not a product of enemy soil, as in the case of *The Thirty Hogsheads of Sugar* v. *Boyle*, *supra*. Neither the land nor the personal property was *hostile property*, as was the cotton involved in *Young* v. *United States*, *supra*. The property did not endanger the safety of our troops, as in the *Juragua Iron Works* case, *supra*. The owner of the property did not live within the enemy lines voluntarily, as in *Green* v. *United States*, *supra*, or at all.

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[1] Bulletin of May 31, 1941, p. 648.

[2] Bulletin of Aug. 1, 1942, p. 660.

[3] Bulletin of Nov. 6, 1943, p. 310. See also Bulletin of Nov. 20, 1943, p. 344.

[4] Bulletin of Oct. 21, 1945, p. 612. See also Bulletin of Oct. 28, 1945, p. 665.

[5] Bulletin of Jan. 20, 1946, p. 81.

" Oppenheim on *International Law*, 6th Ed. 1940, Vol. II, says at Section 140 that Article 46 of the Hague Regulations, which says that 'private property may not be confiscated' does not prevent the utilization of private buildings, temporarily, as hospitals, barracks and stables, without compensation. Wheaton on *International Law*, 7th Ed. 1944, page 248 says substantially the same. From the context it would seem that these departures from the Hague Regulations are permitted in order to enable a commander in the field to meet emergency situations relating to his troops and supplies. They would hardly seem to be applicable to the taking of a luxurious estate, at a remote location in a resort area, for use as an officers' club some months after hostilities had ended.

" We do not find it necessary to decide whether taking without compensation would have been lawful if the circumstances had been otherwise the same as they were, except that the property was in enemy territory. We think that Austria was not, at the time in question, enemy territory. The German armed forces had surrendered, unconditionally, some months before, and there were no enemy activities in Austria.

" If we take at anywhere near face value the numerous expressions of the Executive Department, which is responsible for the conduct of our foreign relations, Austria was, after the surrender of Germany, a nation liberated from a German occupation which had never been recognized as lawful by our Government. The property in question, then, was no more subject to uncompensated confiscation than it would have been had it been located in Holland or France or the Philippines. The fact that the Allies chose to maintain occupation forces in Austria to prevent possible pro-Nazi uprisings, and perhaps to keep watch over each other, seems to us not to be material.

" The Government defends further on the ground of an agreement made between Lieutenant General Geoffrey Keyes, the United States High Commissioner in Austria, and the Chancellor for the Federal Government of Austria, on June 21, 1947. That agreement provided that the United States would pay Austria 308,382,590 schillings[1] in full settlement for all obligations incurred by United States forces during the period 9 April 1945 to 30 June 1947. The agreement, by its terms covered claims of the kind here involved, and extended not only to claims of nationals of Austria, but to persons owning property in Austria. The Austrian Government agreed to settle or adjudicate such claims and to guarantee full protection to the United States against such claims. The agreement appears in a publication of the Department of State, *Treaties and Other International Acts*, Series No. 1920, 61 Stat. 4168.[1]

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[1] The schilling was worth, at the time, about 5 cents.

" We are now confronted with this problem. From what we have said in this opinion, it is evident that we think that the plaintiff's property was taken under such circumstances that she was entitled under the Fifth Amendment to the Constitution, to be paid just compensation. We must now decide whether the agreement took that right from her.

" The Government cites *United States* v. *Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796;[2] *United States* v. *Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134;[3] *B. Altman & Co.* v. *United States*, 224 U.S. 583, 32 S.Ct. 593, 56 L.Ed. 894, to the effect that an executive agreement such as the one here present is, though not ratified by the Senate, a treaty within the meaning of Article VI, Clause 2, of the Constitution.

" The plaintiff urges that even if that were so, it would be immaterial, because even a formally ratified treaty cannot accomplish what the Constitution forbids. She cites *Doe ex dem. Clark* v. *Braden*, 16 How. 635, 657, 14 L.Ed. 1090; *The Cherokee Tobacco*, 11 Wall. 616, 620-621, 20 L.Ed. 227; *De Geofroy* v. *Riggs*, 133 U.S. 258, 267, 10 S.Ct. 295, 33 L.Ed. 642. She points out that in the cases cited by the Government no constitutional rights of American citizens were impaired by the executive agreements with which those cases were concerned, and that in the *Pink* case, *supra*, Justice Douglas, 315 U.S. at page 227, 62 S.Ct. at page 564, and Justice Frankfurter, 315 U.S. at page 236, 62 S.Ct. at page 568, impliedly reserved the question as to whether the executive agreement would have been valid if it had impaired Constitutional rights of American citizens.

" Whatever may be the true doctrine as to formally ratified treaties which conflict with the Constitution, we think that there can be no doubt that an executive agreement, not being a transaction which is even mentioned in the Constitution, cannot impair Constitutional rights. Statements made in our opinion in *Etlimar Société Anonyme of Casablanca* v. *United States*, 106 F.Supp. 191, 123 Ct.Cl. 552,[4] which point in the other direction, are hereby overruled. The decision in the *Etlimar* case, *supra*, was justified by the fact that the plaintiff there sought and obtained the compensation from France to which the executive agreement there involved relegated it. In

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[1] Paragraph 6 of Article I of the Agreement provided:

" The Austrian Government guarantees the Government of the United States to adjudicate individual claims, pay to individuals and settle with individuals, both Austrian nationals and others owning property, rendering service or residing in Austria, and to guarantee full protection to the United States against any claims for services, supplies, and other obligations of whatever nature which occurred during the period 9 April 1945 to 1 July 1947."]

[2] *Annual Digest*, 1935–1937, p. 34.]

[3] *Ibid.*, 1941–1942, p. 48.]

[4] *International Law Reports*, 1952, p. 454.]

Hannevig v. *United States*, 84 F.Supp. 743, 114 Ct.Cl. 410,[1] this court held that a formally ratified treaty between the United States and Norway, which relegated a Norwegian citizen who had a claim against the United States for the taking of his contract to have ships constructed in an American shipyard, to diplomatic procedures for the settlement of his claim, amounted to the withdrawal by the United States of its consent to be sued by him.

" It is probably still the law that Congress could effectively destroy a citizen's Constitutional right such as, for example, the right to just compensation upon a taking of his property by the Government, by a statute withdrawing the Government's consent to be sued. But Congress have given consent to be sued for such a taking and has conferred jurisdiction upon this court to adjudicate such a suit. It would be indeed incongruous if the Executive Department alone, without even the limited participation by Congress which is present when a treaty is ratified, could not only nullify the Act of Congress consenting to suit on Constitutional claims, but, by nullifying that Act of Congress, destroy the Constitutional right of a citizen. In *United States* v. *Guy W. Capps, Inc.*, 4 Cir., 204 F.2d 655,[2] the court held that an executive agreement which conflicted with an Act of Congress was invalid."

[Reports: 130 Ct.Cl. 481; 127 F.Supp. 601.]

NOTE.—The above case is commented upon by Sutherland, " The Flag, The Constitution, and International Agreements," in *Harvard Law Review*, 68 (1955), p. 1374, and Oliver, " Executive Agreements and Emanations from the Fifth Amendment," in *A.J.*, 49 (1955), p. 362. It is noted in *California Law Review*, 43 (1955), p. 525; *Columbia Law Review*, 55 (1955), p. 926; and *Miami Law Quarterly*, 10 (1955), p. 109.

In " Attempts to Transmute Indemnity into Discharge of Claims in Executive Agreements ", in *A.J.*, 49 (1955), p. 560, Professor Cardozo draws attention to the fact that the Agreement in issue in the *Seery Case* and other like Agreements were " intended to be assumptions of responsibility and indemnities by other governments, not discharges of individual claims." He concludes that: " . . . An undertaking from the other governments to settle the claims was enough; if someone collected from the United States first, a clear obligation would bind the other government to indemnify the United States. If these agreements had been limited to this theory, the Constitutional test in court would have been avoided."

[1] *Annual Digest*, 1949, p. 307.]

[2] *International Law Reports*, 1953, p. 412.]

State Responsibility—Claims—State Control Over—Lump-Sum Settlement of Claims—Rights of Private Persons to Share in Proceeds—Judicial Review of Distribution of Fund by Executive—The Law of the United States of America.

De Vegvar *v.* Gilliland *et al.*

United States, Court of Appeals, District of Columbia Circuit.

December 22, 1955.

The Facts.—This was an action against the members of the Foreign Claims Settlement Commission of the United States, seeking to compel reconsideration of a decision of the Commission denying the plaintiff's claim to a share in the Yugoslav Claims Fund administered by the Commission. This fund consisted of monies paid to the United States in settlement of claims against Yugoslavia arising out of the nationalization of property by the Government of that country. The Commission had held that the plaintiff was not entitled to share in the Fund because her property had been taken by Yugoslavia on a date prior to that upon which she had become a naturalized citizen of the United States. The District Court for the District of Columbia dismissed the complaint, and the plaintiff appealed. She contended that the Foreign Claims Settlement Commission had failed to exercise the jurisdiction conferred on it by the International Claims Settlement Act of 1949 by refusing to examine and give effect to the Yugoslav statute relating to the confiscation of property. She also asserted that the refusal of the Commission to receive evidence from her that the decree of the Yugoslav court which purported to confiscate her property was null and void under the Constitution and laws of that country was a failure to apply the standard of international law required by the International Claims Settlement Act.

On further appeal,

Held: that the judgment of the District Court must be affirmed. The provision of the International Claims Settlement Act making the action of the Foreign Claims Settlement Commission " final and conclusive " and exempt from review precluded judicial review of the denial of the plaintiff's claim in the absence of any showing of invasion of the plaintiff's constitutional rights.

The Court said: " The Yugoslav Claims Fund consists of moneys paid by Yugloslavia to the United States pursuant to an executive agreement,[1] this payment to be in full settlement and discharge of certain claims of our government against Yugloslavia and of all claims ' of nationals of the United States against the Government of Yugloslavia on account of the nationalization and other taking by Yugloslavia of property ' between September 1, 1939, and the date of the agreement. The agreement provided that only persons who were nationals of the United States ' at the time of nationalization or other taking ' by Yugloslavia were to be eligible to share in the Fund. It also provided that claims against the Fund were to be adjudicated by an agency to be established or designated by the United States Government, and that distribution was to be made ' in accordance with such methods of distribution as may be adopted by the Government of the United States.'

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[1] The Yugoslav Claims Agreement of 1948, 62 Stat. 2658, T.I.A.S. No. 1803 (see *supra*, p. 332, n. 1).

" Congress passed the International Claims Settlement Act of 1949[1] to implement the executive agreement just described and any similar agreements which might later be negotiated. The Act set up the International Claims Commission[2] and gave it jurisdiction to make ' final decisions with respect to claims ' against the Fund. 22 U.S.C.A. § 1623(a). Such decisions were to ' constitute a full and final disposition ' of each claim considered. 22 U.S.C.A. § 1623(b). The Act then went on to say in Section 4(h) that

> ' [the] action of the Commission in allowing or denying any claim under this subchapter shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise.' 22 U.S.C.A. § 1623(h).

" Appellant's main reliance is on Section 4(a) of the Act, which directs the Commission to ' apply the following in the following order: (1) The provisions of the applicable claims agreement as provided in this subsection; and (2) the applicable principles of international law, justice, and equity.' 22 U.S.C.A. § 1623(a). Appellant says that the Commission failed to examine and give effect to the Yugoslav statute relating to confiscation of property, and that this was a failure by the Commission to exercise the jurisdiction conferred on it by the Act. She further says that the refusal by the Commission to receive the evidence offered by her, to the effect that the decree of the Yugloslav court which purported to confiscated her property was null and void under the Constitution and laws of Yugloslavia, was a failure to apply the required standard of international law, and was an arbitrary act in excess of the jurisdiction of the Commission.

" The Government's principal reliance is on the provisions of Section 4(h) of the Act, quoted above, precluding judicial review of the determinations of the Commission. The legislative history of that section shows that Congress intended this prohibition to be of broad scope and effect.[3] Congress knew that if each claimant could take his claim to the courts the Fund could not safely be distributed until every last litigation had been terminated. Considerations of both domestic and foreign policy called for the prompt distribution of the Fund and the ending of disputes between Yugoslavia and the United States.

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[1] 64 Stat. 13, 22 U.S.C.A. §§ 1622-1627.

[2] The functions and jurisdiction of that Commission were later transferred to the Foreign Claims Settlement Commission. Reorganization Plan No. 1 of 1954, effective July 1, 1954, 19 Fed.Reg.3985, 22 U.S.C.A. § 1622 note.

[3] See Congressman Ribicoff's statements at 95 Cong. Rec. 8840, 8854.

" No doubt the provisions of Section 4(h) do not bar certain types of judicial action. The Government brief, speaking of these provisions, says: ' There are no constitutional or other reasons for inferring any limitations thereon, and appellant has raised none.' And further: ' It is here assumed that, were this an area in which constitutional rights were or might be involved, Congress could not prevent the vindication of such rights in a judicial tribunal. Congress recognized, however, that no constitutional rights were involved in the distribution of the Yugoslav Claims Fund and that the nonreviewability provision could therefore be as broad as the situation required.' We may assume for purposes of argument that the provisions of Section 4(h) would probably not prevent judicial relief in the situation—to illustrate—where a claimant is denied consideration by reason of his race, creed or color. No violation of constitutional right is suggested here: plaintiff-appellant makes no contention, for example, that the United States has taken her property without paying for it. What happened was that Yugoslavia took plaintiff's property; the United States undertook to obtain moneys from Yugoslavia from which certain sorts of claims of United States nationals could be satisfied; a Commission was established to deal finally with such matters; plaintiff made a claim and was determined not to be in the class entitled to participate. Errors in the result reached, or errors in the admission of evidence or in the making of a legal ruling—assuming such errors to have been made—are not grounds for judicial intervention in the face of the congressional fiat that the Commission's determinations shall be free of judicial review. Plaintiff is barred by the statutory prohibition.

" The Government also urges that, apart from the statute, the courts should deny judicial review of the matters complained of. The creation and distribution of the Fund, it says, were within the realm of foreign affairs: the citizen obtained only such status for his claim as his government succeeded in obtaining for him and decided to give him. The Government urges that such settlements of international claims—absent clear congressional intent to the contrary—give rise to no right of judicial review, citing *Z. & F. Assets Realization Corporation* v. *Hull*, 1941, 311 U.S. 470, 61 S.Ct. 351, 85 L.Ed. 288.[1] We need not, for present purposes, pass on this contention."

[Reports: 97 App. D.C. 126, 228 F.2d 640; *certiorari* denied, 350 U.S. 994, 100 L.Ed. 859, 76 Sup.Ct. 543 (1956).]

NOTE.—To like effect see *Haas* v. *Humphrey et Al.*, — App. D.C. —, 246 F.2d 682 (1957).

[[1] *Annual Digest*, 1941–1942, p. 424.]

C—DAMAGES (MEASURE OF DAMAGES)

I.—Award of Damages in General. Grounds for Awarding Damages

State Responsibility—Damages—Measure of Damages—Property Jointly Owned by Claimant and Another—Deduction for Value of Property Recovered.

JOHN CLAIM.

Anglo-Italian Conciliation Commission. November 9, 1953.

(Hannaford, Sorrentino, Bolla.)

THE FACTS.—This was a claim in respect of the loss by enemy action of the furniture and effects of Mrs. M. A. E. John, a British subject, and her daughter, married to an Italian citizen, both resident in Italy for many years before 1940. The furniture and effects belonged as to 25/46ths to Mrs. John and as to 21/46ths to the daughter. In 1938 the property was valued at £900,000. During the war it was put in store and insured for 2,000,000 lire. The greater part of the property was destroyed in an air raid. After the war, Mrs. John claimed compensation under Article 78 (4) (*a*) of the Treaty of Peace.[1]

Held: that the Italian Government must pay Mrs. John the sum of 8,500,000 lire. The Commission had regard to the amount of the insurance policy and to valuations of the furniture and effects before the war and of what had been recovered after the air raid and said: "The Conciliation Commission, . . . availing itself of the wide powers of fair appraisal which are conferred on it, decides on the figure of L. 8,500,000 as being two-thirds of the sum necessary to buy equivalent goods or compensate the loss suffered, in accordance with Article 78, para. 4 (*a*), of the Peace Treaty.

"In arriving at this figure the Conciliation Commission, having taken into account both the fact that 21/46ths of the movable property deposited at [a forwarding agent's in Rome] belonged to [the daughter], and are therefore outside the scope of the present dispute, and also that a part of the claimant's property—although only a small part, and in bad condition—was able to be recovered, has applied the coefficient of revaluation of 47, which was agreed to on behalf of the Italian Government."

[Report: Unpublished.]

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[1] Article 78, para. 4 (*a*) provides: ". . . where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. . . ."

State Responsibility — Claims — Measure of Damages — Cost of Restoring Buildings to Previous Condition — Allowance for Betterment—Value of Pre-War Model Motor-Car—Allowance for Superiority of Available Model.

See p. 301 (*Currie Claim*).

State Responsibility—Measure of Damages—Requisition of Premises—Damage to Building and Contents—Whether Direct Result of Requisitioning—Concurrent Right to Compensation under More than One Clause of Treaty.

See p. 959 (*Shafer Claim*).

State Responsibility—Damages—Measure of Damages.

See p. 858 (*Steinway Claim*).

State Responsibility—Damages—Measure of Damages—Allowance for Inflation of Cost of Repairs.

See p. 340 (*Carnelli Claim*).

State Responsibility—Damages—Measure of Damages—Calculation of Damages.

See p. 307 (*MacAndrews & Forbes Company Claim*).

State Responsibility—Damages—Measure of Damages.

See p. 964 (*Rosasco Claim*).

II.—Indirect Damage and Damages for Loss of Profits

State Responsibility—Measure of Damages—Loss of Profit as Measure of Loss of Value of Claimant's Business Placed under Sequestration—Allowance for Revaluation of Currency.

See p. 312 (*Ousset Claim*).

E—INTEREST

I.—In General

State Responsibility—Interest on Claims—Interest for Delay—Interest as Part of Damages—Necessity for Either Prior Agreement to Allow Interest or Early Notice of Intention to Claim It.

FATOVICH CLAIM.

Italian-United States Conciliation Commission. July 12, 1954.
(Sorrentino, Matturri.)

THE FACTS.—This was a claim by a United States national for compensation, under Article 78 of the Treaty of Peace with Italy of 1947, for loss of and damage to his property situated in Italy as the result of an air raid. The claim was first submitted in 1950 to the Italian authorities, who rejected it on various grounds which were subsequently abandoned. In 1953, the claim was referred to the Conciliation Commission with a request that interest be granted on the amount to be awarded. The case is here reported only on the question of interest.

Held: that the claim must be rejected, because (i) there was no provision in the Treaty of Peace or any other Agreement with which the Conciliation Commission was concerned for the payment of interest, and (ii) no notice of the claim for interest had been given when the initial claim for compensation was lodged in 1950.

The Commission said: " The Petition submitted on May 26, 1953, by the Agent of the United States of America also requests this Commission to grant interest on the principal amount to be awarded to the claimant, at the rate of 5 per cent. per annum, from August 18, 1950, the date on which the claim was first presented to the Italian Ministry of the Treasury.

" The Answer of the Agent of the Italian Republic in this case maintains that the request for interest is inadmissible because Article 78 of the Treaty of Peace does not provide for it.

" As a request for interest on the amount of the claim has been made in many other disputes pending before this Commission, as well as in the instant case, it is necessary for the Commission to examine the question thoroughly.

" Once before (Case No. 1, *Elena Iannone Carnelli*, decided on March 4, 1951, Decision No. 5[1]), a request for interest was rejected but on procedural grounds, because it was contained in the Brief of the claiming Government and not in the Petition; in the instant case that difficulty does not exist because the request for interest is specifically set forth in the Petition, that is, in the manner prescribed by the Rules of Procedure. The request for interest on the claim of *Joseph Fatovich* raises a question which is properly before the Commission under the Rules of Procedure.

" The Briefs of the Agents of the two Governments in the above mentioned Case No. 1, *Elena Iannone Carnelli*, discussed fully the question of the responsibility of the Italian Government for the payment of interest on the claims of nationals of the United States under Article 78 of the Treaty of Peace, but the Commission does not deem it necessary to decide here the question as propounded, of the responsibility of the Italian Government under international law for the payment of interest, whether such interest be considered as an element of the compensation provided for by Article 78 of the Treaty of Peace, or whether such interest be considered as a measure of

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[[1] See *supra*, p. 340.]

damages resulting from delay by the Italian Government in the investigation and settlement of claims under Article 78, for the reason that in this case there is lacking a necessary condition precedent to the right to make the request, as will be seen immediately. In fact, assuming, without however deciding, that the Italian Government might be responsible for the payment of interest on claims of nationals of the United States of America under Article 78 of the Treaty of Peace and the agreements supplemental thereto or interpretative thereof, it is the opinion of the Commission that, in the absence of any agreement by Italy to pay interest on claims, such hypothetical responsibility does not arise unless and until an express request for interest has been made either by the claimant himself or by the Government of the United States of America on his behalf.

" In the instant case, the request for interest was made for the first time in the Petition submitted to this Commission (May 26, 1953); it was not made, instead, in the claim submitted on the administrative level (August 18, 1950). Therefore, it does not seem admissible that a request for interest which was not included in a claim on the administrative level may be presented on the judicial level.

" In this connection, it must be considered that neither in Article 78 nor in any other provision of the Treaty of Peace with Italy is there any reference to interest, either as part of the compensation or as a measure of damages for delay in the fulfilment by Italy of her obligation thereunder. Nor is there any reference to interest on claims under Article 78 in the provisions of the bilateral Agreement between the United States and Italy of August 14, 1947, commonly known as the Lombardo Agreement; although by its terms the Italian Government confirmed its obligations under Article 78 of the Treaty of Peace, Italy did not assume any obligation for the payment of interest. Nor is there any reference to interest on claims contained in the Exchange of Notes between the two Governments dated February 29, 1949. Finally, in the Rules of Procedure adopted and promulgated by the Representatives of Italy and the United States on this Commission on June 29, 1950, no reference is made to interest on claims within the jurisdiction of the Commission.

" Moreover, the Agent of the United States has not produced any evidence that interest on claims under Article 78 was ever the subject of diplomatic negotiations between the two Governments.

" Therefore, in none of the texts of the Agreements between the two Governments governing claims against Italy for damage to property of nationals of the United States is there any provision for the payment of interest, or any other indication that Italy would be held responsible for the payment of interest.

" The foregoing does not completely exclude the possibility of a responsibility for interest based on other principles and rules (a question which is not decided here). The foregoing references to the Treaty and subsequent Agreements are made for the sole purpose of showing that there is no evidence available to this Commission that interest on claims was ever requested in a general way from Italy or that the Italian Government ever assumed such an obligation or that the Italian Government was in any other way made aware that interest would be considered to be part of its responsibility.

" In view of the absence of any provision for interest in the agreements or negotiations concerning claims under Article 78, it is the opinion of this Commission that the fundamental principles of justice and equity, as well as the sounder opinion of other international tribunals, require that a clear and express request for interest, whenever the subject matter of the claim does not involve a prior contractual provision for interest, is a condition precedent to the responsibility of a State (if it exists) for interest on claims.

" The claim which is the subject of the present dispute, and which was presented to the Italian Government on August 18, 1950, through the Embassy of the United States of America at Rome, requests compensation for damage to and loss of certain real and personal property. The claim contains no mention whatsoever of a request for interest on the amount of compensation requested, and there is no prior contract for interest involved.

"After the Italian Government had denied its responsibility to pay compensation to the claimant in this case, the Embassy of the United States of America, by letter dated January 27, 1953, advised the Italian authorities that it considered that a dispute had arisen which would be submitted to this Commission. No reference to interest was made in such letter.

" It does not follow from what has been said that the right to interest may be denied because this Commission finds any line of conduct on the part of the claimant or his Government tending to show an intention not to demand it. Such a presumption would be unjustified; it is entirely possible that there was every *intention* to demand interest, by the claimant and the Government of the United States, but the decisive point is that interest was not expressly demanded.

" It would be manifestly unfair to a Government against which a claim is brought by another Government to hold the respondent Government responsible for interest when it was never advised that the individual claimant or his Government demanded interest.

" If interest were to be demanded as part of the ' compensation ' provided for under Article 78 of the Treaty of Peace, that is, as part of the damages suffered by nationals of the United Nations as a result of injury or damage to their property in Italy, it would be unjust not to have advised the Italian Government, either in the Treaty or in subsequent negotiations, or in the claim itself, that interest would be demanded as part of the compensation, because the Italian Government would have the right to know that interest would be one of the elements in fixing the amount of compensation. When, instead, interest is demanded as a punitive measure based on alleged delay in the settlement of claims on the administrative level, there is all the more reason for requiring that Italy be advised of the claim for interest based on such delay. When a debtor is aware that interest is accruing against him for every day which passes without payment of the principal, he is much more likely to exert every effort to insure that the principal debt is paid as quickly as possible. The Italian Government was never made aware that interest would be requested for delay in fulfilment of its obligations under the Treaty, and this Commission cannot bring itself to hold that, regardless of lack of notice to the Italian Government, the responsibility for interest has existed in this case since August 18, 1950, the date on which the instant claim was first presented to the Italian Government.

" The question of notice of demand for interest as a condition precedent to the responsibility for the payment of interest on claims was not argued by either of the Agents of the two Governments. The Commission's own investigation, however, has revealed the existence of decisions of other international tribunals which accord with its position.

"As high an authority as the Permanent Court of Arbitration has expressed its opinion in the *Russian Indemnity Case*, decided on November 11, 1912. This same case is the source of an extensive quotation in the Brief of the Agent of the United States in Case No. 1, *Elena Iannone Carnelli* [*supra*], in support of his argument that the Italian Government is responsible for the payment of interest in the present dispute; but, in a part of the opinion not quoted by the learned Agent of the United States, the Court was equally of the opinion that

' . . . Equity requires, as its theory indicates and as the Imperial Russian Government itself admits, that there shall be notice, demand in due form of law addressed to the debtor, for a sum which does not bear interest. The same reasons require that the demand in due form of law *shall mention expressly the interest*, and combine to set aside responsibility for more than simple interest.

' It is seen from the correspondence submitted, that the Imperial Russian Government has expressly and in absolutely categorical terms demanded payment from the Sublime Porte of the principal and " interest ", by the note of its Embassy at Constantinople, dated December 31, 1890/January 12, 1891. Diplomatic channels are the normal and regular means of communication between States in their relations governed by international law. This demand for payment is, therefore, regular and in due form.' (Emphasis supplied.) (Scott, *The Hague Court Reports* (1916), p. 298 at p. 317.)

" Although the authority of the Permanent Court of Arbitration would be sufficient to sustain the opinion of this Commission, it is not out of place to cite one of the decisions under the Venezuelan Arbitrations of 1903 which are the source of frequent citations by the Agent of the United States in his Brief in the *Carnelli Case.* The Belgian-Venezuelan Commission dealt with a claim of the Belgian Government against the Venezuelan Government arising under the Universal Postal Convention of 1897, of which both Governments were signatory nations. Here, even though the Article itself (Art. 33) of the Postal Convention provided for the payment of interest, the award of interest was not allowed by the Commission (Filtz, Umpire) on the chief ground that no demand for interest had been made in the claim (Ralston, *Venezuelan Arbitrations of* 1903 (1904), pp. 270–271). Thus, even though the Postal Convention which constituted the law between the parties provided for the granting of interest on claims, the Commission required an express reference in the claim to the interest element, and, when no request had been made for interest, disallowed the claim for interest.

"At page 42 of his Brief in the *Carnelli Case,* the Agent of the United States cites five cases decided by international tribunals in support of his argument that interest begins to run from the date on which the claim is filed against the respondent Government. The following observations are made on each of these five cases in order to show that they can be distinguished from the instant case and cannot be deemed to affect the decision herein which concerns only the requirement of notice of the request for interest.

"In two of the five cases cited by the Agent of the United States, interest was indeed awarded from the date of the filing of the claim, but the tribunal tendering the decision pointed out the interest was demanded in the claim itself (*Alliance Case,* American-Venezuelan Commission: Ralston, *Venezuelan Arbitrations of* 1903, p. 29 at p. 30, where it is indicated that the claim filed contained a request for interest at the rate of 1 per cent. per month; *De Garmendia Case,* American-Venezuelan Commission; *ibid.,* pp. 10–11, where it is indicated that for Items 1 and 2 of the claim, interest had been requested at the rate of 3 per cent. for the first item, and at the legal rate for the second item, at the time the claim had been filed). In the *Macedonian Case,* an arbitration between the United States and Chile by the King of Belgium (reported in Moore, *International Arbitrations,* vol. II, p. 1149), the terms of the Arbitration Convention, under which Chile and the United States agreed to submit all questions to the arbitration of the King of Belgium, include expressly the question of interest, so that the consent of the defendant Government to have the interest question decided exists in that case.

"As for the *Lord Nelson Case* decided by the American-British Claims Arbitral Tribunal on May 1, 1914, under the special agreement of August 18, 1910, between Great Britain and the United States of America, the two Governments agreed upon certain Terms of Submission on July 16, 1911, Article IV of which provides that

> 'The Arbitral Tribunal, if it considers equitable, may include in its award in respect of any claim interest at a rate not exceeding 4 percent. per annum for the whole or any part of the period between the date when the claim was first brought to the notice of the other party and that of the confirmation of the schedule in which it is included.' (Whiteman, *Damages in International Law*, vol. II, pp. 1958–1959.)

The two Governments thus expressly accepted responsibility for interest on claims.

" The fifth, the *Cervetti Case*, cited by the Agent of the United States for the proposition that interest begins to run from the date of the claim, indicates that the Italian Legation did not include a request for interest in claims which were presented to the Venezuelan Government before being presented to the international commission. The dispute was submitted to a neutral Umpire who decided that, even though the universally recognised rule required that a debtor be notified that his debt was overdue and even though the rule has even more weight with relation to claims against Governments,

> '. . . It has seemed fairer to make a certain allowance for interest, beginning its running, usually, at any rate, from the time of the presentation of the claim by the Royal Italian Legation to the Venezuelan Government or to this Commission, whichever may be first, not excluding, however, the idea that circumstances may exist in particular cases justifying the granting of interest from the time of presentation by the claimant to the Venezuelan Government . . .' (Ralston, *Venezuelan Arbitrations of* 1903 p. 663.)

" The Umpire did not discuss the arguments of the Venezuelan Commissioner that a request for interest is necessary and based on equity, as without it the debtor cannot be supposed to know that interest is demanded, and that when it is a question of unliquidated sums, it is impossible to establish the fact that interest has accrued since the amount actually owed was not known. While his opinion is entitled to great weight, the Umpire in the *Cervetti Case* has provided no reason, other than a general reference to ' the conduct of past mixed commissions ' (*loc. cit.*, p. 663), for the granting of interest when it was not requested in the claim, and in his opinion even went so far as to express the somewhat contradictory opinion that the requirement of notice was stronger when the debt of a Government was involved than when the debt of a private individual was involved. Therefore, this Commission prefers to rely upon the considered and well-reasoned opinion of the Permanent Court of Arbitration in the *Russian Indemnity Case* and on the decision of the Umpire on the Belgian-Venezuelan Commission in the *Postal Claim Case*.

" This Commission's investigation has failed to unearth a single decision by an international tribunal, aside from the *Cervetti Case*, in which interest on compensation for war damage to property was accorded, where it was not provided for in the agreement governing the tribunal or where it was not expressly requested in the claim filed either directly with the respondent Government or with the international tribunal itself.

"The Agent of the United States has also cited in his Brief in the *Carnelli Case* the *Administrative Decision No. III* of the Mixed Claims Commission, United States and Germany.[1] That decision, establishing the types of claims against Germany on which interest would be granted, was rendered on December 11, 1923, at the outset of the Commission's work. Claims of nationals of the United States against Germany under the Treaty of Berlin of August 25, 1921, and under the subsequent agreement between the United States and Germany of August 10, 1922, which provided for the creation of the Mixed Commission, were first brought to the notice of Germany when they were presented to the Commission by the Agent of the United States. And in each of the claims so presented to the Commission, interest was formally and expressly requested. The Second Report of Robert C. Morris, Agent of the United States, addressed to the Secretary of State and dated April 10, 1923, lists and describes the forty claims which had been thus far filed with the Commission. In the Agent's summary descriptions of the nature of these forty claims, thirty-eight of the summaries specifically mentioned that interest was requested at the time the claim was filed. Moreover, the Agent of the United States sent a notice of claim to the Joint Secretariat and to the Agent of Germany for each claim which was to be filed with the Commission. The notice consisted of a standard form which included spaces for the name of the claimant, the nature of the claim, and its amount, with the words added 'with interest, if any' (Exhibit to the Second Report of Robert C. Morris, Agent of the United States, at page 56 of *First and Second Reports of Robert C. Morris, Agent of the United States before Mixed Claims Commission, United States and Germany*, Washington, 1923). In this manner, the German Government was fully apprised and officially informed in writing, even before the claim itself was filed, that interest was being requested as part of the award.

"Hence, prescinding from the question whether *Administrative Decision No. III* of the Mixed Claims Commission, United States and Germany, may be authority for the responsibility of a respondent Government for the payment of interest on certain types of claims, it could not be maintained that the decision is authority for the proposition that the responsibility for interest arises despite the fact that no notice has been given to the respondent Government that interest on the principal amount of the claim is being requested.

"Therefore, in view of what this Commission considers to be equity and justice to a debtor Government, as well as the sounder

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[[1] Reported in *Annual Digest*, 1923–1924, Case No. 114 (*sub nom. Liability for Damages* (*Administrative Decision No. III*)).]

opinion of other international tribunals, the request for interest contained in the Petition in this case will not be granted because of the absence of notice to the Italian Government on or before August 18, 1950, that interest was claimed."

[Report: Unpublished (Decision No. 24).]

State Responsibility—Interest—Disallowance because Not Correctly Claimed.

See p. 340 (*Carnelli Claim*).

PART VI

THE INDIVIDUAL IN INTERNATIONAL LAW

A—IN GENERAL

I.—Position of Individuals in International Law. Human Rights and Freedoms

[*See also* PART I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; *and* PART VII, TREATIES: IX, Operation and Enforcement of Treaties.]

Individual in International Law—Position of—Rights under Treaties—Waiver of.

See p. 972 (*Gassner Claim* (*The M.Y. Gerry*)).

Individual in International Law—Position of—Rights under Treaties—Necessity for Municipal Legislation—The Law of Canada.

See p. 591 (*Francis* v. *The Queen*).

Individual in International Law—Position of—Individual Acquiring Rights under Unilateral Declaration of a State.

See p. 500 (*Re Rizzo and Others* (*No.* 2)).

Individual in International Law—Position of—Effect of Treaties—Treaty Waiving Rights of Individuals—Whether Individuals Affected by Waiver—Peace Treaty with Italy, 1947—London Debt Agreement with Germany, 1953.

See p. 611 (*German External Debts Agreement Case*).

Individual in International Law—Position of—Violation of International Law—Violation of Territorial Sovereignty of Another State—Plea of Superior Orders.

See p. 208 (*In re B.P.Z.S. and Others*).

Individual in International Law—Position of—State Control over Private Claims—International Settlement of Claims—Right of Private Persons to Share in Proceeds.

See p. 405 (*De Vegvar* v. *Gillilland et Al.*).

Individual in International Law—Position of—State Control over Private Claims.

See p. 398 (*Seery* v. *United States*).

Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—How Far Part of Law of Signatory States.

See p. 608 (*European Human Rights Convention Case*).

B—NATIONALITY

I.—In General. Proof of Nationality

Nationality—In General—Effective Nationality—Protection by Home State—Statelessness—The Law of Sweden.

CHRUSZCZ *v.* CHRUSZCZ.

Sweden, Supreme Court. December, 20, 1955.

THE FACTS.—In this action Wladyslaw Chruszcz, domiciled in Sweden, petitioned the City Court of Västeräs to grant him a divorce under Chapter 11, Article 6, of the Swedish Law of Marriage,[1] on the ground that his wife, Anna Chruszcz, was away, it not being known that she had been alive within the last three years. The petitioner was registered with the Swedish Alien Commission as a Polish citizen; he was born in 1913 in a place situated in an area which belonged to Poland before the First World War. His parents were Polish citizens. In April 1939 he had married Anna Chruszcz, and on September 9, 1939, while serving in the Polish Army, he had been taken prisoner by German forces. At the beginning of 1942 he had been transported to Norway by the Germans to work on fortifications, and in June 1942 he had escaped to Sweden where he had lived ever since.

Chapter 3, § 1, of the Swedish Law of July 8, 1904, regulating certain international questions concerning marriage, guardianship and adoption, gives Swedish courts jurisdiction over petitions for divorce and separation between aliens, provided that the spouses have at one and the same time been domiciled in Sweden, and the spouse against whom action is brought has abandoned the other, or, after ground for divorce has arisen, has left Sweden. In a decision of December 16, 1948 (*Nytt Juridiskt Arkiv*, 1948, p. 807), the Supreme Court had found that persons who are stateless or, although possessing citizenship, do not enjoy the protection of their home country, are not necessarily " aliens " under the Law cited. It regarded as receivable a petition for divorce submitted by a person who had come to Sweden as a political refugee from Esthonia in 1944, who had been in Sweden ever since but not become a naturalized Swedish citizen, and who could not be presumed to have any intention of returning to his home country. He was consequently given the same right as a Swedish citizen to petition for divorce in Sweden.

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[1] That Article reads: " If one of the spouses is away, and not known to have been alive within the last three years, the other spouse is entitled to obtain a divorce."

In support of the receivability of his petition for a divorce, Chruszcz, referring to his having refused to return to his home country, claimed that he should be regarded as a stateless person. At any rate, he submitted, he could not be considered as enjoying the protection of the Polish State.

The City Court having requested a statement from the legal section of the Swedish Department of External Affairs on the question whether Chruszcz could be presumed to enjoy the protection of his home country, the Acting Chief of the Law Office of the Department, in a letter of December 7, 1953, stated that it was not possible for the Department to judge whether Chruszcz did not enjoy the protection of his home country, but that consistent statements made by him on different occasions seemed to show that he did not wish to seek any contact with Polish authorities, and it appeared that he did not intend to return to his home country.

The City Court, in finding that the petitioner was a Polish citizen, that he had failed to establish that he did not enjoy the protection of the Polish State, and that, therefore, the Court had no jurisdiction to consider the merits of the petition, said: " The City Court finds that in principle nothing precludes him who has the status of a stateless person or who, although possessing citizenship, does not enjoy the protection of his home country, from submitting a petition for divorce to a Swedish court, provided that he resides in the country in such a way that Sweden is to be regarded as his home country, and provided also that the other spouse is away.

" With regard to the question whether Wladyslaw Chruszcz is a stateless person, or does not enjoy the protection of his home country, the following has been disclosed: Wladyslaw Chruszcz, who on his arrival in Sweden was indisputably a Polish citizen, was given a Polish passport by the then Polish Legation at Stockholm, which Legation represented the Polish Government in London. After the change of régime in Poland, at the end of the [Second] World War, the new Polish Legation on several occasions invited Wladyslaw Chruszcz to return to Poland, to which Wladyslaw Chruszcz replied that he did not wish to do so under the present conditions.

" Having sent his passport to the Polish Consulate for an extension in November 1946, Wladyslaw Chruszcz was informed that the passport would not be extended, but that if he would supply certain data he could obtain a new Polish passport, issued by the new Polish Consulate. Wladyslaw Chruszcz refused to accept such a passport, however, and applied to the [Swedish] Alien Commission for an alien passport, which he received on May 12, 1947.

" In a letter (of September 23, 1953) to the Alien Commission, the Department of External Affairs has stated that, as far as could be judged on the basis of documentation available at the Department, Wladyslaw Chruszcz should have been considered a Polish citizen at least until 1945; that Wladyslaw Chruszcz could not since have lost his Polish citizenship—unless he had acquired citizenship in another country before 1951, and this was not likely to have happened—in any other way than by a decision of a Polish authority; and that the Department had no means of ascertaining whether any such decision had been taken in Poland. For this reason, and having regard to all the circumstances disclosed in the matter, the Court finds that Wladyslaw Chruszcz is to be regarded as a Polish citizen.

" With regard, further, to the question whether Wladyslaw Chruszcz may be considered as not enjoying the protection of the Polish State, Wladyslaw Chruszcz has stated that he has no intention of returning to Poland under present conditions. There is no reason but to presume that his statement in this regard is true. Wladyslaw Chruszcz has clearly demonstrated to the Polish authorities his attitude to the present régime, *inter alia*, by his refusal to accept a new Polish passport. From what has thus been said, it must be concluded that Wladyslaw Chruszcz has placed himself in a certain opposition to the present Polish régime. The facts before the Court do not, however, give sufficient support to the assumption that his relation to the Polish State is such that he cannot be considered as enjoying its protection. For this reason, the City Court finds that the petition cannot be received by a Swedish court."

On appeal to the Court of Appeal it was held that the appeal must fail, the Court saying: " Like the City Court, the Court of Appeal finds that Wladyslaw Chruszcz is to be regarded as a Polish citizen. For this reason, and Wladyslaw Chruszcz having shown no other circumstance as a consequence of which his petition may nevertheless be received by a Swedish court, the Court of Appeal confirms the holding contained in the decision of the City Court."

On further appeal to the Supreme Court,

Held: that the appeal must fail and the decision of the Court of Appeal be confirmed.

[Report: *Nytt Juridiskt Arkiv*, 1955, p. 571.]

Nationality—Proof of—Presumption of Continuing Nationality—Proof to Contrary—Determination of Nationality by Authorities of State Concerned—Conclusiveness of—Stateless Person.

BLAIR HOLDINGS CORPORATION *v.* RUBINSTEIN *ET AL.*

United States, District Court, Southern District, New York.

July 19, 1955.

THE FACTS.—This was an action in which the jurisdiction of the federal Court was alleged by the plaintiff to rest upon the fact that the plaintiff was a corporation organized under the laws of New York and that " the defendant Serge Rubinstein . . . is not a citizen of the United States of America or of the State of New York." Under the law of the United States (28 U.S.C. § 1332 (a)), a federal district Court would have jurisdiction over the litigation if it could be demonstrated that the action was one between " Citizens of a State, and foreign states or citizens or subjects thereof." The defendant moved to dismiss on the ground that he was a stateless person, that he was not a citizen or subject of a foreign State, within the meaning of the law conferring jurisdiction on federal Courts, and that the Court was accordingly without jurisdiction. The plaintiff alleged that Rubinstein was a citizen or subject of the Union of Soviet Socialist Republics or of Portgual. The evidence to the contrary is set forth in the portion of the opinion quoted below. On motion to dismiss,

Held: that the motion to dismiss must be granted. The presumption that the defendant remained a national of Russia, in which country he was born, was rebutted by evidence that under Soviet law he ceased to be a citizen of the U.S.S.R. and that he was thereafter treated as a stateless person. The presumption that he continued to be a national of Portugal was overcome by a certificate of the Portugese Consul-General in New York that his citizenship had been cancelled. Each State had the right to determine who were its nationals, and such determination would be accepted by other States. A stateless person was not a citizen or subject of a foreign State for the purposes of invoking the jurisdiction of the federal Courts, and the Court was accordingly without jurisdiction.

The Court said: " Our first inquiry is into the status of Rubinstein at the commencement of the action. Plaintiff contends that it is not incumbent upon it to establish that the defendant is a citizen or subject of a particular foreign state. To require it to do so, it suggests, is imposing too heavy a burden. In view of the nefarious international machinations ascribed to Rubinstein the task of the plaintiff may indeed be difficult but, however onerous, it is a burden from which plaintiff may not be relieved. Hard facts do not justify a deviation from the well established and long accepted principle that one seeking to invoke the jurisdiction of the federal court must show by a preponderance of the evidence that the case falls within its jurisdiction. *McNutt* v. *General Motors Acceptance Corp.*, 1936, 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135.

" Rubinstein was born a subject of the Czar of Russia. He later acquired Portuguese citizenship. Relying on the doctrine that citizenship once established is presumed to continue, *Hauenstein* v. *Lynham*, 1879, 100 U.S. 483, 484, 25 L.Ed. 628; *City of Minneapolis* v. *Reum*, 8 Cir., 1893, 56 F. 576, 577, plaintiff urges that Rubinstein was a citizen or subject of either the Union of Soviet Socialist Republics or Portugal at the commencement of the action.

" The presumption that Rubinstein continued to be a citizen or subject of the U.S.S.R. must yield in face of the following proof: (a) Rubinstein and his entire family fled from Russia in 1918, soon after the Revolution without permission of the Soviet authorities; (b) under the applicable Soviet statutes and laws relating to forfeiture of Soviet citizenship, Rubinstein ceased to be a citizen of the U.S.S.R.;[1] (c) the issuance to Rubinstein of a so-called ' Nansen ' passport which is alleged to have been given him in recognition of his status as a stateless person by an agency created by the League of Nations; (d) Rubinstein's subsequent acquisition of Portuguese citizenship; and (e) Rubinstein's registration as a stateless person with the United States Department of Justice as required by Section 265 of the Immigration and Naturalization Act of 1952, 8 U.S.C.A. § 1305.

" The presumption that Rubinstein continued to be a citizen of Portugal likewise has been overcome. It was demonstrated that the Portuguese Consul General in New York issued a document certifying that Rubinstein's citizenship had been cancelled. While plaintiff regards this certification with suspicion it does not deny that it was in fact issued. Each country has the undoubted right to determine who are its nationals and ' it seems to be general international usage that such a determination will usually be accepted by other nations '. *Murarka* v. *Bachrack Bros.*, 2 Cir., 1954, 215 F.2d 547, 553. Since regularity of the procedure of foreign agencies is to be presumed, *United States* v. *King*, 1845, 3 How. 773, 44 U.S. 773, 784–786, 11 L.Ed. 824, the certificate of the Consul General is sufficient proof of the facts stated therein to wit: ' The Portuguese citizenship of Serge Rubinstein was cancelled by the Government of the Republic of Portugal and it has never been reinstated '.

" The presumption of continuing citizenship of either the U.S.S.R. or Portugal having been successfully rebutted, plaintiff is stripped of any proof identifying Rubinstein as a citizen or subject of either of said foreign states . . . "

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[1] Plaintiff attempted to put the Soviet law in issue, but its expert was willing to go no further than to state: " the facts have not yet been established in sufficient detail to permit a final conclusion on the basis of the record that Serge Rubinstein had lost his status as a citizen or subject of U.S.S.R."

(The Court then determined that a stateless person was not a citizen or subject of a foreign State within the meaning of 28 U.S.C. § 1332 (a), conferring jurisdiction on the federal Courts.)

[Report: 133 F. Supp. 496.]

Nationality—Proof of—Certification by Governmental Authority—Not Invalidated by Interest of Government Issuing the Certificate—Relation between International Law and Municipal Law—Treaties Overriding Public Policy—Termination of Treaties—*Clausula rebus sic stantibus.*

STRANSKY *v.* ZIVNOSTENSKA BANKA.

Switzerland, Federal Tribunal. June 22, 1955.

THE FACTS.—The complainant left Czechoslovakia, of which he was a national, in 1938. He then acquired a residence in Zürich, Switzerland. He had deposits in several Czechoslovak Banks which were brought together in the Zivnostenska Banka of Prague, after the Second World War.

By a Decree of October 19, 1945, the President of the Czechoslovak Republic carried through a monetary reform, as a result of which deposits of the complainant were blocked as from November 1, 1945. After several failures to draw on the blocked deposits, the complainant instituted garnishee proceedings for the purpose of compensating his loss from the assets of the Zivnostenska Banka in various Swiss banks.

The District Court of Zürich and the Obergericht of the Canton of Zürich, the latter by a judgment dated June 5, 1953, held that the plaintiff was debarred from pressing his claim as from January 1, 1950, the date of the coming into force of an Agreement between the Swiss Confederation and the Czechoslovak Republic concerning compensation for Swiss assets in Czechoslovakia, which provided that no such claims by Swiss or by Czechoslovak nationals should be entertained by the Swiss courts.

Stransky now asked the Federal Tribunal to set aside the decision of the Obergericht on the ground that it constituted a violation of the Agreement between Switzerland and Czechoslovakia. It was contended on his behalf, first, that the Agreement was not applicable to his claim since he had lost Czech nationality prior to January 1, 1950, and had become stateless. Secondly, it was contended that the application of the Agreement in this case would be contrary to Swiss public policy; it must be assumed that it was intended to debar Czechoslovak nationals from pursuing their claims in Switzerland only if judicial remedies were open to them in Czechoslovakia, which was not the case here.

Held: that the complaint must be rejected. Certification from Czechoslovak authorities, which must be regarded as accurate in the absence of cogent reasons to the contrary, showed that the complainant had not lost Czech nationality prior to January 1, 1950. The Agreement between Switzerland and Czechoslovakia concerning compensation for Swiss assets in Czechoslovakia debarred the Swiss courts from entertaining claims concerning, *inter alia,* bank deposits from Czechoslovak as well as Swiss nationals. This Agreement was part of the law of the land, and the question of its conformity with Swiss public policy accordingly did not arise.

The Court said: " The Agreement between the Swiss Confederation and the Czechoslovak Republic concerning compensation for Swiss assets in Czechoslovakia, dated December 22, 1949, provides for the payment by the Czechoslovak Government to the Swiss Government of a global sum of 43 million Swiss francs as compensation for Swiss assets listed in Articles 1 and 5 affected by Czech measures of nationalization or expropriation, or by similar restrctions. Article 2, para. 3, reads as follows:

> ' From the date of the coming into force of this Agreement (January 1, 1950) Swiss nationals or juridical persons and commercial companies, as well as natural and juridical persons and institutions which were on that date Czech nationals or had their principal place of business in Czechoslovakia, shall be debarred from bringing any claims in Switzerland in respect of assets of the same nature as those listed in Article 1.'

Article 6, para. 1, makes this provision applicable also to the claims listed in Article 5. This provision is comprehensive in relation to Swiss creditors, since their claims are met by means of the global compensation. It is less easy to understand why it applies to Czechoslovak assets since these do not benefit from the compensation provided for in the Agreement (BGE 81 II 80).

" Article 5 refers to ' bank accounts of Swiss nationals which are blocked as a result of the monetary reform of 1945 '. Pursuant to Article 6, para. 1, natural persons who on January 1, 1950, had Czech nationality, are debarred, as from that date, from making, in Switzerland, any claims relating to bank accounts blocked as a result of that monetary reform. . . .

" The complainant admits that he was a Czech national at the time of his emigration to Switzerland. However, he contends that he lost that nationality as a result of his emigration before January 1, 1950, and that he has since been stateless. The question whether the Obergericht correctly apportioned the burden of proof on this point may be left open, since the result of its examination of the evidence cannot be challenged.

" The Czechoslovak Ministry of Justice declares, in a report made to the Obergericht in answer to its request for judicial assistance on January 14, 1953, that, according to inquiries made by the

Ministry of the Interior of the appropriate authorities, the complainant was a Czech national on January 1, 1950, and had never lost that nationality. The complainant has not produced any cogent argument against the evidential value of this document. Admittedly, the original copy of the certificate did not bear the stamp of the Ministry; this stamp was, however, affixed to the covering note of the same date, signed by the same official as signed the certificate itself, as well as to a letter from the Czechoslovak Ministry of Justice of February 27, 1953, confirming the authenticity of the report of January 14, 1953, and, in particular, to a further copy of the report sent to the Obergericht at a later date. The certificate of the Czechoslovak Ministry of Justice accordingly does not require authentication for its use in Switzerland, in accordance with Article 6, para. 2, of the Swiss-Czechoslovak Agreement of December 21, 1926, concerning mutual judicial assistance in civil and commercial matters. It is in conformity, as to its contents, with a certificate issued at the instance of the complainant by the district committee of Nachod on September 9, 1953. The fact that these certificates emanate from authorities of the State to which the Zivnostenska Banka as a nationalized enterprise belongs, and were issued at a time when proceedings between that Bank and the complainant were already pending, does not justify the view that they must be treated as declarations by a party. They are public documents, the content of which must be regarded as accurate in the absence of cogent reasons to the contrary. There is no evidence that the complainant was deprived of his Czechoslovak nationality before the decisive date on the basis, for instance, of the Czechoslovak Law of July 13, 1949, concerning the Acquisition and Loss of Czech Nationality, Article 7 of which provides that the Ministry of the Interior may deprive of Czech nationality any person resident abroad who carries on an activity hostile or dangerous to the State, or who left the country illegally, or who failed to comply with an invitation to return to Czechoslovakia. There mere fact that the Czechoslovak Consulate in Zürich informed the complainant on March 14, 1949, that the Ministry of the Interior was not prepared to renew his and his wife's passports does not permit us to conclude that the complainant was deprived of his nationality. Similarly, the fact that the complainant received papers from the Swiss authorities describing him as a refugee is not conclusive, seeing that Article 17 of the relevant international Agreement of October 15, 1946 (BS 11, 786) provides that neither the issuance of such papers nor their endorsement would confirm or alter the status of the holder and, in particular, his nationality.

" In particular, it is difficult to reconcile the contention of the complainant that he was no longer a Czech national on January 1, 1950, with a letter from the Czechoslovak Consulate in Zürich, which he has himself produced and which, on August 8, 1950, *i.e.*, after the crucial date, invited him, at the instance of the Ministry of the Interior, to return to Czechoslovakia. It is even more difficult to reconcile that contention with the declaration made by the complainant before the Obergericht that he was convinced that he had been deprived of Czech nationality in pursuance of a law of July 12, 1950, as a result of his failure to comply with that invitation, without being informed of the fact. . . .

" The complainant contends that he cannot be debarred from pursuing his claim in Switzerland in view of the fact that no legal remedies are open to him in Czechoslovakia and that he was deprived of his property without compensation by the Czechoslovak authorities; he argues that in these circumstances the application of the Compensation Agreement between Czechoslovakia and Switzerland to this case would be contrary to Swiss public policy. However, this objection is in substance directed against the Agreement itself, for there can be no doubt that Article 2, para. 3, thereof is applicable to this case. An international agreement concluded by Switzerland is binding on the Swiss courts if it has been approved by the Federal Assembly, which is the case with regard to the Compensation Agreement with Czechoslovakia. Admittedly, that Agreement is not in conformity with traditional Swiss views in so far as the treatment of Czechoslovak creditors is concerned; however, it is, even in this respect, part of the law of the land, and the question whether it is in conformity with Swiss public policy does not arise.

" It can also not be maintained that, as a result of the Czechoslovak currency reform of 1953 by which certain assets of Czechoslovak nationals, including the contested claims of the plaintiff, were written off without compensation, a fundamental change unforeseen by Switzerland has taken place in the circumstances on the basis of which Switzerland concluded the Compensation Agreement, and that this enables the Swiss courts to take cognisance of claims by creditors affected by these measures with reference to a *clausula rebus sic stantibus* tacitly accepted by the parties to the Agreement. As the Agreement stands, it does not permit the Swiss courts to do anything in favour of the complainant. A solution could be found only by means of a change in the treaty position. So far the Federal Council, which is responsible for the international relations of the Confederation, has not taken any steps to that end. Indeed, such steps would encounter serious difficulties, in particular if Switzerland were to rely on a *clausula rebus sic stantibus*."

[Report: *Arrêts du Tribunal Fédéral Suisse*, 81 (1955), I, p. 222.]

Nationality—Proof of—Burden of Proof—Loss of Nationality—Effect of Changes in Sovereignty—Residence Abroad.

Toeplitz *v.* Council of State of the Canton of Uri.

Switzerland, Federal Tribunal. December 2, 1955.

The Facts.—This was a complaint by Madeleine Franzisca Toeplitz, a minor child, against a decision of the Council of State of the Canton of Uri that she had not acquired Swiss nationality at birth. The complainant's father was born in 1894 in the area of Poland which then formed part of Russia; he left Poland in 1939 and had since that time resided in the Lebanon; his identity papers, issued in Beirut in 1951, stated his nationality to be "undetermined". The complainant's mother was a citizen of the Canton of Uri, Switzerland. The Council of State of the Canton of Uri found that the child had not acquired Lebanese nationality at birth. It found, further, that there was no evidence that the child's father had lost his original Polish nationality. It held that in these circumstances the child's father must, pending proof to the contrary, be regarded as a Polish national, and that the child, who could acquire the Swiss nationality of her mother only if the father was stateless, had accordingly not done so.

Held: that the decision of the Council of State of the Canton of Uri must be set aside and the case sent back to it for re-examination. In proceedings for confirmation of nationality the onus was not on the claimant to produce the necessary evidence; it was for the competent authority to seek to obtain all relevant material, including that concerning foreign law. In particular, in this case changes of sovereignty, and the fact of residence abroad, raised serious doubts as to whether the complainant child's father had retained his nationality of origin.

The Court said: "Proceedings to establish claims to Swiss nationality in pursuance of Article 49 of the Federal Law of September 29, 1957, concerning the acquisition and loss of Swiss nationality are not contentious proceedings in which a decision is taken on the basis of the arguments of the parties and the evidence produced by them; they are administrative proceedings designed to clarify a question of status. The competent authority is thus required *ex officio* to obtain all material likely to lead it to the correct conclusion. It would be inconsistent with the nature of the proceedings for the authority to restrict its inquiry by applying the rules of evidence applicable in contentious proceedings. The essential question is not what the interested parties contend, but what is the result of the official inquiry and what are the conclusions to be drawn therefrom after administrative consideration of all the circumstances. Questions of foreign law must also, as far as possible, be determined *ex officio*.

" The Council of State of the Canton of Uri bases its decision that the child Madeleine Franzisca Toeplitz does not possess Swiss nationality essentially on the finding that it had not been established that the child's father had lost his original Polish nationality. It did not take any steps to obtain reliable information as to the nationality status of the father at the time of the birth of the child, and its effect on the status of the child. . . .

" It has not been determined whether the father is at the present day a Polish national, and this is by no means certain. He was born a citizen of Warsaw, which was then Russian and is now Polish. However, his nationality has been affected by the changes undergone by the former Russian province of Poland in connection with the two World Wars of 1914 and 1939. The uncertainty is strengthened by the fact that he left Poland in 1939 and has since lived abroad, without contact with the authorities of his supposed home country. Even if the father is still a Polish national, the relation of the child to the Polish State requires to be clarified. It is not certain what is the bearing of the principles laid down by Articles 8 and 9 of the Polish Nationality Law of January 8, 1951, in the case of children born abroad of a marriage between a Polish national and an alien."

[Report: *Arrêts du Tribunal Fédéral Suisse*, 81 (1955), I, p. 374.]

Nationality—In General—Foreign Confiscatory Laws—Limits on Recognition of *Lex situs* and Proper Law of Contract—Whether Nationality a Relevant Consideration.

See p. 480 (*In re Claim by Helbert Wagg & Co., Ltd.*).

Nationality—In General—Nationality and Citizenship—The British Commonwealth of Nations.

See p. 61 (*Musson and Musson* v. *Rodriguez*).

II.—Acquisition of Nationality. Nationality as Affected by Changes of Sovereignty

Nationality—Acquisition and Loss Resulting from Territorial Changes—Acquisition of German Nationality by Austrian Citizens after Incorporation of Austria into German Reich—Re-Acquisition of Austrian Nationality after Severance of Austria from Reich—Whether Re-Acquisition Results in Loss of German Nationality—Relevance of Domicile and Intention of Person Affected—Liability to Extradition.

AUSTRIAN NATIONALITY CASE.

German Federal Republic, Federal Constitutional Court.

November 9, 1955.

THE FACTS.—The appellant was an Austrian citizen by origin who, as a result of the incorporation of Austria into the German Reich in 1938, acquired German nationality by virtue of a German Law enacted for that purpose. After the severance of Austria from the Reich and the re-establishment of an independent Austrian State, the Republic of Austria enacted a Law on July 10, 1945, whereby all persons who had been Austrian citizens on March 13, 1938, were to revert to their former Austrian nationality with effect from April 27, 1945 (the date of the re-establishment of an independant Austrian State). The appellant, whose extradition from Germany was requested by the Austrian Government, contended that as he had been permanently resident in Germany from 1945 onwards and had always evinced an intention to be regarded as a German citizen, he had not lost his German nationality by virtue of the Austrian Law of July 10, 1945, and that he was accordingly entitled, as a German, to rely on Article 16 (2) of the German Federal Constitution which prohibits the extradition of German nationals.

Held: that, apart from the fact that the appellant could not, on the evidence, be regarded as permanently resident in Germany, he had lost his German nationality as a result of the Austrian Law of July 10, 1945, and that he was therefore subject to extradition. His intention to be regarded as a German citizen was immaterial because there was no rule of international law which conferred a right of option in the matter of nationality on the inhabitants of a territory upon that territory becoming part of another State.

The Court said: " According to this [the Austrian Law of July 10, 1945] all persons are Austrian citizens who would have been Austrian citizens on that date (April 27, 1945) if the Austrian Nationality Law had remained in force without any interruption. It is not disputed that such persons, if living in Austria, lost their German nationality as from that date. There are also decisions of German Courts which hold that the same applies to those Austrians who are neither living in Germany nor in Austria, or who moved from Germany to Austria after April 27, 1945. The question is disputed in so far as concerns Austrians who have been permanently resident in Germany since April 27, 1945. The view has frequently been expressed, in writings as well as in the cases, that persons belonging to this latter category have not lost their German nationality. The Federal Administrative Court has adopted this view. (*Cf.* Reports of Judgments of the Federal Constitutional Court, vol. 1, p. 206; NJW, 1955, p. 35). The Administrative Court examined the question whether the loss of German nationality resulted from German municipal law or occupation law, or whether it could be inferred from a general rule of international law, either in all cases of State succession or in the special case of the severance of part of a territory (emancipation). The Administrative Court found that there were no such positive provisions and rules, and inferred from that that there was no legal justification for the assumption that Austrians living in Germany from 1945 onwards lost their German nationality upon the re-establishment of the Republic of Austria. This Court finds that the view of the Administrative Court is ill-founded. It is true that questions of nationality resulting from the severance of Austria from the German Reich have not yet been determined by German legislation. It is also true that occupation law does not make express provision in this matter, and that there is no general rule of international law governing all cases of State succession or the present case of the re-establishment of a State which a few years previously lost its independence and was incorporated into a neighbouring State. All this, however, does not preclude the possibility that the loss of German nationality may be the result of the application of a different legal principle. In fact, on considering the politico-historical circumstances and the interpretation of the attitude adopted by all concerned when the Republic of Austria was re-established, we are inescapably forced to the conclusion that all former Austrians, upon the re-establishment of Austria, *ipso facto* lost the German nationality which they had acquired upon the incorporation of Austria.

[The Court then described the events which ultimately led to the severance of Austria from Germany, and, having arrived at the conclusion that the re-establishment of an independent Austrian State was a " special case of State succession, an act to restore the *status quo ante* ", continued:] " It follows that this State, which was re-established within its previously existing frontiers, could not be deprived of its former people. It follows further that all those belonging to this nation could, from the date of the re-establishment of the Austrian State, no longer be claimed by Germany as citizens of the latter country, so that they must have lost their German nationality as from that date. This is only logical because the period of incorporation of Austria was so short that there can be no question of the Austrian people becoming completely absorbed by the people of the German Reich. Thus it is comparatively easy to determine the categories of persons reintegrated into Austrian citizenship. Moreover, the new Austrian State does, in fact, claim its former citizens, so that there is no danger that these persons will become stateless.

"We arrive at the following conclusion: As from the date of the re-establishment of an independent Austrian State the latter is exclusively entitled to claim the citizens formerly belonging to it. These citizens accordingly—regardless of their place of residence on the day of declaration of independence—lost their German nationality resulting from the incorporation of Austria in the same manner as they *ipso facto* acquired that nationality on March 13, 1938. The desire of the appellant to be a German is irrelevant, having regard to the matters here set out. There is no general rule of international law whereby upon the emergence of new States as the result of severance the population must be given the option to choose between the nationalities of the new and the old State. Even less can it be inferred from the disannexation of Austria that the loss of their German nationality does not occur in the case of persons desirous of retaining their German nationality."

The Court then examined the further question as to whether it would be "contrary to good faith" to extradite the appellant, having regard to legislation then contemplated which was designed to confer on all Austrians permanently resident in Germany since 1945 the right to re-acquire German nationality with retroactive effect by means of a simple declaration. The Court arrived at the conclusion that on the facts the appellant could not be said to be permanently resident in Germany within the meaning of the proposed legislation, and continued:

"It is clear therefore that the appellant is no longer a German citizen and that there is therefore no obstacle to his extradition."

[Reports: NJW, 8 (1955), p. 1833; B Verf G, 4 (1955), p. 322.]

Nationality—Acquisition and Conferment of—Effect of—Extent of Obligation of Recognition by Other States—Nationality and Diplomatic Protection.

See p. 349 (*Nottebohm Case* (*Second Phase*)).

Nationality—As Affected by Changes of Sovereignty—Effect of Burma Independence Act, 1947, on Persons Locally Naturalized—Plaintiff's Father Locally Naturalized in Burma—Status of Plaintiff after Independence of Burma.

See p. 433 (*Bulmer* v. *Attorney-General*).

V.—Naturalization

Naturalization—" Local Naturalization " within the British Commonwealth—Meaning of " British Subject by Naturalization " in Burma Independence Act, 1947—Whether so-called " Imperial Naturalization "—Plaintiff's Father Naturalized in Burma—Status of Plaintiff after Independence of Burma.

Bulmer *v.* Attorney-General.

England, High Court of Justice (*Chancery Division*). *June* 21, 1955.

(Vaisey J.)

The Facts.—The plaintiff was born in Rangoon, Burma, on August 9, 1883, and it was undisputed that immediately before January 4, 1948, he was a British subject. The plaintiff's father, the late Christian Gottfried Bulmeyer, a German subject by origin but long resident in Burma, had, on May 21, 1878, been granted a certificate of naturalization in Rangoon under the provisions of an Act for the Naturalization of Aliens (No. XXX of 1852) passed by the Governor-General of India in Council on July 16, 1852.

Section VIII of the Act of 1852 provided that, on obtaining such certificate and taking and subscribing the prescribed oath, the person to whom such certificate was granted should within the territories under the Government of the East India Company be deemed a natural born British subject of Her Majesty as if he had been born within the said territories, and that he should be entitled within the said territories to all the rights, privileges and capacities of a subject of Her Majesty born within the said territories, except such rights, privileges and capacities as might be especially excepted in such certificate. The certificate granted to the plaintiff's father contained no such exceptions and he duly took and subscribed the prescribed oath.

On May 17, 1945, the plaintiff changed his name by deed poll from Walter Augustus Bulmeyer to Walter Augustus Bulmer.

About March 1951, the plaintiff's application for the renewal of his passport was refused by the office of the British Consulate in Hamburg on the alleged ground that he was not " a British subject by naturalization " within the meaning of the Burma Independence Act, 1947. The British Home Office also refused to recognize his claim that he had remained a British subject.

The Burma Independence Act, 1947, provided that persons born in Burma who were British subjects immediately before January 4, 1948, should cease to be British subjects on that date, but it provided also that any such person be deemed to be excepted from the operation of that provision if, among other things, his father " became a British subject by naturalization " (see s. 2 (1), and Schedule I, para. 1 and para. 2 (2)).

The plaintiff now claimed a declaration that, on the true construction of the Act of 1947, he had not ceased to be a British subject. It was argued for the Attorney-General that the naturalization contemplated by the Act of 1947 did not include a merely " local " naturalization.

Held: that the naturalization contemplated by the Act of 1947 was not confined to unlimited or imperial naturalization; that the local naturalization of the plaintiff's father was within the terms of the Act; and that the plaintiff was acccordingly entitled to the declaration sought.

Vaisey J. said: " . . . The defendant, the Attorney-General, suggested in the first place that because the Act of 1947 was an Act of the Parliament of this country, any reference to naturalisation contained in it should be read as meaning naturalisation recognised for all purposes as effectual in this country. I find myself unable to accept that argument.

" The Act of 1852 derived its authority by delegation from the Act 3 & 4 Will. IV, c. 85, which received the Royal Assent and became law on August 28, 1833. See sections 43, 45 and 51. Section VIII of the Act of 1852 provides that on obtaining a certificate thereunder and taking and subscribing the oath thereinafter directed, the person to whom such certificate was granted should, within the territories therein referred to, be deemed a natural-born subject of the British Crown as if he had been born within the said territories, and should be entitled within the said territories to all the rights, privileges and capacities of such a subject born within the said territories except such rights, privileges and capacities as might be specially excepted in such a certificate. I cannot accept the argument that this was something short of actual naturalisation and merely the conferring of the rights, privileges and capacities incident to naturalisation, particularly in view of the recital in the Act of 1852 to which I have referred, and its title.

" The certificate granted to the plaintiff's father purported to grant him all the rights, privileges and capacities of naturalisation under the Act of 1852. It contained no exceptions, and the plaintiff's father in due course took and subscribed the oath as provided by the Act. This is admitted, though the actual date of his doing so is unknown. By that oath, the plaintiff's father swore to be faithful and bear due allegiance to the Sovereign of the United Kingdom and all ' these territories dependent thereon ', and that he would be true and faithful to the East India Company. ' These territories ' and the territories referred to in section VIII are those which were under the government of the East India Company, and undoubtedly included Burma. I can and do hold that the plaintiff's father became a British subject by naturalisation in Burma in or about the month of March, 1951, he applied for a renewal of his passport, his application was refused on the ground that he was not entitled thereto, because his father never became a British subject by naturalisation within the meaning of the Act of 1947, so that he, the plaintiff, had ceased to be a British subject on January 4, 1948.

" Though it is not, in my judgment, material for the purposes of the present decision, I cannot in the circumstances refrain from alluding to the fact that the plaintiff had, at considerable personal risk, done good service to this country during the war by supplying information from Germany, where it seems that he was residing in a species of open arrest as a prisoner-of-war.

" The point in the case is whether the plaintiff's father became a British subject by naturalisation within the meaning of paragraph 2 (2) of Schedule I to the Act of 1947. The suggestion is that these words refer only to naturalisation unlimited as to locality (what is apparently known as ' Imperial ' naturalisation) and are not satisfied by the merely local naturalisation which the plaintiff's father undoubtedly obtained in or about 1878. At first sight one would have thought that any naturalisation would have been covered by the words in question—that is, ' became a British subject by naturalisation '—but it is said that the case of *Markwald* v. *Attorney-General* [1920] 1 Ch. 348 is an authority which requires me to decide otherwise.[1]

" [His Lordship then quoted at length from the headnote of the *Markwald* case and continued:] Now it seems to me that all that was decided in *Markwald* v. *Attorney-General* was that an alien locally naturalised did not cease to be and still remained an alien outside the locality. I do not doubt that the plaintiff's father, in all places other than those within the jurisdiction of the East India Company, was and continued to be an alien for all purposes, but it is equally clear to me that, within the limits of that jurisdiction, he was not an alien but a British subject, and a British subject by naturalisation. If the question had been put to the plaintiff, ' Did your father ever become a British subject by naturalisation ? ' he could truthfully have given an affirmative answer. If the question were put to him in Burma, I think that he would naturally have left the answer unqualified. If the question had been put to the plaintiff in, say, this country or in Australia, he would no doubt have had to explain that his father's status as a British subject was of a purely local character and possessed no validity outside India, including Burma. But I do not see how I can hold that the only kind of naturalisation contemplated by the words of the Schedule was the so-called ' Imperial ' naturalisation, that is to say, unlimited as to locality. I should have thought that, in an Act concerning Burma, naturalisation in and quoad Burma was just the kind of naturalisation most likely to have been in the contemplation of the legislature. But the words are perfectly general, and I do not see why they could not be satisfied by the father's naturalisation acquired anywhere, e.g., in Australia or Canada, and not only if he had acquired it everywhere or, at any rate, had acquired it in and for Great Britain. No doubt, if the fact had been that the plaintiff's father was naturalised as a British subject in Canada or Australia, his case would have been much more difficult, because it might well have been argued that the legislature could not be supposed to have been considering a naturalisation which was effectual neither in this country nor in Burma. In no case could the hypothetical question which I have propounded have been answered in the negative, the hypothetical question being, of course, 'Did your father ever become a British subject by naturalisation?' I need say nothing about the nature and extent of the obligations to which the plaintiff's father was subject in respect of his allegiance both under and apart from his oath. Such questions as were considered in the case of *Joyce* v. *Director of Public Prosecutions* [1946] A.C. 347[1] do not, in my judgment, arise here. I need say nothing about them.

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[1] See *Annual Digest*, 1919–1922, Case No. 138.

"It seems to me that the plaintiff's application for renewal of his British passport ought to have been acceded to, and I will declare that, on the true construction of the Act of 1947 and in the events which have happened, the plaintiff did not cease to be a British subject under the provisions of that Act, and that he is now a British subject."

[Report: L.R. [1955] Ch. 558.]

Naturalization—In General—International Requirements of Naturalization for Purpose of Diplomatic Recognition—Recognition by Other States.

See p. 349 (*Nottebohm Case* (*Second Phase*)).

Naturalization—As Affected by Claim of Exemption from Military Service—Nationals of Neutral States.

See p. 1012 (*United States* v. *Bussoz*).

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[1] [*Annual Digest*, 1948, Case No. 31.]

VI.—Expatriation. Loss of Nationality

Nationality—Loss of—Expatriation—By Service in Foreign Army—By Voting in Foreign Election—By Oath of Allegiance to Foreign Sovereign—Voluntary Character of—The Law of the United States of America.

SOCCODATO *v.* DULLES.

United States, Court of Appeals, District of Columbia Circuit.

June 30, 1955.

THE FACTS.—This was an action by Soccodato for a judgment declaring him to be a citizen of the United States. He had acquired United States citizenship at birth *ratione soli* and Italian nationality by reason of the Italian nationality of both his parents. He was taken to Italy by his parents when he was six. While still a minor, he took an oath of allegiance to the King of Italy in July 1935, after entering the Italian Army in April of that year. He was discharged from the Army in December 1935. In September 1940, he re-entered the Italian Army on the alleged ground that he was liable to service as a reservist. He did not take a further oath of allegiance at that time. He was a prisoner of war from February 1941 to March 1946, and was discharged from the Italian Army on June 5, 1946, after 60 days' leave.

Soccodata voted in the Italian election of 1946, and there was some evidence that he had also voted in the 1948 election. He alleged that he had done so under pressure.

The Secretary of State maintained that Soccodato had expatriated himself, pursuant to Section 2 of the Act of March 2, 1907, 34 Stat. 1228, and Section 401 of the Nationality Act of 1940, 54 Stat. 1168 (the texts of which are quoted in the opinion of the Court and in the dissenting opinion of Prettyman J.), by service in the Italian Army, by taking an oath of allegiance to the King of Italy, and by participation in the Italian elections of 1946 and 1948. The District Court held that these acts had been performed voluntarily and that the plaintiff had thereby expatriated himself. It rendered judgment for the defendant.

On appeal,

Held: that the judgment of the Court below must be reversed and the case sent back for further proceedings. Clear and convincing evidence did not exist that the plaintiff performed voluntarily those acts which would have deprived him of his United States citizenship, and he must therefore be held not to have lost his citizenship. Any factual doubts must be resolved in favour of citizenship. One who takes an oath of allegiance to a foreign sovereign while still a minor does not thereby lose his citizenship. The plaintiff's military service begun in 1940 was involuntarily undertaken and did not change its character after January 13, 1941 (the date when foreign military service became a ground for expatriation) by the plaintiff's failure to prove affirmative efforts to secure release from the army during the few weeks when he was not a prisoner of war. Since the plaintiff had been exposed to pressures to vote, and to possible sanctions had he not, he could not be said to have voted voluntarily.

The Court said: " 1. While still a minor he took an oath of allegiance[1] to the King of Italy in July, 1935, after entering the Italian army in April of that year. He was discharged the following December. The Secretary of State concedes that one who takes such an oath during minority does not thereby lose his American citizenship. And no law effective in 1935 made service in a foreign army even during majority an expatriating act. The Government's position is that appellant's subsequent army service in 1940–1946, and his voting in post-war political elections, confirmed the 1935 oath with like effect as though taken during majority. The statute does not so provide, and we cannot read this into the law. See *Pandolfo* v. *Acheson*, 2 Cir., 202 F.2d 38, 41, and *Di Girolamo* v. *Acheson*, D.C.D.C., 101 F.Supp. 380, 382, the latter holding that in the absence of a showing of intent to relinquish American citizenship military service after attaining majority is not to be considered as confirmation of the taking of an oath of allegiance during minority.

" 2. Appellant re-entered the Italian army September 23, 1940. Though then of age he did not take another oath of allegiance to the King, and army service alone did not become a ground of expatriation until January 13, 1941.[2] The question is whether his remaining in the service from January 13, 1941, until June 5, 1946, brought about his expatriation. If entering the service was involuntary his continuing therein ordinarily would seem no less so; but we must examine more fully the circumstances. Appellant testified he entered the army in September, 1940, in response to a general call 'that even without personal notice to each individual draftee, everybody was supposed to appear and report for duty.' He was a reservist and there is evidence that under the laws of Italy the call obliged him to serve. Army service in Italy under conditions then existing has been held to have been under legal compulsion. See *Acheson* v. *Maenza*, 92 U.S.App.D.C. 85, 90–91, 202 F.2d 453, 458–459, and *Alata* v. *Dulles*, 95 U.S.App.D.C. 182, 221 F.2d 52, with its reference to *Mandoli* v. *Acheson*, 344 U.S. 133, 73 S.Ct. 135, 97 L.Ed.

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[1] Section 2 of the Nationality Act of 1907, 34 Stat. 1228, provides " That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state."

[2] § 401 (c) of the Nationality Act of 1940, 54 Stat. 1137, 1169, makes the unauthorized service in a foreign army by one who has or acquires foreign nationality an expatriating act. But § 601 of the same Act provides: " This Act shall take effect from and after ninety days from the date of its approval." The Act was " Approved, October 14, 1940."

146.[1] While each case must stand upon its own facts, there are some circumstances more favorable to appellant than were present in *Alata's* case. Within a few weeks after the Nationality Act of 1940 became effective, appellant, on February 5, 1941, became a prisoner and so remained until March 30, 1946. On April 5, 1946, he was given special leave for 60 days and at its conclusion was discharged June 5, 1946.[2] His failure while a prisoner to seek release from the army cannot without more be held to have rendered voluntary his service during that period. When he was given special leave April 5, 1946, there was no longer any practical reason to seek release since he was to be discharged at the end of the leave. Thus it appears that except for the time he was a prisoner and that spent on special leave appellant's period of actual military service after the 1940 Act became effective was only a few weeks in 1941 and a few days in 1946. His failure in these two short intervals to seek release from the army did not cause a loss of citizenship.

"The Government, however, points to evidence of personal reasons of appellant for re-entering the army in September, 1940, as indicative of the voluntary character of his service. Thus, in his affidavit given the American Vice Consul at Naples May 19, 1952, he said that before he was recalled on September 23, 1940, he had asked to join because he was unemployed and had no way to support his wife and four children. But the fact is he was recalled under circumstances which placed legal pressure upon him to respond. His motives for desiring to re-enter the army do not alter the compulsive nature of the call.

"We conclude that his service involuntarily begun did not change its character by his failure to prove affirmative efforts to obtain release during (a) the few weeks of active service after the Act became effective and before his capture, and (b) the few days of service four years later before his leave preceding discharge. See *Perri* v. *Dulles*, 3 Cir., 206 F.2d 586, 589 [1953].[3]

[[1] *International Law Reports*, 1951, Case No. 64.]

[2] Appellant himself testified that he served "[f]rom December 6, 1940, to March 30, 1946, when I returned home." His army matricular record, however, shows the special leave beginning April 5, 1946, and his unlimited discharge June 5.

[3] In *Perri* v. *Dulles, supra*, the Court said:

"... Since the plaintiff's entry into the Italian army took place long before January 13, 1941, the effective date of the Nationality Act of 1940, that Act cannot apply to his entry into or service in the armed forces of Italy prior to that date. We, therefore, need not consider the plaintiff's contention that the district court erred in finding that his original entry into the Italian forces was voluntary.

"On January 13, 1941, however, the plaintiff, who then had Italian citizenship, was serving actively in the Italian armed forces. The real question at this point, therefore, is whether the plaintiff's military service from and after January 13, 1941 was voluntary in the sense that he could have secured release from it under the laws of Italy but did not do so. Otherwise it was necessarily involuntary, however it may have originated. The plaintiff proved that he was drafted into the Italian army at the age of 19 years and that all his subsequent service was under this original draft. We think that this was sufficient to establish prima facie that his service on and after January 13, 1941 was involuntary. This would, of course,

" 3. There remains for consideration the effect of appellant's voting. Section 401 (e) of the Nationality Act of 1940, 54 Stat. 1137, 1169, provides for loss of American citizenship by ' [v]oting in a political election in a foreign state . . . .' Part of the evidence on this subject is appellant's affidavit before the American Vice Consul at Naples May 19, 1952, in which he says he voted in 1948 ' because of all the electoral propaganda and what they were saying around ', that he did not know it would compromise his American citizenship, and he desired to give his contribution against Communism. At the trial he stated that he voted only in 1946 and that the affidavit to the Vice Consul giving the time of voting as 1948, as well as 1946, is a mistake. Furthermore, the statements in the affidavit must be considered with his testimony at the trial that he voted because if he did not do so he would lose his civil rights, his ' certificate of good behaviour would have been disqualified and I do not find any more job ', that his relatives and immediate family would have been deprived of their ration card, that the Parish priest urged him to vote, and that the law forced him to do so. When asked why he did not tell the Vice Consul that he was compelled to vote he replied that the Consul knew it was an obligation to vote in Italy. He added that he had gone alone to the Consul's office without a lawyer and the statement he signed was not re-read to him.[1]

" His testimony is buttressed partially by a lawyer who had been admitted to the bar in Italy and who testified that Italian law required appellant as an Italian citizen to vote as a matter of duty, and that when appellant entered military service all citizens whether born in the Kingdom or abroad were compelled to serve in the Italian army unless they could prove they had already served in the armed forces of the country of their birth. Another witness testified that during the war if one refused to be drafted he would be arrested, and if one did not vote in the national election of 1946 he would be punished with sanctions such as a fine and loss of his food ration cards.

" We note at this point that the May, 1952, affidavit before the Vice Consul is not the handiwork of appellant, who testified at the trial through an interpreter, but appears to have been composed by the Consular official on the basis of appellant's answers to various questions. Its composition indicates that the questions were not

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be subject to rebuttal by evidence that on or after that date Italian law or military practice would have permitted the plaintiff to secure release, on the ground of his United States citizenship or otherwise. On remand the defendant will have an opportunity to present such evidence. On the present record, however, we cannot hold that expatriation by continued voluntary military service after January 13, 1941 has been established." 206 F.2d at page 589.

[1] When asked why he did not read the statement he said: " They just put a pencil mark at the spot where I was to sign. And I thought they were the papers authorizing me to come back to the United States. So I just signed in the different places."

designed to elicit an exposition of the situation which confronted appellant regarding either his military service or voting. And except as the affidavit does so, the Government made no attempt to rebut appellant's testimony as to the pressures upon him.[1]

" We conclude that appellant's military service after January 13, 1941, and his voting, should not be held to have brought about the loss of his American citizenship. As previously shown, no other conduct on his part did so.

" In reaching this decision we have considered our obligation under Rule 52(a), Fed.R.Civ.P., 28 U.S.C.A., not to set aside the findings of the District Court unless clearly erroneous, giving due regard to the opportunity of the trial court to judge of the credibility of the witnesses. In expatriation cases, however, another rule also applies. As we stated in *Alata* v. *Dulles*, *supra*, factual doubts are to be resolved in favor of citizenship. We cited *Acheson* v. *Maenza*, 92 U.S.App.D.C. at page 88, 202 F.2d at page 456, where our court likened the situation to denaturalization cases, in which the Government has always been held to a strict degree of proof, usually being required to prove its case by clear, unequivocal and convincing evidence, not by a bare preponderance ' which leaves the issue in doubt,' citing *Baumgartner* v. *United States*, 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525 and *Schneiderman* v. *United States*, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796.[2] We now add a reference to *Monaco* v. *Dulles*, 2 Cir., 210 F.2d 760, 762, in which the court explicitly agreed with *Acheson* v. *Maenza*, to the effect that the burden in an expatriation case is like that in a denaturalization proceeding, *i.e.*, the evidence of expatriation must be ' clear, unequivocal and convincing '. Without express reference to Rule 52(a) the Court of Appeals for the Second Circuit in *Monaco* v. *Dulles* reversed the trial court.[3] In *Augello* v. *Dulles*, 2 Cir., 220 F.2d 344, the same Court of Appeals repeated that expatriation of American citizenship must be proved by evidence that is clear, unequivocal and convincing. Again without mention of Rule 52(a) the trial court was reversed although it had found that Augello not only had taken an oath of allegiance to the King of Italy but had done so voluntarily. The appellate court held that the presumption of voluntariness may be rebutted by proof that the oath was taken as an incident of compulsory military service, citing *Perri* v. *Dulles*, *supra*, as well as *Mandoli* v. *Acheson*, supra.[1]

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[1] Another affidavit of appellant dated October 8, 1947, made before an American Vice Consul at Naples, and appellant's matricular record, were also in evidence. These documents contain considerable factual material about his family and activities, including dates of his service in the Italian army, but, except as their contents have been referred to in the body of the opinion, contain no information which affects the conclusion we reach.

[2] In *Alata* we also cited several other cases in which the opinions appear to bear out our view regarding the resolution of factual doubts.

[3] The Government's evidence, however, was documentary, so that one of the reasons underlying Rule 52(a) was absent.

"Whether stated in terms of resolving factual doubts in favor of citizenship, as in *Alata* v. *Dulles*,[2] or in terms of the necessity of proving expatriation by clear, unequivocal and convincing evidence, as in *Monaco* v. *Dulles*, we must keep these criteria in mind when reviewing findings of a trial judge in expatriation cases. As said in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, a finding is clearly erroneous within the meaning of Rule 52(a) when, although there is evidence to support it, the reviewing court on the entire evidence 'is left with the definite and firm conviction that a mistake has been committed.'[3] Guided by the criteria referred to, considered with this interpretation of 'clearly erroneous', we have such a conviction in this case, and accordingly are impelled to set aside the conclusion reached by the learned trial judge, the more so because of uncertainty that the criteria set forth were known to apply in this jurisdiction when the case was before him."

Prettyman, Circuit Judge, dissented on the ground that the decision of the Court was an unwarranted departure from the normal rule that the findings of the District Court are set aside only if clearly erroneous. In his view, the effect of the decision in this case was to carry the law to the point of making the statutes regarding expatriation virtually inapplicable to persons in Italy during the Fascist period.

[Reports: 96 App. D.C. 337; 226 F.2d 243.]

NOTE.—To like effect, as to involuntary service in foreign armies, see *Alata* v. *Dulles*, 95 App. D.C. 182, 221 F.2d 52 (1955) (Italy), and *Namba* v. *Dulles*, 134 F. Supp. 633 (N.D. Calif. 1955) (Japan).

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[1] The court added that the inference of duress from conscription was doubtless also subject to rebuttal, through evidence that once conscripted the soldier volunteered for service more onerous than that mandatorily imposed upon a conscript or through evidence that Italian law permitted him to invoke his American citizenship as ground for immunity from service but he failed to do so.

[2] As our opinion in that case concludes, the doubt as to the voluntary character of the expatriating conduct must be a substantial one. 95 U.S.App.D.C. at page 186, 221 F.2d at page 56.

[3] Compare, however, *Fook* v. *Brownell*, 9 Cir., 218 F.2d 924.

VIII.—Double Nationality

Nationality—Dual Nationality—Right of Dual National to Claim Compensation under Treaty—Test of Dominant or Effective Nationality—Critical Date—Dual Nationality with regard to Third States—Principles and Rules of Interpretation of Treaties—Intention of the Draftsman—Literal Interpretation—" The Spirit of the Treaty "—Restrictive Interpretation—Interpretation by Reference to Principles of International Law—By Reference to Authoritative Writings.

MERGÉ CLAIM.

Italian–United States Conciliation Commission. June 10, 1955.

(Matturri, Sorrentino, Yanguas Messía.)

THE FACTS.—Mrs. F. S. Mergé, a national of the United States of America, submitted a claim under Article 78[1] of the Peace Treaty with Italy of 1947 for compensation for the loss, as a result of the war, of certain property in Italy owned by her. The Italian Government having contended that the claim ought to be rejected because Mrs. Mergé was, under Italian law, an Italian national by marriage, the Commission was called upon to decide the preliminary question of whether a person having dual nationality was entitled to claim compensation under the Treaty.

The following are the relevant facts: The claimant was born in the United States and so acquired United States nationality under the law of the United States. In 1933 she married an Italian national in Rome and thus acquired Italian nationality by the operation of Italian law. The claimant lived with her husband in Italy until 1937 and accompanied him when he was sent to take up a post at the Italian Embassy at Tokyo. She travelled on an Italian passport. In 1940, the claimant registered as a national of the United States at the American Consulate-General at Tokyo. She remained in Japan throughout the war and was not interned as an enemy alien. When hostilities ceased, she refused to be returned by the United States military authorities to the United States, preferring to remain in Japan with her husband. In 1946, the American Consulate at Yokohama issued to the claimant an American passport valid only for travel to the United States, on which she travelled to the United States where she remained from December 1946 until September 1947. The passport was then validated for travel to Italy; the Italian Consulate at New York granted the claimant a visa to enter Italy as a visitor; and she went to Italy, where she had resided with her husband ever since. On arrival in Italy, the claimant registered as a United States national with the consular section of the American Embassy in Rome but a few days later she there swore an affidavit explaining her protracted residence outside the United States. It appeared that her only ties with the United States were her father and mother, and that she did not pay income tax to the United States Government.

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[1] See for the relevant parts of that Article *supra*, p. 301.

In 1950, the claimant obtained from the consular section of the Embassy in Rome a new American passport to replace that issued in 1946, which had expired. In her application she stated that her " legal residence " was in New York and that she intended to return to the United States to reside there permanently at some indefinite time in the future.

Held: that as the claimant did not reside habitually in the United States and the interests and the permanent professional life of her husband were established elsewhere, she could not be regarded as being effectively a United States national within the meaning and for the purpose of Article 78 of the Treaty of Peace.

The Commission said: " It is not disputed between the Parties that the claimant possesses both nationalities. The issue is not one of choosing one of the two, but rather one of deciding whether in such case the Government of the United States may exercise before the Conciliation Commission the rights granted by the Treaty of Peace with reference to the property in Italy of United Nationals nationals (Articles 78 and 83).

" The Commission, completed by the Third Member, called upon to decide this case, notes that the problem raised has the importance of a question of principle, also because of the frequency with which it is presented, in view of the difference between the municipal laws (conflict between the principles of *jus sanguinis* and *jus soli*; diverse regulation of acquisition and loss of nationality by the woman who marries an alien, cases of automatic re-acquisition of original nationality, etc.). The Commission has therefore deemed it advisable to take up the examination of the complex problem of dual nationality in all its aspects.

" I. *Position of the Government of the United States of America*

" (a) The Treaty of Peace between the United Nations and Italy provides the rules necessary to a solution of the case. The first sub-paragraph of para. 9 (*a*) of Article 78 states:

> ' " United Nations nationals " means individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.'

All United Nations nationals are therefore entitled to claim, and it is irrelevant for such purpose that they possess or have possessed Italian nationality as well.

" (b) The intention of the drafters of the Peace Treaty was to protect both the direct and indirect interests of United Nations nationals in their property in Italy.

" (c) The principle according to which one State cannot afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses, cannot be applied to the Treaty of Peace with Italy because such principle is based on the equal sovereignty of States, whereas this Treaty of Peace was not negotiated between equal Powers but between the United Nations and Italy, a State defeated and obliged to accept the clauses imposed by the victors who at that time did not consider Italy a sovereign State.

" II. *Position of the Italian Government*

" (a) The text governing cases of dual nationality is not the first sub-paragraph of para. 9 (*a*) of Article 78 but the second sub-paragraph of the same paragraph: only in cases of treatment as enemy can the Italian national who is also a United Nations national request application of Article 78.

" (b) A defeated State, even when it is obliged to undergo the imposition of the conqueror, continues to be a sovereign State. From the juridical point of view, the Treaty of Peace is an international convention, not a unilateral act. In cases of doubt, the interpretation must be that more favorable to the debtor.

" (c) There exists a principle of international law, universally recognised and constantly applied, by virtue of which diplomatic protection cannot be exercised in cases of dual nationality when the claimant possesses also the nationality of the State against which the claim is being made.

" III. *Interpretation of the Treaty of Peace*

" (1) *The letter of the Treaty of Peace* (*para.* 9 (*a*) *of Article* 78).—The first problem to be confronted by the Commission is that concerning whether this provision does or does not govern the problem of dual nationality.

" (a) *First sub-paragraph of the definition*: ' " United Nations nationals " means individuals who are nationals of any one of the United Nations, or corporations or associations organised under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.'

" In reality, the importance of this provision is confined to two points only: (i) to explain the phrase, ' United Nations nationals ', used in the preceding paragraphs of Article 78 itself—doubtless for the sake of brevity, by specifiying that by such phrase it is intended to indicate ' individuals who are nationals *of any* of the United Nations, or corporations or associations organized under the laws *of* *any* of the United Nations ;' (ii) to require possession of such nationality *of any* of the United Nations on the date of the coming into force of the Treaty of Peace and on September 3, 1943, that is, when the Armistice was signed. Neither one of these two conditions refers to dual nationality.

" Can it nevertheless be considered to be implicitly contained in the letter of the text ? The same question was discussed during the Venezuelan Arbitrations (1903–1905). One of the claimants, Mrs. Brignone, a widow, possessed dual nationality, Italian and Venezuelan. The Italian Commissioner based his argument on the text of the Protocol. Mrs. Brignone, he stated, is Italian according to Italian law. It does not matter that she is also Venezuelan. Article 4 of the Protocol of February 13, 1903, speaks of ' Italian claims, without exception '. To exclude claims of Italian nationals because they simultaneously possess another nationality is to introduce an exception not contemplated by the text and is an infraction of the provisions of the Protocol. The Umpire did not accept this argument, nor did he follow a literal interpretation. He faced openly the problem of dual nationality.

"The fact that there exists in the Treaty of Peace which we are discussing an apposite definition of persons who can invoke the benefits of Article 78 obligated its drafters even more to insert explicitly in the text all the cases which it was desired to include within its contents. Therefore, it is clear that, in the first sub-paragraph, no reference, direct or indirect, is made to dual nationality. This is the surest indication that the problem did not enter the minds of the drafters of the Treaty. If it had, it seems most probable that it would have been included in the definition, even more so inasmuch as this legal situation has previously given rise to numerous controversies and arbitrations on the international level.

" (b) *Second sub-paragraph of the definition*: ' If dual nationality is not governed by the first sub-paragraph, is it perhaps governed by the second ? ' Let us recall that in this second sub-paragraph, the term ' United Nations nationals ' includes all individuals, corporations or associations which, ' under the laws in force in Italy during the war have been treated as enemy '.

" Notwithstanding every effort of interpretation, one cannot arrive at the conclusion that such paragraph was drawn up with the intention of regulating specifically the dual nationality which interests us. Not only that, far from referring concretely to such cases, the paragraph cited is applicable to other, different cases, such as those, above all, concerning corporations owned by United Nations nationals organised in Italy and those of stateless persons, but not to cases in which the Italian nationality of individuals comes into play. In fact, by the Italian War Law of July 8, 1938, it was established that, for the purpose of such Law, he who, being a national of an enemy State, at the same time possessed Italian nationality or that of another State, must be considered to be an enemy national. However, by the new Law of December 16, 1940, which was in force from January 30, 1941, until the end of the war, consideration as enemy nationals was limited to those cases only in which the individual possessed at the same time the nationality of an enemy State and that of another foreign State. The possibility of application of the provision contained in the Law of 1938 lasted only the short time from the beginning of hostilities on June 10, 1940, to January 30, 1941, date on which the new Law took effect, but the provision was never applicable to United States nationals as the United States did not enter the war until December 1941. Logically, it is not possible to deduce from this text a general rule to resolve the problem of dual nationality.

" (c) *Conclusion from paragraph* 9 (*a*): The conclusion to be reached from what has been said is that neither the first nor the second sub-paragraph of para. 9 (*a*) of Article 78 contains a definition specifically referring to dual nationality and therefore capable of being a governing rule for those cases.

" (2) *The spirit of the Treaty of Peace.*—If cases of dual nationality do not appear to be specifically settled by the letter of the Treaty of Peace, is it perhaps possible to infer from the spirit of the Treaty that its drafters intended to protect United Nations nationals even though they possess Italian nationality?

" The United Nations nationals expressly protected by the Treaty of Peace certainly are entitled to compensation for property damaged or lost in Italy. The Commission considers that the provision cannot be extended to cases not contemplated in the Treaty. The clauses of the Treaty must be strictly followed, even when they constitute a derogation from the general rules of international law. Article 78, in fact, constitutes a derogation when it declares the Italian Government responsible, in every case, and without reference to the cause, for the restitution to United Nations nationals in good order of their property and, in the event that that is not possible, for the payment of compensation, free of any type of tax, in the amount of two-thirds of the sum necessary, as of the date of payment, for the purchase of similar property or to make good the loss suffered. And this provision, in all the cases contemplated by the Treaty, is indisputably and undisputedly applicable.

" The United Nations obviously could have inserted in the Treaty, in the same manner, a specific rule to govern cases of dual nationality, apart from or even in conflict with the generally recognized rules of international law, and such an obligation would have been legally binding on the Italian Government. However, they did not do so; and it is a universally admitted principle, in international law as in domestic law, that any contractual obligation—and the Treaty, by its nature, is such—must be performed only within the limits of what has been agreed.

" (3) *Principle of equality in relation to treaties.*—Finally, let us see if the Treaty of Peace between the United Nations and Italy lacks the principle of legal equality and hence can have applied to it no principle of international law which is based on the equality between sovereign States.

" To admit this argument it would be necessary that the Treaty of Peace not be a treaty. Prof. Rousseau writes and underlines: ' Those between contracting parties at least one of which is not a direct subject of the Jus Gentium *cannot be classified as treaties* ' (translated from Spanish) (Rousseau, *Droit International Public*, Paris, 1953, p. 17). Liszt says: ' The capacity to conclude treaties derives from sovereignty. Nevertheless, the custom exists of conceding to semi-sovereign States the right to conclude treaties, on condition that they do not have a political character (especially, commercial treaties) ' (Liszt, *Derecho Internacional Publico* (traduccion espanola), Barcelona, 1929, p. 225). A treaty of peace, essentially political by nature, is subject to this rule.

" The defeated State can, in the peace treaty itself, accept limitations, more or less temporary, on the exercise of its sovereignty. Such acceptance, however, as a manifestation of intention, presupposes possession of a personality on the international level as a subject of the *Jus Gentium*. The armistice is only an agreement of a military nature which recognizes a situation of fact, leaving the juridical settlement for the subsequent treaty of peace.

" Without the consent and the signature of the defeated State a treaty of peace does not exist. It may be a unilateral regulation on the part of the victor, but it is not a treaty of peace. Dupuis says:

> " ' Whether one looks at it from the point of view of natural law or from the point of view of positive law, the fact that force intervened to dictate a treaty or a law is unable, of itself, to invalidate the treaty or the law. The State which accepts a treaty under the pressure of force is bound by the consent given. If it agrees reluctantly, it agrees, with full knowledge, in order to avoid the force, in order to avoid a worse evil or in order to obtain some advantage of which a refusal would deprive it. If force has a weight in its decision, it is not the only fact in that decision. If it did not agree, it would remain under a régime of force and of force only. . . . The object of treaties is to replace the instability of force with the stability of conventions.' (Translated from French) (Dupuis, [in] Recueil des Cours de l'Académie de Droit International de la Haye, 1924, vol. ii, pp. 346–7).

" The inequality of every treaty of peace following a victory exists and is manifested, not in the capacity of the international subjects which conclude it, but rather in the very contents of the treaty. This inequality, consequence of the victory, has been translated into numerous clauses of the Treaty which we are discussing, and likewise could have been manifested—but it was not—by the express regulation of dual nationality within para 9 (*a*).

IV. *Principles of International Law in the matter of Dual Nationality.*

"As the Treaty contains no provisions governing the case of dual nationality, the Commission must turn to the general principles of international law. In this connection two solutions are possible: (a) the principle according to which a State may not afford diplomatic protection to one of its nationals against the State whose nationality such person also possesses; (b) the principle of effective or dominant nationality.

" (1) *The Hague Convention of* 1930.—The two principles just mentioned are defined in this Convention: the first (Art. 4) within the system of public international law; the second (Art. 5) within the system of private international law.

"Art. 4 (approved in plenary session by 29 votes to 5) is as follows:

> " 'A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.'

The same Convention, in Art. 5, indicates effective nationality as the criterion to be applied by a third State in order to resolve the conflicts of laws raised by dual nationality cases. Such State

> " '. . . shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be most closely connected.'

This rule, although referring to the domestic jurisdiction of a State, nevertheless constitutes a guiding principle also in the international system.

" Certain of the replies sent by the Governments to the Preparatory Committee of the Hague Conference, charged with drawing up the Bases for Discussion, are interesting and are helpful to our study.

" The Government of the United States, in its reply, set forth an instructive historical datum. It concerned a letter dated August 8, 1882, which the then Secretary of State of the United States, Mr. Frelinghuysen, sent to a member of Congress, Mr. O'Neill, with regard to a young man born in the United States of German parents and desirous of going to Germany to pursue his studies:

" 'The young man referred to under the Constitution of the United States, having been born in this country, is, while subject to the jurisdiction of the United States, a citizen of the United States notwithstanding the fact of his father being an alien. As such citizen he is entitled to a passport. This, of course, would be a sufficient protection to him in every other country but that of his father's origin—Germany. There, of course, as the son of a German subject, it may be claimed that he is subject to German military law, and that, not being then subject to the jurisdiction of the United States, he cannot claim the rights secured to him by the 14th amendment to the Constitution. It is proper, therefore, that I should add, in the interest of young Mr. J. . . . , that it will be perilous for him to visit Germany at present.' (143, MS. Dom. Let. 270; Moore, *Digest of International Law,* vol. III, p. 532.)

To clarify the concept, there is added in the aforesaid reply the following comment, which connects the letter with the concrete aspect of protection:

" ' In any case, it is considered necessary to view the aforementioned statements as referring to the right of the interested parties to the protection of the Government of the United States abroad, rather than as referring to the strictly legal question of their nationality.' (Bases for Discussion of the Preparatory Committee, Reply of the United States of America, vol. I, p. 27.)

" The Government of the United States added with reference to the principle of effective nationality:

" ' There exists presently no established rule which permits a determination, in the case of an alien who possesses the nationality of two other States, of which one is the nationality that must be recognized by the United States. . . . There would appear to be no obstacle to the regulation of this question by international agreement, and we consider that the domicile of the interested party should be taken into consideration in order to determine his nationality.' (*Op. cit.*, p. 32.)

" The Italian Government, in its reply, declared itself in favor of the nationality which is accompanied by habitual residence (*op. cit.*, p. 33).

" The Hague Convention, although not ratified by all the Nations, expresses a *communis opinio juris*, by reason of the near-unanimity with which the principles referring to dual nationality were accepted.

" (2) *Precedents.*—Uniformity of precedents in this field does not exist, but it can be stated that the *ratio* of nearly all the arbitral and judicial decisions on the international level is either one or the other of the two afore-mentioned principles. We shall cite a few by way of example.

" (a) The principle which bars diplomatic protection of the individual who is a national of the State against which the claim is made was applied by the United States–British Claims Commission established under the Treaty of Washington of May 8, 1871, in the *Alexander Case* between Great Britain and the United States (Moore, *International Arbitrations* (1898), vol. III, p. 2529). Instead, the same Commission decided the *Halley Case*, between the same Powers, in another way (Moore, *op. cit.*, p. 2239).

" (b) In the Venezuelan Arbitrations, the British Agent himself, in the *Mathison Case*, maintained the view that, if a claimant were both a British subject and a Venezuelan national, his claim could not be heard by the Commission (Ralston, *Venezuelan Arbitrations* of 1903 (1904), pp. 429 *et seq.*). The principle of effective nationality was instead applied in the following cases: *Miliani*, Italy *vs.*

Venezuela (Ralston, *op. cit.*, pp. 754–761); *Stevenson*, Great Britain *vs.* Venezuela (Ralston, *op. cit.*, pp. 438 *et seq.*); *Massiani*, France *vs.* Venezuela (Ralston's *Report of* 1902 (Washington, 1906), p. 211, 224).

" (c) The case of *Baron Canevaro*, Italian *jure sanguinis* and Peruvian *jure soli*, is typical of those decided in favor of the effective nationality. The case having been submitted to the Permanent Court of Arbitration at the Hague, the motive which—according to the decision of May 3, 1912—caused the Peruvian nationality to prevail for the purposes of the disputed claim was the previous conduct of Canevaro, who was a candidate for election to the Senate where only Peruvian nationals are admitted and who had requested the Government of Peru, as its national, to grant authorization to perform the functions of Consul General of the Netherlands (*Revue générale de droit international public*, 1913, pp. 328–333).

" (d) The Franco-German Mixed Arbitral Tribunal applied the principle of effective nationality in the case of *Mrs. Barthez de Monfort* v. *Treuhander* (Decision of July 10, 1926).[1]

" (e) The Franco-Mexican Claims Commission (1924–1932) examined the problem of dual nationality in 1928 in the *Georges Pinson Case*.[2] The decision is based on the fact that the French nationality of Pinson was proved, but not the Mexican nationality, so that, in reality, contrary to Mexico's claim, there did not exist a case of dual nationality.

" Nevertheless, it is important to examine the reasoning of the President of the Commission, Mr. Verzijl [in that case], who states that the Mexican argument was based on the theory, generally enough admitted in the *jus gentium*, according to which a State is not permitted to take advantage of its right to provide diplomatic protection in the event that the nationals to be protected simultaneously possess the status of nationals of the State against which the right of protection is to be exercised. Mr. Verzijl continues:

" ' While recognizing the well-foundedness of that theory for the cases in which the person in question is effectively considered and treated as a national by each of the two States in the case, and this by virtue of legal rules which do not overstep the bounds set out for them by public or customary international law, I nevertheless believe I must make certain reservations with regard to its admissibility in the case in which one or the other of these two conditions might not be fulfilled.' (Translated from French) (*La réparation de dommage causé aux étrangers par des mouvements révolutionnaires:* Jurisprudence de la Commission franco-mexicaine des réclamations, 1924–1932.)

" Although the word ' effectively ' seems to refer to the principle of effective, in the sense of dominant, nationality, this is not so, because the case which Professor Verzijl is considering is not that of choosing one of two nationalities but only that of ascertaining that each one of the two contesting States effectively considers and treats the person in question as its national.

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[1] See *Annual Digest*, 1925–1926, Case No. 206.]

[2] *Ibid.*, 1927–1928, Cases No. 194 and 195.]

" (f) The International Court of Justice, in its Advisory Opinion of April 11, 1949,[1] refers to 'The ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national' (International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders*, 1949, p. 186).

" The same International Court, in the interval between the meeting of this Commission in Paris and the meeting in Rome, issued a decision in the *Nottebohm Case* (*Liechtenstein* v. *Guatemala*), which is not a case of dual nationality; but it is interesting for our purposes to note what is set forth in the reasoning of the decision in regard to the problem of dual nationality when such problem arises because of the simultaneous possession of the nationality of two States involved in the dispute:

" ' International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.' (*Reports of Judgments, Advisory Opinions and Orders*, 1955, p. 22, *Nottebohm Case*.[2])

" (3) *Legal literature*

" (a) The Institute of International Law, during its meeting at Cambridge in 1931, discussed an excellent report of Professor Borchard. It was entitled 'Diplomatic Protection of Citizens Abroad'. Its purpose was explained by Borchard himself: 'This report shall be confined to a study of the conditions for protection when a formal international request for damages can be submitted, either through diplomatic channels or before an international tribunal, in conformity with the existing or appropriate rules of law' (*Annuaire de l'Institut de Droit International*, Session de Cambridge, 1931, vol. I, p. 274). Borchard's proposal was to make a compilation of the existing positive law, so as to avoid uncertainties and controversies. Therefore, he refused (*Annuaire*, 1931, vol. II, p. 203) to accept an amendment of Mr. Politis, supported by Messrs. de la Barra and James Brown Scott, in favor of the admissibility of diplomatic protection whenever there had been a change of nationality, because it meant an innovation. And this faithfulness of Mr. Borchard in adhering to the existing law and in not accepting any innovation was precisely the cause of the suspension of the discussion and its postponement to a later meeting (*Annuaire*, 1931, vol. II, p. 212).

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[1] Concerning *Reparation for Injuries Suffered in the Service of the United Nations*: see *International Law Reports*, 1949, Case No. 112.]

[2] See *supra*, p. 349.]

" Within the framework of positive law and of simple compilation within which the Yale Professor kept himself, there is to be noted this assertion of his: ' It is a well established rule of international law that a person who possesses two nationalities cannot demand that one of the countries of which he is a national appear as defendant before an international tribunal ' (*Annuaire*, 1931, vol. I, p. 289). Of the members of the XIXth Commission consulted by Borchard, only one, Prof. Kraus, proposed a change in wording, formulated as follows: ' The protection of international law can be exercised in favor of individuals as well as of legal persons who possess the nationality of the protecting State if, according to the law of the defendant State, they do not simultaneously or exclusively possess the nationality of the latter State (*Annuaire*, 1931, vol. I, p. 481). In the plenary discussion (*Annuaire*, vol. II, pp. 201 *et seq.*), no comment was made on the principle declared in this respect by Mr. Borchard. It should be noted that jurists representing the most varying legal systems in the world participated in the meeting.

" (b) The writers of treatises on international law recognize the two principles which we are expounding. Two excellent contemporary authors, Rousseau and Battifol, attest their existence in books of recent publication date. Rousseau writes:

> " ' In case of dual nationality, the claimant State in general refuses to protect a person against a State of which he is simultaneously a national; a claimant is not protected against his own State ' (Rousseau, *Droit international public* (Paris, 1953), p. 353).

In the same order of ideas, Battifol says:

> " ' Nevertheless, a positive limit is recognized to this liberty of the States [in the field of nationality]: States may not exercise diplomatic protection on behalf of their nationals against other States which consider the latter as their own nationals ' (Battifol, *Droit international privé*, 2nd ed. (Paris, 1955), p. 87).

However, both authors also mention the theory of effective nationality (Rousseau, *op. cit.*, p. 364; Battifol, *op. cit.*, p. 92).

" The same theory, on the other hand, has not only been recognized but has also been adopted by jurists of such universal authority as A. de la Pradelle and Basdevant. La Pradelle defends effective nationality even when the nationality of the defendant State is involved (*Dictionnaire Diplomatique*, under the heading *Nationalité*), and Basdevant, in an interesting comment on the Venezuelan Arbitrations of 1903–1905, emphasizes and explains the idea which predominates in those decisions according to which ' the conflict between two nationalities must be resolved by giving prevalence to the law with which the real nationality of the person in question corresponds' (Conflits de nationalités dans les arbitrages vénézuéliens, [in] *Revue de droit international*, 1909, pp. 41 *et seq.*).

V. *Considerations of Law*

"(1) The rules of the Hague Convention of 1930 and the customary law manifested in international precedents and in the legal writings of the authors attest the existence and the practice of two principles in the problem of diplomatic protection in dual nationality cases. The first of these, specifically referring to the scope of diplomatic protection, as a question of public international law, is based on the sovereign equality of the States in the matter of nationality and bars protection in behalf of those who are simultaneously also nationals of the defendant State. The second of the principles had its origin in *private* international law, in those cases, that is, in which the courts of a third State had to resolve a conflict of nationality laws. Thus, the principle of effective nationality was created with relation to the individual. But decisions and legal writings, because of its evident justice, quickly transported it to the sphere of *public* international law.

"(2) It is not a question of adopting one nationality to the exclusion of the other. Even less when it is recognized by both Parties that the claimant possesses the two nationalities. The problem to be explained is, simply, that of determining whether diplomatic protection can be exercised in such cases.

"(3) A prior question requires a solution: are the two principles which have just been set forth incompatible with each other, so that the acceptance of one of them necessarily implies the exclusion of the other? If the reply is in the affirmative, the problem presented is that of a choice; if it is in the negative, one must determine the sphere of application of each one of the two principles.

"The Commission is of the opinion that no irreconcilable opposition between the two principles exists; in fact, to the contrary, it believes that they complement each other reciprocally. The principle according to which a State cannot protect one of its nationals against a State which also considers him its national and the principle of effective, in the sense of dominant, nationality, have both been accepted by the Hague Convention (Articles 4 and 5) and by the International Court of Justice (Advisory Opinion of April 11, 1949,[1] and the *Nottebohm* decision of April 6, 1955[2]). If these two principles were irreconcilable, the acceptance of both by the Hague Convention and by the International Court of Justice would be incomprehensible.

"(4) The International Court of Justice, in its recent decision in the *Nottebohm Case*, after having said that ' . . . international law leaves to each State to lay down the rules governing the grant of its own nationality ', adds:

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[1] Concerning *Reparation for Injuries Suffered in the Service of the United Nations*: see *International Law Reports*, 1949, Case No. 112.]

[2] See *supra*, p. 349.]

> ' On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States . . . Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.' (Judgment of April 6, 1955, p. 23.)

" For even greater reason, this theory must be understood to be applicable to the problem of dual nationality which concerns the two contesting States, in view of the fact that in such case effective nationality does not mean only the existence of a real bond, but means also the prevalence of that nationality over the other, by virtue of facts which exist in the case.

" (5) The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty.

" (6) The question of dual nationality obviously arises only in cases where the claimant was in possession of both nationalities at the time the damage occurred and during the whole of the period comprised between the date of the Armistice (September 3, 1943) and the date of the coming into force of the Treaty of Peace (September 15, 1947). In view of the principles accepted, it is considered that the Government of the United States of America shall be entitled to protect its nationals before this Commission in cases of dual nationality, United States and Italian, whenever the United States nationality is the effective nationality. In order to establish the prevalence of the United States nationality in individual cases, habitual residence can be one of the criteria of evaluation, but not the only one. The conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States must also be considered.

" (7) It is considered that in this connection the following principles may serve as guides:

" (a) The United States nationality shall be prevalent in cases of children born in the United States of an Italian father and who have habitually lived there.

" (b) The United States nationality shall also be prevalent in cases involving Italians who, after having acquired United States nationality by naturalization and having thus lost Italian nationality, have re-acquired their nationality of origin as a matter of law as a result of having sojourned for more than two years, without the intention of re-transferring their residence permanently to Italy.

" (c) With respect to cases of dual nationality involving American women married to Italian nationals, the United States nationality shall be prevalent in cases in which the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.

" (d) In case of dissolution of marriage, if the family was established in Italy and the widow transfers her residence to the United States of America, whether or not the new residence is of an habitual nature must be evaluated, case by case, bearing in mind also the widow's conduct, especially with regard to the raising of her children, for the purpose of deciding which is the prevalent nationality.

" (8) United States nationals who did not possess Italian nationality but the nationality of a third State can be considered ' United Nations nationals ' under the Treaty, even if their prevalent nationality was the nationality of the third State.

" (9) In all other cases of dual nationality, Italian and United States, when, that is, the United States nationality is not prevalent in accordance with the above, the principle of international law, according to which a claim is not admissible against a State, Italy in our case, when this State also considers the claimant as its national and such bestowal of nationality is, as in the case of Italian law, in harmony (Article 1 of the Hague Convention of 1930) with international custom and generally recognized principles of law in the matter of nationality, will re-acquire its force.

VI. *Decision*

" Examining the facts of the case in bar, in the light of the aforementioned criteria, especially paragraph (6), in relation to paragraph (7) (c), the Commission holds that [the claimant] can in no way be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, because the family did not have its habitual residence in the United States and the interests and the permanent professional life of the head of the family were not established there. In fact, Mrs. Mergé has not lived in the United States since her marriage, she used an Italian passport in travelling to Japan from Italy in 1937, she stayed in Japan from 1937 until 1946 with her husband, an official of the Italian Embassy in Tokyo, and it does not appear that she was ever interned as a national of a country enemy to Japan.

" Inasmuch as [the claimant] for the foregoing reasons, cannot be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, the Commission is of the opinion that the Government of the United States of America is not entitled to present a claim against the Italian Government in her behalf."

[Report: Unpublished (Decision No. 55).]

NOTE.—See also the *Mazzonis Claim*, decided by the same Commission on the same date (Decision No. 56), in which the claimant was a United States national by birth who in 1942 married an Italian national in Italy, thereby herself acquiring Italian nationality under Italian law. She resided with her husband in Italy until his death in 1948, and after settling his estate returned in 1949 to the United States, where she took up her permanent residence. The Commission observed that " Mrs. Mazzonis, by reason of her conduct as it appears from the record, cannot be considered to have been effectively a United States national within the meaning of Article 78 of the Treaty of Peace, because, apart from the fact that she married a national of a country then at war with her own country, thus acquiring the nationality of an enemy country, the family did not have its habitual residence in the United States, but in Italy where her husband's professional life was located, even after the end of hostilities when the family would have been able to move to the United States. If her husband had not died in 1948, Mrs. Mazzonis would presumably still be living in Italy." The Commission *held* that as the claimant for the foregoing reasons could not be considered to have been effectively a United States national, within the meaning of Article 78 of the Treaty of Peace, the Government of the United States of America was not entitled to present a claim on her behalf against the Italian Government.

Nationality—Dual Nationality—Powers of Secretary-General of United Nations to Determine Nationality of an Official for Administrative Purposes.

See p. 809 (*Julhiard* v. *Secretary-General of the United Nations*).

C—ALIENS

I.—Admission of Aliens

Aliens—Admission of—Illegitimate Children—The Law of Canada.

Re Leong Ba Chai.

Canada, British Columbia Court of Appeal. January 30, 1953.
(O'Halloran, Robertson and Bird JJ.A.)

Regina and McDonnell *v.* Leong Ba Chai.

Canada, Supreme Court. December 18, 1953.
(Rinfret C.J.C.; Kerwin, Tascherau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.)

The Facts.—This was an appeal from a decision of the Supreme Court of British Columbia whereby that Court granted an order directing the Immigration Officer-in-Charge, Vancouver, to consider the application to enter Canada which had been made on behalf of Leong Ba Chai.[1] Leong Hung Hing was born in China and was a citizen of China until 1951. In 1911 he married in China. In 1926, his first wife being still alive, he contracted a second alleged marriage in China. In 1933 a son, Leong Ba Chai, was born to Leong Hung Hing and his second "wife". From 1926 onwards Leong Hung Hing spent long periods in Canada: his family, whom he continued to maintain, remained in China. In February 1957, he applied for the admission to Canada of his son, then aged 18. The application was rejected on the ground that the son was illegitimate. Leong Hung Hing sought and obtained in the Supreme Court of British Columbia an order directing an Immigration Officer to consider the application again: the Court considered that in the relevant Regulations[2] the word "child" included an illegitimate as well as a legitimate child.

Held (by the British Columbia Court of Appeal): that the appeal must be dismissed on grounds substantially identical with those underlying the judgment of the Court below. [Report: [1953] 2 D.L.R. 766.]

On appeal,

Held (by the Supreme Court of Canada): that the appeal must be dismissed. Leong Ba Chai was to be regarded as legitimate, and was not therefore barred from immigration to Canada, but could be admitted if he otherwise complied with the provisions of the Immigration Act.

The Court said (*per* Tascherau J.): "Under the authority of

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[1] For a report of the earlier proceedings and a fuller statement of the facts see *International Law Reports*, 1953, p. 284.

[2] The provisions of the Regulations are set out in the Judgment of the Supreme Court of Canada.

s. 38 of the Immigration Act, R.S.C. 1927, c. 93, which allows the Governor in Council, by proclamation or order, to prohibit or limit in number, for a stated period or permanently, the landing in Canada of immigrants belonging to any nationality or race, the Governor in Council made the following Regulation (P.C. 2115, dated September 16, 1930; am. P.C. 6229 ([1951] S.O.R. 19)]:

> 'From and after the 16th August, 1930, and until otherwise ordered, the landing in Canada of any immigrant of any Asiatic race is hereby prohibited, except as hereinafter provided:
>
> 'The Immigration Officer-in-Charge may admit any immigrant who otherwise complies with the provisions of the *Immigration Act*, if it is shown to his satisfaction that such immigrant is,
>
> 'The wife, the husband, or the unmarried child under twenty-one years of age, of any Canadian citizen legally admitted to and resident in Canada, who is in a position to receive and care for his dependants.'

"It will therefore be seen that, if the immigrant *otherwise complies with the provisions of the Immigration Act*, he may be admitted if he is the unmarried child, under 21 years of age, of any Canadian citizen, legally admitted and resident in Canada. [After reviewing the facts, the learned Judge continued:] " . . . if it be established that the respondent has been legitimated in China, while the father had his domicile in China, the law of Canada will recognize this child as legitimate within the meaning of the Regulation, because the personal status of the respondent as to his legitimacy, is governed by the law of the domicile of his father . . . In that case, it will be unnecessary to consider if the word 'child' found in the Regulation includes an illegitimate child.

[The learned Judge considered the Chinese law of legitimation, and then continued:] "The Court was of opinion, as the Courts below found, that if the father changed his domicile in 1951 when he became a Canadian citizen, he nevertheless had not abandoned his Chinese domicile at the time his child was born in 1933. The Court also thought that whether the second marriage was valid or not, the child had become from the time of birth a legitimate child, since the law[1], which was sufficiently proven, had a retroactive effect owing to the fact that the child was legitimated by acknowledgement. It was therefore found unnecessary to discuss the question as to whether the word 'child' included an illegitimate child.

"It naturally follows that the applicant being the legitimate son, under 21 years of age, of a Chinese [*sic.*] citizen, legally admitted to and resident in Canada, does not fall within the ban of the Regulation, but may be admitted to the country, if he otherwise complies with the provisions of the Immigration Act."

[Report: [1954] 1 D.L.R. 401.]

[[1] Article 1065 of the Civil Code of China, 1930, which reads as follows: "A child born out of wedlock who has been acknowledged by the natural father is deemed to be legitimate; where he has been maintained by the natural father, acknowledgement is deemed to have been established."]

Aliens—Admission of—Alien Given Permission to Enter—Permission Improperly Given—Deportation Order Pursuant to Discovery of Impropriety—The Law of Canada.

See p. 490 (*Masella* v. *Langlais*).

Aliens—Admission of—Alien Seamen—Conditional Admission—International Convention for the Safety of Life at Sea, 1929—Effect of—Reservation to—Whether Creating Rights in Individuals—The Law of the United States of America.

See p. 589 (*Savelis et Al.* v. *Vlachos et Al.*).

Aliens—Admission of—Right of Asylum—Political Offence Involving Murder—Request for Extradition—Whether Extradition Can be Refused—The Law of Germany.

See p. 520 (*Extradition of Greek National* (*Germany*) *Case*).

II.—Position of Aliens

i.—Subjection to Territorial Sovereignty of Receiving State

Aliens—Position of—Liability to Military Service—Military Service as Condition of Eligibility for Naturalization—Exemption from Military Service by Treaty—Consistency with Statute Making Persons Applying for Exemption Ineligible for Citizenship—Interpretation of Treaty Consistently with Statute—Statute as Overriding Prior Inconsistent Treaty—The Law of the United States of America.

BALLESTER *v.* UNITED STATES.

United States, District Court, District of Puerto Rico. March 26, 1954.

Court of Appeals, First Circuit. March 22, 1955.

THE FACTS.—Ballester, a Spanish subject, entered the United States for permanent residence at San Juan, Puerto Rico, in 1934. In 1940, he duly registered for military service under the Selective Training and Service Act of 1940, and in 1944 he was directed to report for pre-induction physical examination. At that time, he executed at the demand of his draft board a form entitled " Application by Alien for Relief from Military Service," in which he stated his understanding that the making of the application would debar him from becoming a citizen of the United States.

Ballester filed an application for naturalization in 1952. He relied in so doing on *Moser* v. *United States*, 340 U.S. 910 (1951)[1], dealing with a similar claim to exemption from military service by an individual whom the Supreme Court held had been misled as to the effect of his application.

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[1] See *Annual Digest*, 1949, Case No. 78.

Held (by the District Court): that the petition for naturalization must be denied. Ballester had, unlike Moser, signed the application for exemption from military service with complete knowledge and understanding of what he was doing. [Report: 119 F. Supp. 629.]

The petitioner appealed.

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. The provision of United States law debarring from citizenship an alien who has applied for exemption from military service is not in conflict with the provision of the Treaty of Friendship and General Relations between the United States and Spain of 1902, exempting the citizens or subjects of each of the parties from compulsory military service in the territories of the other. In any event a later statute would prevail over the treaty provision. The petitioner was fully aware of the consequences of his application for exemption. He remained ineligible for naturalization under the Immigration and Nationality Act of 1952.

The Court said: " A Treaty of Friendship and General Relations between the United States and Spain, signed at Madrid July 3, 1902, and proclaimed April 20, 1903, 33 Stat. 2105, provides in part as follows:

> 'Article II.
>
> 'There shall be a full, entire and reciprocal liberty of commerce and navigation between the citizens and subjects of the two High Contracting Parties, who shall have reciprocally the right, on conforming to the laws of the country, to enter, travel and reside in all parts of their respective territories, saving always the right of expulsion which each Government reserves to itself, and they shall enjoy in this respect, for the protection of their persons and their property, the same treatment and the same rights as the citizens or subjects of the country or the citizens or subjects of the most favored Nation.
>
> 'They can freely exercise their industry or their business, as well wholesale as retail, without being subjected as to their persons or their property, to any taxes, general or local, imposts or conditions whatsoever, other or more onerous than those which are imposed or may be imposed upon the citizens or subjects of the country or the citizens or subjects of the most favored Nation.
>
> 'It is, however, understood that these provisions are not intended to annul or prevent, or constitute any exception from the laws, ordinances and special regulations respecting taxation, commerce, health, police, and public security, in force or hereafter made in the respective countries and applying to foreigners in general.'
>
> 'Article V.
>
> 'The citizens or subjects of each of the High Contracting Parties shall be exempt in the territories of the other from all compulsory military service, by land or sea, and from all pecuniary contributions in lieu of such, as well as from all obligatory official functions whatsoever. . . .'

" The treaty exemption in Art. V is from ' compulsory military service,' which leaves open and unprescribed the procedure by which a person called to service may manifest his unwillingness to serve—if such is his state of mind—and thus obtain his release from any military obligation. As applied to a given individual, Art. V is not ' automatic ' in the sense that the alien, if he is unwilling to render military service, may simply ignore a summons to service, or ignore the procedure, set up or authorized by legislative enactment, whereby the alien may claim his exemption from compulsory military service by making a declaration to the proper authorities of his unwillingness to serve.

" Therefore, entirely consistent with the exemption contained in Art. V of the treaty, § 3(a) of the Selective Training and Service Act of 1940, 55 Stat. 845, provided as follows:

> ' Sec. 3. (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of twenty and forty-five at the time fixed for his registration, or who attains the age of twenty after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States: *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: *Provided further*, That no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service unless he is acceptable to the land or naval forces.'

This statutory provision, it may be noted, enabled any neutral alien who was unwilling to render military service to the United States to be relieved from this liability, whether or not the alien was also covered by a treaty exemption as in Art. V of the Treaty with Spain. Of course, this was a matter within the discretion of Congress; and the fact that the statutory provision for exemption was broader than that required by treaty in no way derogates from the conclusion that the Spanish alien's right under Art. V of the treaty was fully protected under § 3(a), as amended, of the Selective Training and Service Act. The clause in the first proviso of § 3(a), that any person who made application to be relieved from such military service, in accordance with regulations prescribed by the President, ' shall thereafter be debarred from becoming a citizen of the United States ', is not in conflict with Art. V of the treaty, for nothing in Art. V, and indeed nothing in the whole treaty, purports to impose any limitation upon the power of the respective countries to formulate the conditions of eligibility for naturalization. As the Supreme Court stated in reference to a similar provision of the treaty with Switzerland:

> ' That the statute unquestionably imposed a condition on exemption not found in the Treaty does not mean they are inconsistent. Not doubting that a treaty may be modified by a subsequent act of Congress, it is not necessary to invoke such authority here, for we find in this congressionally imposed limitation on citizenship nothing inconsistent with the purposes and subject matter of the Treaty. The Treaty makes no provision respecting citizenship.' *Moser* v. *United States*, 1951, 341 U.S. 41, 45, 71 S.Ct. 553, 555, 95 L.Ed. 729.[1]

" It is suggested by appellant that the bar to naturalization contained in the proviso of § 3(a) was inconsistent with certain other provisions of the treaty with Spain. We do not think that this was so. But we do not stop to labor the point, for even if it were so, it is perfectly well-settled that provisions of a subsequent Act of Congress may, for purposes of domestic law, supersede inconsistent provisions of a prior treaty with a foreign country. See *Head Money Cases* (*Edye* v. *Robertson*), 1884, 112 U.S. 580, 597–599, 5 S.Ct. 247, 28 L.Ed. 798; *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 1934, 291 U.S. 138, 160, 54 S.Ct. 361, 78 L.Ed. 695[2]; *Clark* v. *Allen*, 1947, 331 U.S. 503, 508–509, 67 S.Ct. 1431, 91 L.Ed. 1633.[3]

" Appellant duly registered under the Selective Training and Service Act of 1940. On October 21, 1944, he was directed by his draft board to report for pre-induction physical examination.

"The administrative regulation which had been issued under authority of § 3(a) of the Act required a neutral alien, seeking to be relieved from military service, to execute DSS Form 301 (Application by Alien for Relief from Military Service), which application form read in part as follows:

> ' I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the Act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States. I have not filed a declaration of intention to become a citizen of the United States.'

[After outlining the facts of the present case and stating that the petitioner's main reliance was on *Moser* v. *United States*, the Court described the facts in that case. The Court then went on to say of the *Moser* Case:] " The Supreme Court held as a matter of law that § 3(a) of the Act ' imposed a valid condition on the claim of a neutral alien for exemption; petitioner had a choice of exemption and no citizenship, or no exemption and citizenship.' 341 U.S. at page 46, 71 S.Ct. at page 556. It could hardly be suggested that this alternative was an unconscionable one, applicable as it was not to aliens who were only temporary sojourners in the United States, but only to resident aliens 'who sought the advantages of our life and the protection of our flag'. *McGrath* v. *Kristensen*, 1950, 340 U.S. 162, 175–176, 71 S.Ct. 224, 232, 95 L.Ed. 173.[1] But the Supreme Court read into § 3(a) the implication that the bar to naturalization would not operate until the alien had made an intelligent choice between the alternatives presented, well knowing the legal effect of what he did. For that reason, in order not to 'entrap' the alien, the Court held that he had not waived his right to apply for future naturalization by having executed the Revised DSS Form 301.

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[1] *Annual Digest*, 1949, p. 244.]
[2] *Ibid.*, 1933–1934, p. 3.]
[3] *Ibid.*, 1947, p. 171.]

'Petitioner did not knowingly and intentionally waive his rights to citizenship. In fact, because of the misleading circumstances of this case he never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the case, we think that to bar petitioner, nothing else than an intelligent waiver is required by elementary fairness.' 341 U.S. at page 47, 71 S.Ct. at page 556.

"The case at bar presents a significantly different picture from that in *Moser* v. *United States*. No misrepresentations were made to Francisco Ballester Pons; he was never deceived as to the legal effect of applying for relief from military duty by executing DSS Form 301. In asking to be so relieved, his only purpose, as his testimony showed was to avoid possible penalties under the Spanish law for entering the military service of the United States when he was still under a conditional commitment to military service in Spain in his capacity as a member of the Spanish Army Reserve. The district court found [119 F.Supp. 631], upon ample evidence, that when appellant came to execute DSS Form 301, he was 'perfectly aware of the fact that by signing the form he was forever debarring himself from American citizenship.' The fact that this was the only way he could avoid the obligation to report for induction did not constitute such 'duress' as would negative '"an intelligent election"' on his part; it was of the essence of the alternatives lawfully presented to him that he 'had a choice of exemption and no citizenship, or no exemption and citizenship.' We shall say no more in elaboration upon the inapplicability of *Moser* v. *United States* to the case at bar, since the point has been so fully and convincingly discussed in the opinion of the district court. 119 F.Supp. 629.

"When Congress by amendment in 1941 of § 3(a) of the Selective Training and Service Act provided that 'any person who makes such application shall thereafter be debarred from becoming a citizen of the United States', 55 Stat. 845, it omitted to make a corresponding amendment of the substantive provisions of the Nationality Act of 1940, 54 Stat. 1137, prescribing the conditions of eligibility for naturalization. And § 3(a), along with the other sections of the Selective Training and Service Act of 1940, as amended, became inoperative and ceased to apply on the indicated date in 1947, as provided in the Act of June 29, 1946, 60 Stat. 342. But meanwhile, on October 29, 1945, 59 Stat. 551, Congress had amended § 28(c) of the Immigration Act of 1924, 43 Stat. 168, so as to include within the term ' " ineligible to citizenship " ' persons debarred from citizenship under § 3(a) of the Selective Training and Service Act of 1940, as amended; and it has uniformly been held that in so doing Congress intended to continue in effect the disqualification to naturalization in § 3(a) of the Selective Training and Service Act. See *Benzian* v. *Godwin*, 2 Cir., 1948, 168 F.2d 952, 956–957, certiorari denied 1948, 335 U.S. 886, 69 S.Ct. 235, 93 L.Ed. 425.[1]

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[1] *International Law Reports*, 1950, p. 234.]

" If the matter were otherwise doubtful, it was set at rest by provisions of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C.A. § 1101 et seq., which became effective December 24, 1952, 66 Stat. 281, 18 U.S.C.A. § 1101 note. Appellant had filed his petition for naturalization on the preceding December 16, 1952, on which date he was ineligible to citizenship by virtue of the amended § 28(c) of the Immigration Act of 1924, as above stated. The Immigration and Nationality Act of 1952 repealed the Immigration Act of 1924, 66 Stat. 279, § 403(b), 8 U.S.C.A. § 1101 note. But § 405(b) of the Immigration and Nationality Act, 66 Stat. 280, 8 U.S.C.A. § 1101 note, provides that any petition for naturalization pending on the effective date of the Act shall be determined in accordance with the requirements of law in effect when such petition was filed, except as otherwise specifically provided in Title III. Turning then to Title III of the Act, § 315 thereunder, captioned 'Alien Relieved from Training and Service in the Armed Forces of the United States because of Alienage Barred from Citizenship', provides as follows, 66 Stat. 242, 8 U.S.C.A. § 1426:

> ' Sec. 315. (a) Notwithstanding the provisions of section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.
>
> ' (b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.'

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[1] *Annual Digest*, 1948, p. 218.]

This section would seem clearly enough to constitute an absolute bar to citizenship, even for a person who had petitioned for naturalization prior to the effective date of the Act, and regardless of whether exemption from military service was sought and obtained under the regulations prescribed by the President pursuant to § 3(a) of the Selective Training and Service Act, as amended, or by virtue of an exemption contained in a treaty. In this respect the bar of § 315(a) of the Immigration and Nationality Act is wider than that of § 3(a) of the Selective Training and Service Act, and would have precluded appellant even if he had not executed DSS Form 301 in claiming the exemption. It is true that § 357 of the Immigration and Nationality Act provides, 66 Stat. 272, that nothing in Title III ' shall be applied in contravention of the provisions of any treaty or convention to which the United States is a party and which has been ratified by the Senate upon the effective date of this title '. 8 U.S.C.A. § 1489. But as pointed out earlier in this opinion, excluding from eligibility to citizenship resident aliens who have chosen not to render military service to the United States is not inconsistent with the treaty provisions. Furthermore, in this connection the government calls our attention to § 101(a) (19) of the Immigration and Nationality Act, 66 Stat. 169, which provides as follows:

> ' (19) The term "ineligible to citizenship" when used in reference to any individual, means *notwithstanding the provisions of any treaty relating to military service*, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.' 8 U.S.C.A. § 1101(a) (19). [Italics added.] "

[Reports: 220 F.2d 399; *certiorari* denied, 350 U.S. 830, 100 L.Ed. 741, 76 Sup. Ct. 62 (1955).]

NOTE.—In *Schenkel* v. *Landon, District Director, Immigration and Naturalization Service*, 133 F. Supp. 305 (D. Mass. 1955), it was *held* that a Swiss national who had applied for exemption from military service was not eligible for admission to the United States. The petitioner's contention that the President had been deprived of the power to promulgate regulations relieving aliens from military service by the amendment in 1951 of the Selective Service Act of 1948 was rejected. The petition of another Swiss national for naturalization was rejected in *Petition of Oster; Oster* v. *United States Department of Justice, Immigration and Naturalization Service*, 135 Cal. App. 2d 769, 287 P.2d 859 (Court of Appeal, Fourth District, 1955), on the ground that he was aware of the consequences of his application for exemption from military service.

Aliens—Position of—Status of Refugees Within Meaning of Refugees Convention of July 28, 1951—Whether Person of " Indeterminate Nationality and of Polish Origin " Qualifies as a Refugee —The Law of France.

Re KLEIMANN.

France, War Damage Commission of the Seine Department.
July 8, 1955.

THE FACTS.—The claim of the applicant, a Polish refugee, to compensation for the loss of property looted from his residence in Paris on June 6, 1944, was rejected by the competent French Ministry on the grounds that he had failed to produce a certificate of the French Office for the Protection of Refugees and Stateless Persons and that the Refugee Conventions of October 28, 1933, and February 10, 1938, were not applicable to refugees of Polish origin. He appealed against the dismissal of his claim and contended that he was in possession of a police certificate issued on August 23, 1940, describing him as a person " of indeterminate nationality and of Polish origin ", and that he was entitled to the protection of the Convention relating to the Status of Refugees of July 28, 1951. That Convention defines a refugee as any person " who, not having a nationality, as a result of events occurring before January 1, 1951, is outside the country of his former habitual residence as a result of such events ", and by virtue of Article 12 of that Convention his personal status was governed by the law of the country of his domicile or residence.

Held: that as a Polish refugee the applicant was entitled to invoke the protection of the Convention of July 28, 1951, and that he was therefore entitled to compensation.

The Court said: " The war damage claim submitted by K., whose furniture at No. 11, rue des Recollets, Paris, was looted on June 6, 1944, was rejected on the ground that he had failed to produce a certificate of the French Office for the Protection of Refugees and Stateless Persons to the effect that he was entitled to rely on one or other of the Geneva Conventions of October 28, 1933, or February 10, 1938. K. is not, in fact, entitled to the benefit of the provisions of these Conventions. The first Convention applies to Russian, Armenian and similar refugees and the second to refugees from Germany. On the other hand, the documents annexed to the proceedings, and in particular the identity card issued by the police prefecture on August 23, 1940, show that K. was, prior to this event, ' of indeterminate nationality and of Polish origin '; and the certificate issued by the French Office for the Protection of Refugees and Stateless Persons on May 20, 1955, shows that he was ' a stateless person of Polish origin ' before his naturalization in

France in 1947. The Convention of July 28, 1951, relating to the Status of Refugees provides in Article 1 that the term 'refugee' applies to any person who, not having a nationality as a result of events occurring before January 1, 1951, is outside the country of his former habitual residence as a result of such events. It provides in Article 12 that the personal status of all refugees shall be governed by the law of the country of their domicile or residence. K. thus satisfies the factual requirements of the Convention of 1951 enabling him to claim its application and the benefit of the Law relating to war damage."

[Report: *Gazette du Palais*, October 19–21, 1955.]

Aliens—Position of—Exercise of a Profession—Admission as Barrister—Ability to Take Oath of Allegiance—Nature of Allegiance Owed by Alien.

In re SCHOLER.

New Zealand, Wellington Supreme Court. October 3, 1955.

(McGregor J.)

THE FACTS.—In 1951 Scholer, a Dutch national, went to New Zealand where he resided from then on, without, however, becoming naturalized as a British subject. He applied to be admitted as a barrister in New Zealand, and his application was opposed on the basis that an unnaturalized alien is not "a fit and proper person" to be admitted as a barrister.

Held: that the applicant, being an alien, was not "a fit and proper person" to be admitted as a barrister.

The Court said: "There is no question that the applicant is both duly qualified by examination and of good character; but the question is whether, being an unnaturalized alien, he is 'a fit and proper person to be admitted' as required by s. 6 of the Law Practitioners Act, 1931.

"The applicant is of Dutch nationality. He served in the former Netherlands East Indies for more than twenty-five years as a member of the judiciary, and subsequently as a legal adviser to a State department; and, later, he practised privately in Holland. He came to New Zealand in 1951 and has resided in this country since that date; but he has not, and, as I understand the position, does not intend to, become a naturalized British subject.

"It is clear that the onus is on the applicant to satisfy the Court that he is a fit and proper person to be admitted: *In re Manilal Maganlal, Doctor* ([1921] N.Z.L.R. 1059; [1929] G.L.R. 598). It was held in *In re Heyting* ([1928] N.Z.L.R. 233; [1928] G.L.R. 174), that an alien was not entitled to be admitted as a solicitor. As I read the judgment of the Court in that case, delivered by Sir Charles Skerrett C.J., the following reasons can be deduced:

" (1) That the New Zealand Court occupies a similar position in New Zealand to the High Court of Justice in England, and is largely guided by the principles and conventions of that Court.

" (2) That the Law Practitioners Act, 1931, did not intend to destroy or remove any common-law disability relating to admission as practitioners existing at the date of the constitution of the Colony.

" (3) That the disability of an alien to be admitted as a solicitor was recognized in England by long continued usage. As is stated, from Lord Coke's time and for some 300 years afterwards, there is no record of an alien being admitted as a solicitor. Reliance was placed upon a statement of Lord Coke in *Coke on Littleton*, 128 (a): "Fems ne poient estre attorneyes . . . ne nul que n'est a le foy le roy".

" (4) Every person before he is admitted as a solicitor is required to take the oath of allegiance. This requirement involves the assumption that the applicant must be a British subject.

" (5) There are provisions in the Act for admission of persons admitted as solicitors in other parts of the British Dominions, and no such provisions for the recognition of admitted practitioners in foreign courts.

" It is convenient to consider to what extent these reasons are applicable to the admission of barristers. In regard to the qualifications for admission to the Bar in England it appears that the first Act of the reign of Elizabeth I (1 Eliz. I, c. 1) ordered that the holders of certain great offices of State, Bishops, Judges, and ' every other person having your Highness Fee or Wages within this realm ' should take corporal oath of allegiance. By 5 Eliz. I, c. 1, this provision was extended to

> ' all manner of Person or Persons that have taken or hereafter shall take any Degree of Learning in or at the Common Laws of this realm as well utter Barristers as Benchers Readers Ancients in any House or Houses of Court.'

By a subsequent Act (1 Jac. I, c. 6), the requirement was extended to include students as well as barristers:

> ' All your Highness subjects in the Inns of Court or that thereafter shall be admitted thereto . . . in Their open Halls.'

Except for the period of the Commonwealth, similar requirements continued by virtue of various orders and statutes (*e.g.*, Orders in Council, 1660 and 1663, and 1 Will. & Mar., c. 8) until 1868. In that year, the Promissory Oaths Act, 1868 (31 & 32 Vict., c. 72) not only repealed the oath so far as it affected barristers, but practically forbade them to be sworn:

> ' No person shall be required *or authorised* to take the oath of allegiance

except the persons required to take the oath of allegiance by this Act [and certain other recited Acts].'

Subsequently, the Judges held a consultation to consider the point, and formally decided that barristers were no longer to take the oath of allegiance upon call.

" From this summary, it appears that, in England, barristers, from the beginning of the reign of Elizabeth I and until 1868, were required to take an oath of allegiance. Since then, such requirement has been abolished; and likewise in New Zealand the Law Practitioners Act, 1931, and its amendments do not require barristers to take an oath of allegiance.

" In England, at the present time, an alien is not eligible for admission as a student or for call to the Bar unless there are special reasons, and the Benchers of the Inn concerned pass a resolution to consider the proposed admission or call: 3 *Halsbury's Laws of England* 3rd ed., p. 6, para. 7, and *Consolidated Regulations of the Four Inns of Court* (June 1952). These regulations are a consolidation of earlier regulations, and the general ineligibility of aliens was contained in such earlier regulations. But it does not seem that there is any common-law disability in respect of call attaching to an alien; and, in England, the matter is one of discretion provided special reasons can be substantiated. In most, if not all, Australian States at the present time, aliens are not eligible for admission as barristers by virtue of various statutes or regulations, *e.g.*, Western Australia: Legal Practitioners Act, 1893, Part III, s. 14; South Australia: Supreme Court Rules, 1936 R. 10 (i); New South Wales: Rules of Court (January 1, 1942).

" It seems to me that this declared ineligibility of aliens is not derived from any inability on their part to take an oath of allegiance. The capacity of an alien to take an oath of allegiance was considered by the High Court of Australia in *Kahn* v. *Board of Examiners* (*Vict.*) ((1939) 62 C.L.R. 422). Sir John Latham C.J. was not prepared to hold that an alien cannot take the oath of allegiance, while Rich J., as then advised, inclined to the view that an alien within the realm may take such oath. But, to my mind, the question of allegiance itself, rather than the ability to take an oath of allegiance is of importance in considering whether an alien is ' a fit and proper person ' for admission as a barrister. An interesting discussion on citizenship and allegiance is contained in an article in (1902) 18 *Law Quarterly Review*, p. 49, by no less an authority than Sir John Salmond. It is there recognized that an alien within the realm owes allegiance to the Crown. But, although this is so, the allegiance an alien owes is essentially different from the allegiance owed by a British subject. Sir John Salmond says:

> ' In some points the position of aliens, instead of being inferior to that of subjects, is superior to it. The reason is that aliens, even though

resident within the territory, are partially exempt from the local jurisdiction. In most respects, indeed, the German who comes to England, subjects himself to English law, and submits to the jurisdiction of the English courts and legislature. Yet his submission is not so full and absolute as that of the natural subject. *It is qualified by the allegiance which he still owes to his own sovereign.*" (*Ibid.*, p. 61.)

" Later, Sir John Salmond adverts to the opinion that the allegiance of an alien is owed only within the realm itself, and ' even for acts done by him in British territory he is no traitor, if he come openly with force of arms and in the way of lawful war '. The first portion of this proposition requires reconsideration in the light of the decision in *Joyce* v. *Director of Public Prosecutions* ([1946] A.C. 347; [1946] 1 All E.R. 186[1]). In that decision, it is explained that the duty of allegiance is founded in the protection ' a foreigner enjoyeth for his person, his family, or effects ': *Foster's Crown Cases*, 3rd ed., 183. To owe allegiance or to be faithful to the trust is the counterpart of the duty to protect. Lord Jowett L.C. said:

> ' In consequence, by virtue of the possession of a British passport, an alien was enabled to obtain in a foreign country the protection extended to British subjects . . . As one owing allegiance to the King he sought and obtained the protection of the King for himself while abroad.' (*Ibid.*, p. 370.)

The duty of allegiance, therefore, remained while the alien was availing himself abroad of the protection of a British passport.

" It seems, therefore, that the allegiance owed by an alien is essentially different from that owed by a British subject in that, first, such allegiance is not exclusive, but may be coincident in point of time with the allegiance owed to the alien's own sovereign; and, secondly, the duty of allegiance ceases when the protection of the Crown is no longer sought or obtained.

" I, therefore, turn to consider the question whether this limited form of allegiance detracts from the fitness of such a person to be admitted as a barrister. I have already referred to the statement of Lord Coke in his *Coke on Littleton*: ' Fems ne poient estre attorneyes . . . ne nul que n'est a le foy le roy '. It is true that the reference is to attorneys; and Sir Charles Skerrett C.J., in *In re Heyting* ([1928] N.Z.L.R. 233, 238; [1928] G.L.R. 174, 176) accepts the quotation as applicable to solicitors. But, although a barrister does not come within this meaning of ' attorney ', as used in the quotation to which I have referred and, although an oath of allegiance is not required by the Law Practitioners Act, 1931, it seems to me that full fidelity is as essential an attribute of fitness of a barrister.

" To secure due administration of justice has been described as ' the noblest prerogative of the Sovereign '. Her Majesty the Queen has promised as part of her Coronation Oath to the utmost of her power to ' cause Law and Justice in Mercy to be executed in all

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[1] [*Annual Digest*, 1948, Case No. 31.]

Her Judgments '. The Judges of the Supreme Court are appointed by the Governor-General in the name and on behalf of Her Majesty: Judicature Amendment Act, 1935, s. 2. A barrister of the Supreme Court of not less than seven years' standing is eligible for appointment as a Judge. A barrister has valuable rights and privileges. Likewise, he has obligations: Law Practitioners Act, 1931, s. 7. He occupies an essential place in the administration of British justice. It is recognized that the holding of certain offices is inconsistent with practice of a barrister: 3 *Halsbury's Laws of England*, 3rd ed., p. 33, para. 45. Can it be said that such responsibilities and obligations can be undertaken by a person who does not owe full and complete allegiance to the Crown ?

" Before the passing of the New South Wales disqualifying rules, the Full Court of New South Wales in *Ex parte Korten* ((1941) 59 N.S.W.W.N. 29) refused an application by an unnaturalized alien for admission to the Bar. Halse Rogers J., delivering the judgment of the Court, said:

> ' I do not think it could be argued that an alien has a *right* to be admitted to the Bar. The exercise of discretion in his favour depends upon the view the Court takes as to whether he falls within the category of a fit and proper person. Now it is clear that the disqualification of aliens in some other States, and the impending disqualification in this State already referred to, must be based on the view that only British subjects are fit and proper persons for admission. This seems a cogent reason against our making any order for the admission of the applicant.'

" It appears that the matter is one of discretion and depends upon the view as to whether the Court considers the applicant is a fit and proper person. In the view I take on the question of allegiance, in view of the fact that Australian States, and the Inns of Court (except in special circumstances) have recognized that, in general, aliens are not fit and proper persons for admission as barristers, in view of the fact that there are provisions in the Act for admission of persons admitted as barristers in any superior or Supreme Court of any part of the British Dominion and no such provision for the admission of admitted practitioners of any foreign Court and no evidence that the rules of the Bar of the country of which the alien is a subject permit the call to the Bar of British subjects (Inns of Court regulations), I am not satisfied by the applicant in the present case that he is ' a fit and proper person to be admitted '. I, therefore, refuse the application."

[Report: [1955] N.Z.L.R. 1190.]

Aliens—Position of—Taxation of Foreign Corporations—The Law of Argentina.

FOX FILM DE LA ARGENTINA *v.* NACIÓN ARGENTINA.

Argentina, Supreme Court. June 23, 1955.

THE FACTS.—The Argentine Income Tax Law establishes a conclusive presumption that 50 per cent. of the royalties earned by foreign motion-picture enterprises from the exploitation of their films in the country constitutes net income from Argentine sources for the purpose of taxation. This is an exception to the general principles of the Law which, in the determination of the tax due, permits deduction of expenses necessary to earning or preserving income. Fox Film de la Argentina, sole agent for the films of Twentieth Century Fox, Inc., demanded a refund of the tax paid on the ground that the Law contained a discrimination against foreign enterprises, which alone are subject to an arbitrary determination of the tax due, and that, in consequence, the Law violated the principle of equality contained in the national Constitution. At the trial the Court of first instance held that the Law was unconstitutional. The Constitution laid down that " no one may be excluded from what is granted to others in identical circumstances, and that the categories of taxpayers may not be established arbitrarily or with a hostile purpose toward specific persons or classes." On appeal to the National Chamber of Appeals on Civil Matters, the decision of the trial Court was overruled.

On further appeal to the Supreme Court,

Held: that the judgment of the Court of Appeal must be sustained. The special category created by the Income Tax Law was based not on the fact that " the companies are foreign, but on the fact that the manner or form of conducting their activities does not permit the Treasury to make the same analysis of their business as in the case of Argentine companies which produce and exhibit films. . . . In effect, to show the extent and amount of the true income from national sources, the State would be compelled to appoint representatives in foreign countries to audit the books of film companies which exhibit their products in Argentina. . . . This justifies the adoption of a different system from that applied to national producers and exhibitors, which in no way involves clearly arbitrary or hostile action."

[Report: *Fallos de la Corte Suprema de Justicia de la Nación*, vol. 232, p. 52.]

NOTE.—Although the above decision bears primarily upon the interpretation of an Argentinian statute, it has been reported here as bearing generally upon the question of taxation of foreign corporations.

Aliens—Position of—Political Refugees—Compliance with Law of State of Refuge—Right of Asylum—The Law of Argentina.

Re MARTINEZ VASQUEZ *ET AL.*

Argentina, Supreme Court. July 14, 1955.

THE FACTS.—The petitioners, political refugees, who had been held on a charge of violating provisions of Law No. 14.062 declaring the country to be in a state of internal war,[1] asked the Supreme Court to grant their petition for *habeas corpus* which had been denied by the Court of first instance. On behalf of the petitioners it was contended that Law No. 14.062 was unconstitutional and that it had been applied to the petitioners in disregard of the principle of the right of asylum.

Held: that the petition for *habeas corpus* must be denied. Political refugees were subject to the laws of the asylum State. The Supreme Court upheld the judgment under appeal on the basis of the report on the case presented to the Court by the Procurator-General.

The Procurator-General pointed out that the constitutionality of the Law had been sustained in earlier decisions of the Supreme Court,[2] and stated with regard to the plea to the right of asylum that: " The circumstances of the case suffice to show that there is no merit in this plea. The principle of inviolability of asylum granted to persons persecuted for political offences is an international norm which guarantees that they shall not be surrendered to their Government. But this principle cannot be interpreted as exempting political refugees from the authority of the laws of the State of asylum. That the status of refugee cannot confer greater rights on an individual than those enjoyed by the citizens of the state of asylum seems too elementary for discussion. Law No. 14.062, which has been put into effect in the Republic for reasons of public security, authorizes the Executive Branch to take the action which the petitioners challenge as being inapplicable to them in their condition as political refugees. The request for political asylum presupposes that the refugees will submit to the juridical order prevailing in the State in which asylum is sought. It is illogical to argue that political fugitives should be exempted from the operation of the laws which make up that juridical order."

[Report: *Fallos de la Corte Suprema*, Vol. 232, p. 247.]

Aliens—Treatment of—Liability to Military Service—Nationals of Neutral States.

See p. 1012 (*United States* v. *Bussoz*).

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[1] *Anales de Legislación Argentina*, XI–A, p. 167.

[2] See, *e.g.*, *Re Attias*: *Fallos de la Corte Suprema*, vol. 223, p. 206.

Aliens—Position of—Liability to Requisitioning—The Law of France.

See p. 623 (*C.* v. *Intendant Militaire de la 3e Région*).

iii.—Treatment by and Responsibilities of the Receiving State

[*See also* PART V, STATE RESPONSIBILITY.]

Aliens—Treatment of—Right of Non-resident Alien to Inherit Real Property from Resident of State Concerned—Distribution of Proceeds of Sale to Residents of " Iron Curtain " Nations—Requirement that Payment Be Made Only If It Will Be Received by Payee—The Law of the United States of America.

PILCHER *v.* DEZSO *ET AL.*

United States, Supreme Court of Alabama. January 13, 1955.

THE FACTS.—This was a suit in equity by residents of Hungary who were the next of kin of the decedent, Margaret Pilcher, to set aside a deed executed by her husband and executor to the respondent, Mary Pilcher, and to have the real estate embraced in the deed sold for division amongst the next of kin as remaindermen of the estate. The Court overruled a demurrer to the bill filed by Mary Pilcher. The respondent appealed. She maintained, *inter alia*, that " it affirmatively appears from the bill that the complainants are enemy aliens of the United States of America and as such have no legal or equitable standing in this court and no legal or equitable right to bring this suit." On appeal,

Held: that the decree of the Court below must be affirmed. An alien, resident or non-resident, may take and hold real property in the State of Alabama, and residents of Hungary accordingly had standing to bring this action. However, the proceeds of a sale of the land would, should the question arise, in all probability not be permitted to be distributed to the Hungarian next of kin in view of the fact that the funds might assist a Government engaged in a " cold war " with the United States or might be confiscated by the Government of Hungary.

The Court said: " It is the theory of the appellant that the bill shows on its face that since the appellees, who filed the bill, are residents of the country of Hungary and, therefore, reside in a satellite state of the Soviet Group, the complainants should not be allowed to prosecute their suit in the courts of Alabama. In § 1, Title 47, Code of 1940, it is expressly provided that an alien, resident or nonresident, may take and hold real property in this state. It is insisted, however, that since the complainants are residents of a country engaged in what is termed a ' cold war ' with this country, the statute does not apply and the present suit should be abated. We are entirely in sympathy with the idea that property located in this state should not be transferred to residents of the country of Hungary so as to aid Hungary in its efforts with the other Soviet countries to injure this country in its economic or material resources and to overthrow the government of the United States through the teachings of the International Communist Party. Our cases hold that the courts of this state will not allow an alien enemy to obtain a judgment in the courts of this state because he thereby adds to the resources of the power of which he is a subject. *Lutz* v. *Van Heynigen Brokerage Co.*, 202 Ala. 234, 80 So. 72.

" There is a difference between allowing the appellees to attempt to establish their title to land in this state and allowing the proceeds of land sold for division to be distributed to residents of Hungary. It is the distribution of such proceeds which should be safeguarded.

" We do not feel that the allegations of the bill as against demurrer show any reason for abatement of the suit. The property of distribution of proceeds of the sale of the land, if any, should be determined when the case reaches that stage, if it ever does. There may be the danger that if distributive shares of the estate should be turned over to residents of Hungary the government of Hungary would confiscate the same and not only would the intention of the testatrix be thwarted but the government of Hungary thereby aided.

" The State of Pennsylvania like this state has no statute covering the present situation. But in Pennsylvania the courts have impounded funds of aliens behind the Iron Curtain without benefit of legislation on the theory that it is the duty of the court to see to it that money in the hands of the court reaches the true owner and is not diverted by his government into its own treasury. The Pennsylvania rule dates back to the days of Hitler and is presently used in cases of legacies or distributive shares belonging to residents of Russia and its satellites. In *Re Stede's Estate*, 38 Pa.Dist. & Co.R. 209, the court directed the funds of an estate to be paid to the Clerk of the Orphans' Court for the benefit of the legatees of an estate, subject to the further orders of the court, saying that ' the people unfortunate enough to be involved are without the right to have or hold money except at the pleasure of the autocrat and all the assets of the German people are in a state of semiconfiscation or impressment for war purposes and this whether the owners of the assets are willing or not. . . . Indeed if notice were mailed to these legatees apprising them of this embarrassment of riches, there is no certainty that the communication would not be opened by some authority and pressure put upon them to acquire the funds for the purpose of confiscation.' The court goes on to say that ' If nobody else is going to protect them, the law of Pennsylvania will.' Later the principle of *In re Stede's Estate, supra*, was applied in *Re Zielinski's Estate*, 73 Pa.Dist. & Co.R. 81, where the decedent died in 1948 and his heirs resided in Poland.

" We understand that the practice of impounding distributive shares belonging to persons behind the Iron Curtain is now also in effect without legislation in Massachusetts, Michigan, Missouri, Nebraska and Vermont. *Southern California Law Review*, Vol. 25, No. 3, p. 313. We are not, however, aware of any decision by the courts of last resort in the foregoing states approving or disapproving the practice.

"Accordingly in the instant case the court acted correctly in overruling the demurrer and in holding that the bill did not show on its face that the suit should be abated."

(The Court then proceeded to a consideration of certain issues of the municipal law of the United States.)

[Reports: 262 Ala. 249, 78 So.2d 306.]

NOTE.—This case is typical of a considerable number of cases dealing with the right of nationals and residents of " Iron Curtain " countries to receive real or personal property by inheritance from residents of the United States. In *Re Volencki's Estate*, 35 N.J. Super. 351, 114 A.2d 26 (1955), the Mercer County Court (Probate Division) *held* that the distributive shares of residents of Hungary in the estate of the decedent should be paid into court under a statute directing such action when it appeared that the beneficiaries would not have " the benefit or use or control of the money or other property ". A similar holding in *Re Siegler's Estate* 284 App. Div. 436, 132 N.Y.S. 2d 392 (3d Dep't 1954) was based upon a regulation of the Treasury Department forbidding the transmission of checks or warrants drawn on the United States to persons residing in Hungary, because local conditions there preclude the assurance that the payee would receive such warrants or checks. A certificate to the contrary from the Hungarian Minister was not accepted. In *Hamilton National Bank* v. *Touriansky et al.*, 197 Tenn. 245, 271 S.W. 2d 1 (1954), a decedent had left 75 per cent. of his estate to residents of Russia, to be claimed within five years. The Supreme Court of Tennessee *held* that no distribution should be made to the alternate beneficiaries until the five years had run, since there was no prohibition on the transfer of funds to a private citizen in Russia. The Surrogate's Court, New York County, New York, denied a motion to take the testimony of a person in Russia with respect to the right of legatees under Soviet law to enjoy the legacies, on the ground that there had been no showing of the materiality and necessity of the testimony: *In re De Lowe's Estate*, 143 N.Y.S. 2d 270 (1955). These and related cases are discussed in Heyman, " The Nonresident Alien's Right to Succession Under the ' Iron Curtain Rule ' ", in *Northwestern University Law Review*, 52 (1957), p. 221.

In a number of jurisdictions the right of a foreign legatee or beneficiary to take property is made conditional on the existence of a reciprocal right granted by the foreign country to American legatees and beneficiaries. In *Re Gaspar's Estate*, 128 Mont. 383, 275 P. 2d 656 (1954), the Supreme Court of Montana *held* that Roumanian heirs were entitled to share in the estate of the decedent under the provisions of a statute which made the right of foreign heirs to inherit conditional on the existence of a reciprocal right to transfer property to heirs in the United States under the law of that foreign country. (*Cf. In re Spoya's Estate*, 129 Mont. 83, 282 P. 2d 452 (1955), as to the recognition of a similar reciprocal right under the law of Yugoslavia.) Under a similar statute, a District Court of Appeal of California *held* in *Re Zimmermann's Estate*, 132 Cal. App. 2d 702, 283 P. 2d 68 (1955), that a reciprocal right of inheritance existed between Germany and the United States and that German heirs were therefore entitled to inherit property left them by a resident of the United States, subject, however, to the right of the Attorney General to have the funds paid over to him under the Trading With the Enemy Act.

Aliens—Treatment of—Treaty providing for National Treatment —Franco-Spanish Treaty of 1862—Measures of Supervision Dictated by Considerations of Public Policy—The Law of France.

In re Bertrina.

France, Conseil d'Etat. March 18, 1955.

The Facts.—By virtue of the Franco-Spanish Treaty of January 7, 1862, Spanish nationals were entitled to carry on trade in France on the same conditions as French nationals, identical rights being accorded to French nationals in Spain. On the other hand, a French Decree of November 12, 1938, as subsequently amended, provided that aliens carrying on trade in France must be in possession of a special trader's permit. The appellant, a Spanish national, applied to the French Ministry of Commerce and Industry for a trader's permit to carry on the business of a plasterer. The application was refused, and the appellant now contended that by virtue of the Franco-Spanish Treaty of January 7, 1862, he was entitled to engage in trade without a permit, and that the decision of the Ministry should therefore be reversed.

Held: that the appeal must be dismissed. As the Minister of Foreign Affairs had stated that, notwithstanding the Franco-Spanish Treaty, Spanish nationals were not exempt from such control as the French Government might deem it necessary to exercise over aliens, the appellant could not claim the right to exercise the trade of a plasterer.

The Court said: " The interpretation of the Franco-Spanish Consular Convention signed at Madrid on January 7, 1862, which has been provided by the Minister of Foreign Affairs in a telegram addressed to this Court on April 9, 1954, is to the effect that ' although Spanish nationals may, by virtue of this Convention, claim the right to national treatment so far as concerns the exercise of trading activities, they cannot, for that reason, escape measures of control which the country of residence deems it necessary to take against aliens on the ground of public policy '. The provisions of the Decree of November 12, 1938, and the Law of October 8, 1940, concerning trader's permits for aliens are in the nature of measures of control taken for reasons of public policy. It follows that Bertrina cannot validly claim, in the present appeal, which asks for the reversal of the decision of the Minister of Commerce and Industry refusing him a trader's permit, that the Franco-Spanish Convention relieves him of a duty to apply for a trader's permit. The appeal must accordingly be dismissed."[1]

[Report: *Revue critique de droit international privé*, 45 (1956), p. 50.]

Aliens — Treatment of — National Treatment — Franco-Spanish Treaty of 1862—The Law of France.

See p. 606 (*In re Hurtado*).

Aliens—Treatment of—Declaration by Receiving State as Creating Obligation in Favour of National State and of Alien.

See p. 500 (*Re Rizzo and Others* (*No.* 2)).

Aliens—Treatment of—Registration of Aliens and Issue of *Cartes de résidence*—Right of Residence—Meaning of Expression " permitted to reside ".

See p. 500 (*Re Rizzo and Others* (*No.* 2)).

Aliens—Treatment of—Treaty containing Most-favoured-Nation Clause—Conflict with Municipal Law—The Law of France.

See p. 604 (*Sanzogni* v. *Caisso*).

Aliens—Treatment of—Right of Non-resident Alien to Inherit Property from Resident of State Concerned—Reciprocal Right of Inheritance—Establishment by Treaty—Applicability to Persons Resident in Territory Controlled by Unrecognized Government—Effect of Civil War on Treaties—Effect of Foreign Assets Control on Right of Alien to Inherit Property—The Law of the United States of America.

See p. 90 (*In re Nepogodin's Estate*).

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[1] *Contra: Chambre correctionnelle* of the Court of Amiens, which held in a judgment of October 22, 1954, that the provisions of the Decree of November 12, 1938, were not applicable to Spanish nationals resident in France (*Recueils Dalloz et Sirey*, 1956, *Sommaires*, p. 13).

iv.—Plea of Non-discrimination

Aliens—Position of—Non-discrimination—Position under Treaty—Workmen's Compensation Benefits—Treaty as Prevailing over Inconsistent Municipal Statute—The Law of the United States of America.

See p. 580 (*Iannone* v. *Radory Construction Corporation et Al.*).

v.—Respect for Property. Expropriation

[*See also* PART IV, JURISDICTION: A, I, TERRITORIAL.]

Aliens—Treatment of—Property of Aliens—Currency Legislation—Whether Confiscatory—Whether Given Effect in Foreign Courts if Contrary to International Law—Limits on *lex situs* and Proper Law of Contract—German Moratorium Law of 1933—Debt Payable in London Made Payable to *Konversionskasse* in Reichsmarks—Trading with the Enemy—Loan Contract Made before War—Whether Contract Abrogated by War.

In re CLAIM BY HELBERT WAGG & CO. LTD.

England, High Court of Justice (*Chancery Division*). *December* 8, 1955.

(Upjohn J.)

THE FACTS.—By a loan agreement made on December 19, 1924, between a German company (" the Company ") of the one part and an English company (" the claimant ") of the other part, the claimant agreed to create a sterling loan of £350,000 with interest at 7½ per cent. Clause 2 of the agreement provided that the principal and interest should be paid in sterling in London free from all German taxes, and clause 5 provided that the loan should be secured by a specific mortgage upon certain coalfields in Germany belonging to the company. Clause 12 provided: " This agreement shall be construed in accordance with German law. An English and German text have been drawn up, but the parties agree that in the event of any conflict between the English and German texts, the English text shall prevail . . ."

The loan was duly made and the Company discharged its obligations thereunder until 1933, when the German Moratorium Law of June 30 was passed in an attempt to solve Germany's economic position. That law provided that a *Konversionskasse* for foreign debts would be created, that debts payable in foreign currencies must be converted into Reichsmarks and paid into the *Konversionskasse*, the debtor's liability to the creditor being discharged thereby. The Company duly paid Reichsmarks into the *Konversionskasse* at the appropriate rate of exchange, and continued to do so after the outbreak of war between Great Britain and Germany in 1939, and by 1945 the company had paid the full equivalent in Reichsmarks of the whole loan outstanding and interest thereon.

On September 3, 1939, there was outstanding under the loan agreement £174,142 in respect of capital, and the claimant claimed under the provisions of the Distribution of German Enemy Property Act, 1949, and the Orders made thereunder, to rank as creditor in respect of that amount and interest thereon.

The Administrator of German enemy property, in rejecting the claim, held that the contract was governed by German law and that the company's payments to the *Konversionskasse* had the effect under the municipal law of Germany then in force, namely, the Moratorium Law of 1933, of discharging all liabilities of the Company in respect of the loan both as to capital and interest. The claimant appealed.

Held: that the appeal must be dismissed.

(1) By virtue of clause 12 of the agreement, German law, as it existed from time to time, was the proper law of the contract.

(2) The question whether the court would recognize the validity of the Moratorium Law depended on the proper law of the contract and not on the situs of the debt.

(3) In any event the locality of the debt was in Germany, since that was the only place where the debtor resided, although the debt was payable under the contract in London.

(4) English courts recognize that in general every State has power to legislate in respect of movables situate within it and contracts governed by its law unless (*inter alia*) the legislation aims at confiscating the property of particular individuals or classes of individuals.

(5) Effect must be given to foreign exchange control where the law of the foreign State is the proper law of the contract or the movable is situate within its territorial jurisdiction, provided the law was passed with the genuine intention of protecting its economy in times of national stress, although for that purpose it regulated (*inter alia*) the rights of foreign creditors; this Moratorium Law was such foreign exchange control legislation which must be recognized, the proper law of the contract being German.

(6) On the outbreak of war the contract, though suspended, was not abrogated, as it was wholly executed on the part of the claimants, and involved no intercourse between subjects and alien enemies or increase of enemy resources.

(7) Under the terms of the Distribution of German Enemy Property (No. 2) Order, 1951, the decision of the Administrator as to the effect of German law on the provisions of the contract was a question of fact and was final, so that the claimants could not adduce evidence to controvert it.

After dealing with (1) (2) and (3) above, which do not concern public international law, Upjohn J. said: "I start with the elementary proposition that it is part of the law of England, and of most nations, that in general every civilized State must be recognized as having power to legislate in respect of movables situate within that State and in respect of contracts governed by the law of that State and that such legislation must be recognized by other States as valid and effectual to alter title to such movables and to sustain, modify or dissolve such contracts. The substantial question I have to determine is what limit is to be imposed upon that proposition when the effect of such legislation comes to be debated in the courts of other States. I may note in passing that the modern tendency is to deny extraterritorial validity to legislation, for example, upon movables situate outside the state at the time of the legislation: *Bank voor Handel en Scheepvaart N.V.* v. *Slatford* [1953] 1 Q.B. 248.[1]

" To this general principle of recognition in foreign courts of territorial validity of legislation there are undoubted limitations or exceptions as the following examples show: (1) No State will enforce the fiscal laws, however proper, of another State, nor penal statutes, using that phrase in the strict sense of meaning statutes imposing penalties recoverable by the State for infringement of some law. ' The penal laws of foreign countries are strictly local and affect nothing more than they can reach and can seize by virtue of their authority,' *per* Lord Loughborough in *Folliott* v. *Ogden* (1789) 1 H. Bl. 123, 135. (2) English law will not recognize the validity of foreign legislation intended to discriminate against nationals of this country in time of war by legislation which purports to confiscate wholly or in part movable property situated in the foreign State. As long ago as 1817, such confiscation was described by Lord Ellenborough C.J., in *Wolff* v. *Oxholm*, (1817) 6 M. & S. 92, as ' not conformable to the usage of nations.' That case also shows that legislation tending to preserve enemy property by the appointment of a custodian will be recognized. Another case illustrative of the principle is *In re Fried. Krupp Aktien-Gesellschaft*, [1917] 2 Ch. 188, 192, where Younger J., while recognizing the validity of German legislation which prohibited payment to enemy nationals in time of war, held that a German law passed shortly after the outbreak of war which purported to cancel and not merely to suspend liability for payment of interest by a German to a British firm would not be recognized in these courts although the proper law of the contract was German. Younger J. said: ' And this ordinance, as well as similar German ordinances enacted at the same time and made applicable to France and Russia, have this feature common to all, that their intention plainly is to penalize particular classes of persons, and incidentally to injure the enemy countries to which these persons belong.' (3) English courts will not recognize the validity of foreign legislation aimed at confiscating the property of particular individuals or classes of individuals; *Banco de Vizcaya* v. *Don Alfonso de*

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[1] *International Law Reports*, 1951, Case No. 40.]

Borbon y Austria, [1935] 1 K.B. 140,[1] which treated the Spanish laws purporting to expropriate the ex-King of Spain's property as examples of penal legislation; and see *Anglo-Iranian Oil Co.* v. *Jaffrate* (*The Rose Mary*), [1953] 1 W.L.R. 246,[2] where Campbell J., sitting in the Supreme Court of Aden, held that certain laws of the State of Persia which he found to be passed to nationalize the plaintiff company only without compensation were confiscatory and ineffectual to pass title.

"Another example suggested by Professor Lauterpacht in the 8th edition of *Oppenheim's International Law*, at p. 268, is a law passed by a foreign State expropriating the property in such State of British Protestants.

"I do not challenge the correctness of the decision in the *Rose Mary* case upon the facts of that case, but Campbell J. came to the conclusion that the authorities both of this and other countries justified the formulation of a more general principle, namely: (1) all legislation that expropriates without compensation is contrary to international law; and (2) that such law is incorporated in the domestic law of Aden and accordingly such legislation will not be recognized as valid in the courts of Aden. Unless the law of England takes a different view of international law from the law of Aden, the judge's conclusions can only be correct if his interpretation of *Aksionairnoye Obschestvo A.M. Luther Co.* v. *James Sagor & Co.* [1921] 3 K.B. 532[3] and *Princess Paley Olga* v. *Weisz* [1929] 1 K.B. 718[4] is correct. Those cases, both in the Court of Appeal, were concerned with the effect of Russian legislation introduced shortly after the Russian Revolution of 1917 which in fact expropriated certain types of private property situate in Russia without any compensation. They established the principle that this court will not inquire into the legality of acts done by a foreign government in respect of property situate in its own territory. Campbell J. considered that principle to be valid only where the property confiscated belongs (as in both those cases) to subjects of the confiscating State. However, all three judgments in *Luther* v. *Sagor* [1921] 3 K.B. 532, laid down the principle in perfectly general terms and it was in no way limited, at any rate in express terms, to a recognition of the validity of such legislation in relation only to nationals of the confiscating State.

"Bankes L.J. said this:

'Even if it was open to the courts of this country to consider the morality or justice of the decree of June, 1918, I do not see how the courts could treat this particular decree otherwise than as the expression by the de facto government of a civilized country of a policy which it considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the Government of this country, are repudiated by the vast majority of its citizens, and are not recognized by our laws. Taking the view I do of the point I do not consider it necessary to discuss the authorities to which our attention has been called.'

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[1] *Annual Digest*, 1933–1934, Case No. 56.]

[2] *International Law Reports*, 1953, p. 316.]

[3] *Annual Digest*, 1919–1922, Case No. 26.]

[4] *Ibid.*, 1929–1930, Case No. 60.]

The authorities he did not think it necessary to discuss included *Folliott* v. *Ogden* 1 H.Bl. 123 and *Wolff* v. *Oxholm* 6 M. & S. 92. I do not understand the Lord Justice to be purporting to overrule those cases without examination, but to be treating them as irrelevant because they were exceptions to the general rule as examples of penal legislation (in the strict sense) and of discriminatory legislation respectively which in his view had no application to the case before him.

" In equally general terms were the judgments of two members of the court in *Princess Paley Olga* v. *Weisz* [1929] 1 K.B. 718. It seems clear that Scrutton L.J. drew no distinction between the operation of legislation upon the property of a national of the confiscating State and a foreigner who had movables in that State, for he said this:

> 'The United States, situate in the neighbourhood of South and Central American Republics, where the life of any Government is precarious and its death rarely by natural causes, frequently found in its territory property seized by a revolutionary force which ultimately succeeded in establishing itself in power and there sold the goods it had seized to persons who exported them to the United States, where they were claimed by their original owners. In *Oetjen* v. *Central Leather Co.* (1918) 246 U.S. 297, these facts occurred with reference to a seizure in Mexico of property of a Mexican citizen which when sold came into the United States, and in *Ricaud* v. *American Metal Co.* (1918) 246 U.S. 304, they occurred again with respect to the property of a citizen of the United States.'

He then went on to state the general principle, which I need not restate.

" It is true that Russell L.J., in that case, said: 'This court will not inquire into the legality of acts done by a foreign government against its own subjects in respect of property situate in its own territory,' but it was sufficient for the decision of the case before him, and he dealt with the point very briefly.

" Maugham J., in *In re Russian Bank for Foreign Trade*,[1] also stated the principle in the same limited way but his remarks were obiter.

" On the other hand, in *Perry* v. *Equitable Life Assurance Society of United States of America* (1929) 45 T.L.R. 468, the plaintiff, a British subject residing in Russia, took out a policy of life assurance

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[1 *Annual Digest*, 1933–1934, Case No. 55.]

with the defendants, the proper law of the contract being Russian. It was held that certain confiscatory decrees of the Russian Government were effective to annul the contract, though it is true that no point was taken that such decrees could be valid only against Russian nationals. This case was quoted without disapproval by Lord Radcliffe in *Kahler's* case, [1950] A.C. 24, 56.

" In *In re Banque des Marchands de Moscou* (*Koupetschesky*), *Royal Exchange Assurance* v. *The Liquidator* [1952] 1 T.L.R. 739 (which does not appear to have been cited to Campbell J.) Vaisey J. expressed the view that the general principle was not limited to nationals of the confiscating State. I respectfully agree with him, for it seems to me that on this question nationality must be irrelevant. If the principle be true in respect of a State in relation to its own nationals, it must surely be conceded in relation to those persons who, though not subjects of the State, nevertheless bring their movables within its jurisdiction for business or private reasons or for the like reasons enter into contracts governed by the law of the State, and in general enjoy the same benefits and protection and are subject to the same disadvantages and disabilities as subjects of the State.

" With all respect to Campbell J. I think that *Luther* v. *Sagor* [1921] 3 K.B. 532, and *Princess Paley Olga* v. *Weisz* [1929] 1 K.B. 718 laid down principles of general application not limited to nationals of the confiscating State.

" In my judgment the true limits of the principle that the courts of this country will afford recognition to legislation of foreign States in so far as it affects title to movables in that State at the time of the legislation or contracts governed by the law of that State rests in considerations of international law, or in the scarcely less difficult considerations of policy as understood in these courts. Ultimately I believe the latter is the governing consideration. But, whatever be the true view, the authorities I have reviewed do show that these courts have not on either ground recognized any principle that confiscation without adequate compensation is per se a ground for refusing recognition to foreign legislation. That view is further supported by the authorities on exchange control legislation which I must now consider.

" It cannot be doubted that legislation intended to protect the economy of the nation and the general welfare of its inhabitants regardless of their nationality by various measures of foreign exchange control or by altering the value of its currency, is recognized by foreign courts although its effect is usually partially confiscatory. Probably there is no civilized country in the world which has not at some stage in its history altered its currency or restricted the rights of its inhabitants to purchase the currency of another country. Most countries, including the United Kingdom, are restricting those rights at this very moment. In individual cases the result of such legislation is in fact to confiscate in some degree private rights of property but the right of the State to do so has never been challenged.

" A few examples may be cited. In *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] A.C. 500[1] His Majesty's Government in a contract made in 1917, whose proper law was that of the U.S.A., contracted to pay a debt by instalments at the option of the holder in New York in gold coin of the U.S. of a certain weight and fineness or in London at a certain rate. A resolution of Congress in 1933, which had the force of law in the U.S.A., held that such a provision was against public policy, as it obstructed the power of Congress to regulate the value of money of the U.S. and that such an obligation was discharged by payment dollar for dollar of coin which at the time of payment was legal tender. As in the meantime the U.S.A. had devalued the dollar, the direct result of that legislation was to reduce the value of the debt sued upon and pro tanto to confiscate without compensation the property rights of the holder, but it was never suggested that such a resolution was not thereby applicable as part of the proper law of the contract.

" Another case is *Kahler* v. *Midland Bank, Ltd.* [1950] A.C. 24, already mentioned. In that case certain exchange regulations of Czechoslovakia which had in effect been in force since 1934 made unlawful without the permission of the Czechoslovakian National Bank transfers of foreign securities from (among other cases) currency ' inlanders ' to currency ' foreigners '. Lord Simonds said:

> ' It is necessary only to say that the relevant law relating to foreign exchange, under which the delivery without a consent that was in fact withheld would be illegal, is not in my opinion a law of such a penal or confiscatory nature that it should be disregarded by the courts of this country.'

" Lord Reid said:

> ' I have already stated that in my opinion an exchange control regulation of the kind here in question is not within the kind of foreign law which an English court cannot recognize.'

And Lord Radcliffe said:

> ' There is nothing in the contract that would prevent him from calling for the shares at any time; but the law of Czechoslovakia to which the contract is subject has so far modified his right so to recover possession of the shares as to make the consent of the National Bank a condition precedent. If, then, the courts of this country are to recognize that modification, Mr. Kahler lacks a present right to possession. It seems to me that we should ignore an established rule of our private international law if we were not to give effect to the currency regulation in question. If the proper law of the contract is the law of Czechoslovakia, that law

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[[1] *Annual Digest*, 1935–1937, Case No. 6.]

not merely sustains but, because it sustains, may also modify or dissolve the contractual bond. The currency law is not part of the contract, but the rights and obligations under the contract are part of the legal system to which the currency law belongs. So to decide is to give effect to the same principle as was upheld by our courts when the United Kingdom Government's obligations under its American loan of 1917 were treated as modified by American legislation (see *Rex* v. *International Trustee for the Protection of Bondholders A/G* [1937] A.C. 500), or when Mr. Perry's life assurance policy was annulled by supervening legislation in the U.S.S.R. (see *Perry* v. *Equitable Life Assurance Society of the United States of America*, 45 T.L.R. 468).'

"The case of *Merwin Pastoral Co. Proprietary Ltd.* v. *Moolpa Pastoral Company Proprietary Ltd.*, (1933) 48 C.L.R. 565, a decision of the High Court of Australia, also affords a useful illustration. The State of New South Wales passed a law providing, *inter alia*, that all personal rights to payments under mortgages of or agreements for sale of land in New South Wales should be void, leaving the parties to their remedies against the land. The parties litigated in the State of Victoria. On appeal to the High Court, Evatt J. said:

'I therefore think that the governing law of the contract was that of New South Wales. But Macfarlan J. was also, I gather, prepared to decide against the present appellant upon the separate ground that the ex post facto New South Wales legislation was very unmeritorious and its application would probably "work manifest injustice to or, in effect, a fraud on one of the parties." It is true that, very occasionally, upon grounds of public policy, English courts have refused to accord recognition to some part of the law of a foreign country, which might otherwise be treated as governing or underlying a transaction. It is, in my view, not permissible for a Victorian court to adopt such an attitude here. All that the legislature of New South Wales did was, in a period of unexampled economic crisis, to revise, alter, suspend or discharge certain contractual obligations over which it could exert its constitutional power. The legislature of Victoria, too, enacted a law which differed in degree only from that of New South Wales.'

"In my judgment these courts must recognize the right of every foreign State to protect its economy by measures of foreign exchange control and by altering the value of its currency. Effect must be given to those measures where the law of the foreign State is the proper law of the contract or where the movable is situate within the territorial jurisdiction of the State. That, however, is subject to the qualifications that this court is entitled to be satisfied that the foreign law is a genuine foreign exchange law, that is, a law passed with the genuine intention of protecting its economy in times of national stress and for that purpose regulating (inter alia) the rights of foreign creditors, and is not a law passed ostensibly with that object, but in reality with some object not in accordance with the usage of nations. The title and expressed purpose of such legislation are not conclusive upon the point. For example, in *Frankfurther* v. *W. L. Exner Ltd.* [1947] Ch. 629,[1] a law was passed under the Hitler régime in Austria with the apparently innocent object of providing for receivers in certain cases, but with the real object of confiscating the property of Jews and others. Romer J. expressed the view that this court is entitled to inquire what manner of legislation it really was, and for that purpose to see what was done under it. Again, if it had not been for the difficulties which arose on the pleadings in that case, I do not think the House of Lords in *Kahler's* case [1950] A.C. 24, would have hesitated to investigate the question whether an exchange control statute passed in 1934 with the genuine object of protecting the State's economy had not by 1946 become an instrument of oppression and discrimination.

"Further, while every State is in the best position to know what measures of control are best suited to its particular needs, and must be allowed much latitude in its choice of control weapons, there are limits in the recognition to be afforded to such legislation; and this court must be entitled to consider whether, looking at all the circumstances, the law is so far-reaching in its scope and effect as really to offend against considerations of public policy of this country."

His Lordship then considered in detail the provisions of the Moratorium Law, and concluded that he must assume that its genuine purpose was to prevent a scramble among Germany's Foreign creditors, which might have resulted from another collapse of the mark, and this was foreign exchange control legislation which must be recognized as effective to modify contractual obligations where the proper law was German. He then turned to the effect of the outbreak of war on September 3, 1939, on the rights of the contracting parties:—"At that date the position was that the claimants had long since performed all their obligations under the contract, and all that remained to be done by the company was payment of a liquidated sum of money by instalments of principal and interest as set out in great detail in the schedule to the loan agreement. By the Moratorium Law this obligation could be discharged by payment in Reichsmarks to the Konversionskasse. It is argued that upon the outbreak of war the provision for payment to the Konversionskasse became illegal, as it tended to increase the resources of the enemy, for it was said the German Government would no doubt have the use of the money paid into the Konversionskasse. Upon that footing it was said that the provision permitting the discharge of the contract by payment to the Konversionskasse became illegal, but, as it was admitted that you cannot abrogate a particular term of a contract, whether expressed or implied by the general law governing the contract, the result must be that the whole contract

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[[1] *Annual Digest*, 1947, Case No. 4.]

was abrogated in the sense that no part of it could legally be performed thereafter, but the original debt with all its characteristics remained: see *Arab Bank Ltd.* v. *Barclays Bank Ltd.* [1954] A.C. 495.[1]

"The principles of law to be applied are well settled by the highest authority. In *Ertel Bieber & Co.* v. *Rio Tinto Co. Ltd.* [1918] A.C. 260, 274, Lord Dunedin said:

'... From these cases I draw the conclusion that upon the ground of public policy the continued existence of a contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law.'

"It is clear, however, that, in the words of Lord Russell in *Schering Ltd.* v. *Stockholms Enskilda Bank Aktiebolag*, [1946] A.C. 219, 248–249,[2]

'... a contract of which nothing remains to be performed except payment to be made by the other of a liquidated sum whether already due, or *debitum in praesenti solvendum in futuro*, is unaffected by the outbreak of war.'

Lord Morton of Henryton quoted that passage with approval in the *Arab Bank* case. If, therefore, the claimants had been under an obligation to the company to pay a liquidated sum by instalments, that obligation would have been suspended, not abrogated.

"This is the converse case but, in my judgment, the same principles apply. The contract is wholly executed on one side, no question of any continued intercourse between subjects and alien enemies arises. Had the original obligation to pay in sterling in London remained, that obligation, in my judgment, would not have been abrogated, but suspended; the German Government under legislation passed for that purpose could have directed payment to a German Custodian of Enemy Property without offending any principle of public policy of this country or of international law. In fact, the proper law permits payments in Germany to a German agency. I cannot see that transfer of German marks from one person to another in Germany increases the resources of the enemy unless such transfer is the result of some seizure of enemy funds by the German Government for use against its enemies. Whether such a seizure would in itself be illegal I do not pause to consider (see *In re Ferdinand, Ex-Tsar of Bulgaria*, [1921] 1 Ch. 107[3]), as no such seizure is suggested here. I must assume that payments made by the company into the Konversionskasse remained at all material times to the credit of the claimant in some blocked account.

"In my judgment this point also fails."

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[1] *International Law Reports*, 1954, p. 443.]

[2] *Annual Digest*, 1943–1945, Case No. 105.]

[3] *Ibid.*, 1919–1922, Case No. 286.]

His Lordship then went on to consider whether the claimants could bring evidence to controvert the administrator's decision as to the effect of German law on the contract, and decided they could not.

[Report: L.R. [1956] 1 Ch. 323.]

Aliens—Treatment of—Respect for Property of Aliens—Nationalization Decrees.

See p. 23 (*Anglo-Iranian Oil Company Ltd.* v. *S.U.P.O.R. Company*).

III.—Expulsion of Aliens

i.—Right of Expulsion

Aliens—Deportation of—Alien Improperly Given Permission to Enter—Deportation Order Pursuant to Discovery of Impropriety —The Law of Canada.

MASELLA *v.* LANGLAIS.

Canada, Supreme Court. March 7, 1955.

(Tascherau, Locke, Cartwright, Fauteux and Abbott JJ.)

THE FACTS.—The appellant was an Italian citizen resident in Italy. He was informed on November 3, 1950, that permission had been granted for him to enter Canada as an immigrant. In May 1951, an officer of the Canadian Embassy at Naples stamped his passport with the seal of the Ministry of National Health and Welfare, and issued a visa in favour of the appellant permitting him to enter Canada in order to establish a permanent residence there. The issue of this visa was irregular and the usual medical and other examinations of the appellant required by the Immigration Act[1] and Regulations[2] thereunder had not taken place. In June 1951, the appellant presented himself at the Canadian Office in Italy, where he produced his passport, visa and other documents, and he was informed that he could leave for Canada. On June 27, 1951,[3] he arrived in Canada. In October 1951,[3] the appellant made inquiries about the admission to Canada of his wife. His passport was examined and inquiries made concerning his visa, and the various irregularities were brought to light. A complaint was then made to the Minister that the appellant was a prohibited immigrant. A Board of Inquiry was set up, which ordered his deportation. The appellant appealed to the Minister, who confirmed the order for deportation. At first the appellant was detained in custody for six days, but he was then released on signing an undertaking, on security of $500, to report weekly to the Immigration Authorities. The appellant was able to continue his employment. While thus at liberty the appellant asked for the issue of a writ of habeas corpus addressed to the respondent Immigration Officer, in order to have his case reviewed by a court of law. The appellant contended that his deportation order was illegal since all the necessary formalities had been fulfilled and the Canadian Minister of Citizenship and Immigration accepted his application and he had entered the country with permission of the competent authorities. The respondent contended (i) that the appellant being at liberty, habeas corpus proceedings did not lie, and (ii) that the provisions of the Immigration Act did not allow review by the Courts of decisions or orders of the Board of Inquiry if those decisions or orders were rendered in conformity with the provisions of the Act. The issue of the writ was authorized by Ferland J. of the Superior Court in Montreal, but, after a hearing, Perrier J., of the Superior Court in Montreal, quashed and annulled the writ. The Quebec Court of Queen's Bench affirmed the judgment of Perrier J. The appellant appealed to the Supreme Court of Canada.

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[1] R.S.C. 1927, c. 93.

[2] Orders in Council P.C. 2744 and P.C. 2856: the text of the relevant parts of these Orders in Council is given in the judgment of Abbott J.

[3] These are the dates given in the judgment of Taschereau J.: different dates are given by Abbott J. in his judgment (June 18 and September 12 respectively).

Held: that the appeal must be dismissed. Habeas corpus did not lie in respect of an individual who was at liberty on a personal undertaking accompanied by a deposit of money as a forfeit. Notwithstanding that permission to enter Canada had been granted, the discovery that it had been granted improperly enabled the Immigration Authorities to order the deportation of an immigrant.

Taschereau J. said: " Perrier J. was of the opinion that s. 23 (now s. 39 of R.S.C. 1952, c. 325) of the Immigration Act must be applied. This section is drawn up as follows:

> '23. No court, and no judge or officer thereof, shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any Board of Inquiry, or officer in charge, had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile.'

The majority of the Court of Appeal came to the same conclusion. Evidently, and the jurisprudence is unanimous on this point, this provision of the Act closes the door to intervention of the Courts, on condition however that the decision and order be rendered in conformity with the provisions of the Act. If the Board of Inquiry followed the provisions that the statute orders, it is clear that the Courts cannot intervene. That, moreover, is what was decided by this Court in *Samejima* v. *The King*, [1932] 4 D.L.R. 246, S.C.R. 640, 58 Can. C.C. 300.

"In the case of *De Marigny* v. *Langlais*, [1948] 2 D.L.R. 801 at p. 805, S.C.R. 155 at p. 159, 91 Can. C.C. 313 at p. 338,[1] Kelock J. says:

> 'In proceedings such as this the Court is precluded from reviewing the findings of fact made by the Board of Inquiry; s. 23; *Samejima* v. *The King*, [1932] 4 D.L.R. 246 at pp. 259–60, S.C.R. 640 at p. 650, 58 Can. C.C. 330 at pp. 313–4, *per* Lamont J. But equally the applicant for a writ of *habeas corpus* may show that the proceeding of which he complains "has not been had, made or given in accordance with the provisions of the Act."'

"These are the principles that must guide us in determining the present case. I do not believe it would be useful to analyze the facts further. It will be sufficient, I think, to say that the order of the Board, confirmed by the Minister, seems to me to have been issued in conformity with the provisions of the Immigration Act, and that it is not for the Courts to interfere and decide if in fact an immigrant is desirable or not.

"I concur entirely in the views of my colleague Mr. Justice Abbott and particularly the observations that he makes on the subject of the legality of the visa, of the medical examination that appellant underwent, of the revocation of the permission that had been given him to enter Canada and of the right that he may have to the benefit of a writ of *habeas corpus*."

Locke J. said: "Throughout the progress of this litigation the appellant has been at liberty, carrying on his customary occupation, subject only to the obligations assumed by him in his written undertaking of October 12, 1951. There is, first, to be determined the question as to whether, in these circumstances, the appellant was entitled to the remedy of a writ of *habeas corpus*.

"The relief afforded by the writ of *habeas corpus* is in England a common law right and not one created by statute: *Ex p. Besset* (1844), 6 Q.B. 481, 115 E.R. 180. In *Bacon's Abridgement* (vol. 4, p. 113, *Habeas Corpus* (A)), the nature of the writ of *habeas corpus ad subjiciendum* is thus stated:

> 'Wherever a person is restrained of his liberty by being confined in a common goal, or by a private person, whether it be for a criminal or civil cause, he may regularly by *habeas corpus* have his body and cause removed to some superior jurisdiction, which hath authority to examine the legality of such commitment, and on the return thereof either bail, discharge, or remand the prisoner.'

On the return of the writ pending the hearing, the prisoner is detained not under the authority of the general warrant but under the authority of the writ of *habeas corpus* and he may be bailed or remanded, in the discretion of the Court: *R.* v. *Bethel* (1697), 5 Mod. Rep. 19, 87 E.R. 494.

[[1] *Annual Digest*, 1947, Case No. 63.]

"In *Barnardo* v. *Ford*, [1892] A.C. 326 at pp. 333-4, Lord Watson said in part:

'The remedy of *habeas corpus* is, in my opinion, intended to facilitate the release of persons actually detained in unlawful custody, and was not meant to afford the means of inflicting penalties upon those persons by whom they were at some time or other illegally detained. Accordingly, the writ invariably sets forth that the individual whose release is sought, whether adult or infant, is taken and detained in the custody of the person to whom it is addressed, and rightly so, because it is the fact of detention, and nothing else, which gives the Court its jurisdiction.'

"In *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A.C. 603 at p. 609, the Earl of Birkenhead referred to the purpose of the writ in these terms:

'It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege.'

"In *Re Isbell*, [1930] 1 D.L.R. 393, S.C.R. 62, 52 Can. C.C. 170, a person who had been arrested in Ontario on a criminal charge and released on bail made application for a writ of *habeas corpus* to Rinfret J. (as he then was) and that learned Judge in refusing the application said in part [p. 395 D.L.R., p. 65 S.C.R., p. 173 Can. C.C.]:

'In my view, in order to make a case of *habeas corpus* in criminal matters there must be an actual confinement or, at least, the present means of enforcing it. A person may apply for the writ while in the custody of a constable, immediately upon being arrested, and need not wait until he is actually incarcerated. But a person at large on bail is not so restrained of his liberty as to entitle him to the writ.'

"The language of the Habeas Corpus Act of Ontario which affected the matter (R.S.O. 1927, c. 116, s. 1) read: 'Where a person . . . is confined or restrained of his liberty'.

"We have not been referred to any case, and my own researches have not discovered any, in which in England where the right to the remedy originated, a writ of *habeas corpus* was granted to a person who was at liberty on bail. I would assume the reason for this is that the writ, by its terms and by its very nature as above described, is inapplicable to such a situation. It is my understanding of the practice in this country that if a person who has been under detention, either under criminal or civil process, and set at liberty on bail or on his own recognizance, wishes to test the jurisdiction of the Court which has ordered him to be detained, he surrenders himself into custody and makes the application when thus under restraint.

[Locke J. then considered *Respublica* v. *Arnold* (1801), 3 Yeates (Pa.) 263, *Wales* v. *Whitney* (1884), 114 U.S. 564, *R.* v. *Cameron* (1897), 1 Can. C.C. 169, and *De Bennonville* v. *Langlais*, [1951] Que. S.C. 277, and continued:] " There can, of course, be no pretence in the present matter that the Immigration Officer to whom the writ of *habeas corpus* was directed had either the custody or control of Masella, either at the time the writ was issued or when it was served or when he made his return to the writ, and the contention that he was restrained of his liberty within the meaning of Article 1114 is, in my opinion, quite without foundation.

" No proceedings by way of *certiorari* were taken in this matter and the objection that the remedy by way of writ of *habeas corpus* was not available to the appellant is fatal to his appeal, in my opinion."

Cartwright J. and Fanteux J. concurred with Locke J.

Abbott J. said: " The only ground with which I find it necessary to deal is that urged by appellant on the hearing before this Court to the effect that since the Immigration authorities had allowed him to land in Canada, the burden of proof was on the Department to establish that he was not eligible to enter this country as an immigrant and that in consequence a complaint could not be validly laid under s. 40 of the Act. The relevant part of that section is as follows:

> ' 40. Whenever any person, other than a Canadian citizen or person having Canadian domicile . . . enters or remains in Canada contrary to any provision of this Act, it shall be the duty of any officer cognizant thereof, and the duty of the clerk, secretary or other official of any municipality in Canada wherein such person may be, to forthwith send a written complaint thereof to the Minister giving full particulars.'

" Counsel for the Attorney-General of Canada took the position that a prerequisite to a legal entry into this country as an immigrant is the compliance by such immigrant with the requirements of the Immigration Act and the Regulations made thereunder, including compliance with the requirements with respect to medical and other examinations and the issue of a valid visa; that these not having been complied with, it is immaterial whether or not the failure to so comply was due to some act or omission on the part of the employees of the Department, the admission to Canada of an immigrant being subject to review by the Minister in accordance with the provisions of the Act.

" Counsel for respondent further submitted that even assuming for the purposes of this case the appellant was in perfect good faith, since he had not in fact complied with the requirements of the Immigration Act and the Regulations made thereunder and was not a Canadian citizen or a person having acquired Canadian domicile, he was therefore a prohibited immigrant under s. 3 (1) (i) of the Act, which reads as follows:

> ' 3. (1) No immigrant, passenger, or other person, unless he is a Canadian citizen, or has Canadian domicile, shall be permitted to enter or land in Canada, or in case of having landed in or entered Canada shall be permitted to remain therein, who belongs to any of the following classes, hereinafter called " prohibited classes ":—
>
> ' (i) Persons who do not fulfil, meet or comply with the conditions and requirements of any regulations which for the time being, are in force and applicable to such persons under this Act.'

" The Orders in Council made under the provisions of the Act, which were applicable to appellant, are P.C. 2744 and P.C. 2856, the relevant parts of which read as follows:

" P.C. 2744:

> ' From and after the date hereof [June 2, 1949] every person seeking to enter or land in Canada shall be in possession of an unexpired passport issued by the country of which such person is a subject or citizen; Provided:
>
> 1. That this Regulation shall not apply to: (here follow exempting provisions which are inapplicable to appellant).
>
> 2. That the passport of every alien other than defined in paragraph (b) of section 1 of this Regulation sailing directly or indirectly from Europe shall carry the visa of a Canadian Immigration Officer stationed in Europe; Provided that this section shall not apply to the non-immigrant nationals of any country with which Canada has a reciprocal agreement abolishing visas.
>
> 3. That the passport of every alien immigrant not included in section 2 of this Regulation shall carry the visa of a British diplomatic or consular officer or of a Canadian diplomatic or consular officer in the country of issue, as may be required by the Minister of Mines and Resources [now Minister of Citizenship and Immigration].'

" P.C. 2856:

> ' From and after the 1st July, 1950, and until such time as otherwise ordered, the landing in Canada of immigrants of all classes and occupations is prohibited, except as hereinafter provided:
>
> ' The Immigration Officer-in-Charge may permit any immigrant who otherwise complies with the provisions of the Immigration Act to land in Canada, if it is shown to the satisfaction of such Officer-in-Charge that such immigrant is:
>
> 4. A person, who satisfies the Minister, whose decision shall be final that:
>
> (a) he is a suitable immigrant having regard to the climatic, social, educational, industrial, labour, or other conditions or requirements of Canada; and
>
> (b) is not undesirable owing to his peculiar customs, habits, modes of life, methods of holding property, or because of his probable inability to become readily adapted and integrated into the life of a Canadian community and to assume the duties of Canadian citizenship within a reasonable time after his entry.'

" The appellant was in possession of a valid passport issued by the Italian Government and endorsed with what purported to be a visa signed by one George G. Wilson, a Canadian Immigration Officer entitled to issue visas in Italy.

"As I have already mentioned, evidence adduced at the Court of inquiry indicated that this visa had been issued improperly and that appellant had not been medically examined by an officer of the Canadian Government although a stamped entry on the passport falsely indicated that such examination had taken place.

" It also seems clear from this evidence that no examination of appellant took place in Italy in order to ascertain his suitability to enter Canada as an immigrant.

" In my view appellant's contention, that because he was allowed to land in Canada on the strength of a visa and a certificate of medical examination assumed to have been legally issued no complaint to the Minister could be validly laid under s. 40 of the Act, cannot be sustained. The legality of his entrance to Canada was subject to question at any time until he had acquired Canadian domicile within the meaning of the Act.

" Immigration to Canada by persons other than Canadian citizens or those having a Canadian domicile is a privilege determined by statute, Regulation or otherwise, and is not a matter of right.

" In the Immigration Act, Parliament had set up the machinery for the control of immigration to this country and for the selection of prospective immigrants. To accomplish this purpose, very wide discretionary powers are given under the Act, to the Governor in Council and to the Minister, and perhaps it is necessary that this should be so. An example of these wide discretionary powers is to be found in s. 4 of Order in Council P.C. 2856 above quoted, in virtue of which the Minister is given in effect an absolute discretion to determine who is, or who is not, a suitable immigrant.

" In order to provide for the effective administration of an Act such as this, it would seem not unreasonable that the Immigration authorities should be in a position to insist upon strict compliance abroad with the requirements of the Act or Regulations concerning medical and other examinations in order to determine the suitability of a proposed immigrant whether from a medical standpoint, an internal security point of view, or otherwise. In this case it was established to the satisfaction of the Board of Inquiry that these Regulations had not been met.

" In my opinion the proceedings before the Board of Inquiry were regularly taken and a proper investigation made of the subject-matter of the complaint in accordance with the provisions of the Act. As to the application of s. 23, the effect of that section has been considered by this Court on a number of occasions: See *Samejima* v. *The King*, [1932] 4 D.L.R. 246, S.C.R. 640, 58 Can. C.C. 300, and *De Marigny* v. *Langlais*, [1948], 2 D.L.R. 801, S.C.R. 155, 91 Can. C.C. 313. It is clear that under that section, where a Board of Inquiry has taken evidence in good faith and has otherwise complied with the provisions of the statute, a Court has no jurisdiction to substitute its judgment for that of the Board.

" In view of the conclusion that I have reached, I do not find it necessary to deal with the issue as to whether in the circumstances of this case the appellant was entitled to the remedy of *habeas corpus*, which was raised in respondent's *factum* but was not argued before this Court."

[Report: [1955] 4 D.L.R. 346.]

Aliens—Expulsion of—Extradition—Extradition Act—Aliens Act —The Law of India.

MULLER *v.* SUPERINTENDENT, PRESIDENCY JAIL, CALCUTTA, AND OTHERS.

India, Supreme Court. February 23, 1955.

(B. K. Mukherjea C.J.; Das, Bose, Bhagwati, Jagannadhadas JJ.)

THE FACTS.—Hans Muller, a West German subject, was arrested by the Calcutta Police on September 18, 1954, and placed under preventive detention. The order was made by the West Bengal Government under section 3 (1) of the Preventive Detention Act, 1950, on the ground that his detention was " with a view to making arrangements for his expulsion from India ". On September 21, 1954, the petitioner asked the West Bengal Government for repatriation from India. On October 9, 1954, the West German Government wrote to the West Bengal Government stating that a warrant of arrest had been issued against the petitioner in West Germany in connexion with a number of frauds, and that legal proceedings in connexion with those warrants were still pending. At the same time the Consul-General of West Germany in Calcutta stated that his Government intended to apply for the petitioner's extradition and requested the West Bengal Government to issue a provisional warrant of arrest ensuring the petitioner's detention up to the date of his extradition to Germany.

The petitioner now asked the Court for a writ of habeas corpus and challenged the good faith of the Government of West Bengal in making the order of detention on the following grounds: " First, whatever the original intention of the West Bengal Government may have been, when the West German Consul's letter was received, the object of the detention was no longer for the purpose of making arrangements for the petitioner's expulsion but for keeping him in custody till the West German Government was in a position to commence extradition proceedings; that . . . was an abuse of the Preventive Detention Act and was not justified by any of its provisions. The second ground was that, if that was not the object, then, very clearly, the idea was to hand the petitioner over to the German authorities on a German boat without the formality of extradition proceedings and without giving the petitioner a chance to defend himself and show that he could not be extradited. . . . It was denied that the petitioner had committed any offence in West Germany or anywhere else. He claimed to be a communist, and said that the real object of the West German Government was to subject him to political persecution the moment they could lay hands on him. His contention was that once an order of extradition is asked for, an alien cannot be handed over to the Government seeking his extradition except under the Extradition Act. The Attorney-General contended . . . that this question was academic and should not be considered because no order of expulsion had yet been served on the petitioner and no one knows the terms of the order."

Held: that the petition failed. The detention of the petitioner had been ordered with a view to his expulsion. The fact that a request for extradition was made did not fetter the decision of the Government to choose the less cumbrous procedure of expulsion of an alien. Even though a Government was not bound to extradite, it had a discretion to expel an alien in conformity with its territorial supremacy.

The Court in considering the question of the status and rights of aliens in India, and distinguishing extradition from expulsion, said: " The Aliens Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision limiting this discretion in the Constitution, an unrestricted right to expel remains. The law of extradition is quite different. Because of treaty obligations it confers a right on certain countries (not all) to request that persons who are alleged to have committed certain specified offences on their territories, or who have already been convicted of those offences by their courts, be handed over to them in custody for prosecution or punishment. But, despite that, the Government of India is not bound to comply with the request and has an absolute and unfettered discretion to refuse.

" There are important differences between the two Acts. In the first place, the Extradition Act applies to everybody, citizen and foreigner alike, and to every class of foreigner, that is to say, even to foreigners who are not nationals of the country requesting extradition. But, as we have seen, because of Article 19 [of the Constitution] no citizen can be *expelled* (as opposed to extradited) in the absence of a specific law to that effect; and there is no such law.

Also, the kind of law touching expulsion (as opposed to extradition) that could be made in regard to a citizen would have to be restricted in scope. That is not the case where an alien is concerned, because Article 19 does not apply. But a citizen who has committed certain kinds of offences abroad can be extradited provided the formalities prescribed by the Extradition Act are observed. An alien, however, can be expelled without any formality beyond the making of an order by the Central Government. But if he is extradited instead of being expelled, then the formalities of the Extradition Act must be complied with. The importance of the distinction will be realized from what follows; and that applies to citizen and foreigner alike.

" The Extradition Act is really a special branch of the law of Criminal Procedure. It deals with criminals and those accused of certain crimes. The Aliens Act is not directly concerned with criminals or crime, though the fact that an alien has committed offences, or is suspected of having committed offences, may be a good ground for regarding him as undesirable. Therefore, under the Extradition Act warrants or a summons must be issued; there must be a magisterial inquiry and if there is an arrest it is penal in character; and . . . when the person to be extradited leaves India he does not leave the country a free man. The police in India hand him over to the police of the requesting State, and he remains in custody throughout.

" In the case of expulsion, no idea of punishment is involved, at any rate in theory, and if a person is prepared to leave voluntarily he can ordinarily go as and when he pleases. But he has no *right* in that regard. Under Indian law, the matter is left to the unfettered discretion of the Union Government and that Government can prescribe the route and the port or place of departure and can place him on a particular ship or plane (see sections 3 (2) (b) and 6 of the Aliens Act). Whether the captain of a foreign ship or plane can be compelled to take a passenger he does not want or to follow a particular route is a matter that does not arise and we express no opinion on it. But assuming that he is willing to do so, the right of the Government to make the order *vis-à-vis* the person expelled is absolute.

" This may not be the law in all countries. Oppenheim, for example, says that in England, until December 1919, the British Government had ' no power to expel even the most dangerous alien without the recommendation of a court, or without an Act of Parliament making provision for such expulsion, except during war or on an occasion of imminent national danger or great emergency ' (*Oppenheim's International Law*, vol. I, 7th ed., p. 631).

" But that is immaterial, for the law in each country is different and we are concerned with the law as it obtains in our land. [After restating once more the position under the Aliens Act and the Extradition Act, the Court said in conclusion:] " The Aliens Act is not governed by the provisions of the Extradition Act. The two are distinct and neither impinges on the other. Even if there is a request and a good case for extradition, the Government is not bound to accede to the request. It is given an unfettered right to refuse. Section 3 (1) of the Extradition Act says—'the Central Government may, if it thinks fit'. Therefore, if it chooses not to comply with the request, the person against whom the request is made cannot insist that it should. The right is not his; and the fact that a request has been made does not fetter the discretion of the Government to choose the less cumbrous procedure of the Aliens Act when a foreigner is concerned, provided always that in that event the person concerned leaves India a free man. If no choice had been left to the Government, the position would have been different; but as the Government is given the right to choose, no question of lack of good faith can arise merely because it exercises the right of choice which the law confers. This line of attack on the good faith of the Government falls to the ground."

[Report: 1955 S.C.J. 324.]

ii.—Procedure of Expulsion

Aliens—Expulsion of—Procedure of Expulsion—Effect of Revocation of Expulsion Order by Subsequent Order of Arrest—Effect of Non-execution of Expulsion Order " for reasons of humanity " —Declaration by Receiving State as Creating Obligation in Favour of National State—Treatment of Aliens—Registration and Issue of *Cartes de résidence*—Conciliation Commission Sitting as *Collège arbitral*—Powers of—Power to Examine Relevant Municipal Law —Whether Conciliation Commission Bound by Contrary Decision of Municipal Court.

Re RIZZO AND OTHERS (No. 2).[1]

Franco-Italian Conciliation Commission. July 6, 1954.

(Périer de Féral, Sorrentino, Bolla.)

THE FACTS.—Article 79 (1) of the Peace Treaty with Italy, 1947, provides as follows:

> " 1. Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property, rights and interests which on the coming into force of the present Treaty are within its territory and belong to Italy or to Italian nationals, and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Italy or Italian nationals, including debts, other than claims fully satisfied under other Articles of the present Treaty. All Italian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned."

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[1] See *International Law Reports*, 1952, Case No. 107 (*Re Rizzo and Others*).

Paragraph 6 of the same Article provides that the property covered by paragraph 1 shall not include, *inter alia:*

> " (*c*) Property of natural persons who are Italian nationals permitted to reside within the territory of the country in which the property is located or to reside elsewhere in United Nations territory, other than Italian property which at any time during the war was subjected to measures not generally applicable to the property of Italian nationals resident in the same territory."

On November 29, 1947, France and Italy signed a Convention under which France, in consideration of certain payments, agreed not to avail herself of Article 79 of the Treaty. Article 3 of the Convention provided, however, that " property, rights and interests within the territory of the Regency of Tunis and belonging to Italy or to Italian nationals shall be liquidated in accordance with Article 79 ". When France sought to liquidate property in Tunis belonging to certain Italian nationals, of whom Rizzo was one, Italy objected, on the ground that the property was exempted from liquidation by Article 79 (6) (*c*). The dispute was referred to the three members of the Conciliation Commission as an arbitral tribunal (*collège arbitral*).

The *Collège arbitral* gave their decision on June 25, 1952, and invited the Italian Government to present to the *Collège* " precise arguments regarding the individual cases in which, in its opinion, the French Government was, to the prejudice of Italian nationals, infringing Article 79 (6) (*c*) of the Treaty ". The cases now put forward by the Italian Government were in two categories:

(1) persons who had by September 15, 1947,[1] been authorized to reside in France—they held either

(a) a *carte de résident ordinaire* valid for three years or

(b) a *carte de résident temporaire;*

(2) persons who ought to be regarded as having by September 15, 1947, been authorized to reside in Tunisia and who either

(a) had never been the subject of an order expelling them from Tunisia or

(b) had been the subject of an expulsion order which had been revoked subsequent to September 15, 1947.

As regards the persons in category (1), the French Government had always recognized that aliens who, when the Treaty came into force, held a *carte de résident ordinaire* should be regarded as persons " permitted to reside " within the meaning of Article 79 (6) (*c*) and, in view of the decision of June 25, 1952, of the *Collège arbitral,* it was contended that the same attitude should be taken towards persons who held a *carte de séjour temporaire.* As regards persons in category (2), the Italian Government, for its part, urged that the regulation of the presence of aliens in Tunisia was radically different from that in force in France. According to Article 1 of the Beylical

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[1] The date when the Treaty of Peace came into force.

Decree of April 13, 1898, permission to reside in Tunisia was an automatic and necessary consequence of the *déclaration de résidence* which an alien wishing to " take up residence in Tunisia or to exercise there a profession, trade or industry " has to make before the local police authority within five days after his arrival. His enrolment in the Aliens Register and the delivery to him of an extract therefrom are only formalities relating to the proof of his residence. The Beylical Decree of June 11, 1940, was limited to changing the form of documents which were evidence of residence in Tunisia by substituting an identity card for the extract from the register.

Against this it was observed in a general manner on behalf of the French Government that the circumstance that certain Italian nationals having left Tunisia, whether voluntarily or as the result of expulsion orders or cancellation of permission to reside (*refoulement*), had been kept on the Aliens Register did not suffice to confer on them the right of residence in Tunisian territory. It was true that the Tunisian system of *séjour* for an alien was different from the French system, but the modification effected by the Decree of June 11, 1940, to the Tunisian system was one of substance. The combined effect of the provisions of the Decrees of April 13, 1898, and June 11, 1940, respectively, made it obligatory for aliens arriving on Tunisian territory (i) to make, within five days of their arrival, a *déclaration de résidence*, in consequence of which they were enrolled on the Aliens Register; and (ii) to obtain forthwith an identity card which had to be examined at regular intervals, which was valid for two years only and which had to be produced whenever demanded by the police authorities. Enrolment was a necessary formality, but was not sufficient to establish the regularity of a given residence. In fact, the identity card ought to have been withdrawn from every alien who left Tunisian territory, seeing that no striking out of the entry on the Aliens Register was required. On his eventual return to Tunisia, the identity card was restored to its holder, but only if the regulations concerning passport visas had been observed by the alien, otherwise, despite the declaration already made and the corresponding enrolment, the alien's position was not regularized.

As regards persons in category (2) (b), it was observed in a general way, on behalf of the French Government, that a distinction must be made between the withdrawal of expulsion orders and the mere abrogation of such orders. In the former case, the withdrawal was equivalent to a retroactive annulment of the order, which was deemed never to have been made; the individual who had been the subject of such an order must be regarded as never having forfeited the permission to reside which he had held. In reply to this it was contended on behalf of the Italian Government that a cancellation of permission to reside must be regarded as a revocation of such permission, but only if it was pronounced by the competent authority and in the circumstances provided for by municipal legislation. Now, cancellation was a measure taken by the Minister of the Interior or by the Prefect and notified to the person concerned; it should not be confused with the instructions which the Minister of the Interior could be induced to give Prefects with a view to bringing about the cancellation, by the latter, of persons named therein. On the other hand, according to the *Ordonnance* of November 2, 1945, and the Decrees of March 18 and June 30, 1946, cancellation of permission to reside was strictly regulated as regards aliens who held a *carte de séjour*; if it was a *carte de séjour temporaire*, cancellation was authorized solely if the person concerned had ceased to fulfil the conditions to which the grant of the *carte de séjour* was subject. Apart from such a case, cancellation was forbidden, and only an expulsion order could bring about the termination of the permission to reside. In the case of a *carte de résidence ordinaire* or *privilégiée*, cancellation was absolutely forbidden and the authorities could only commence proceedings with a view to expulsion. The fact of having been expelled from Tunisia before having obtained the grant of a *carte de séjour temporaire* had no connection with a change of circumstances subsequent to the grant of the *carte* and as a result of which the conditions of the said grant ceased to be fulfilled. The French Government, moreover, could not (it was contended) require that the holder of a *carte de séjour temporaire* should have been effectively and materially present on French territory on September 15, 1947. Such a condition was not imposed by the Treaty of Peace, and residence, although it comported habitude and intention, did not require absolute and uninterrupted continuity.

It was also contended on behalf of the Italian Government that in Tunisia the identity card had replaced the extract from the Register of Aliens and constituted no more than evidence of permission to reside in Tunisia while only inscription on the general registers of the population was the essential condition *ad substantiam* of permission to reside in Tunisia. In support of this argument, mention was made of the fact that striking out on the Register was done only in the case of aliens who had left Tunisia definitively or were expelled therefrom. The practice of withdrawing the identity card on the holder's leaving Tunisian territory and restoring it on his return, even if the absence was of short duration, constituted merely a supplementary measure of police control. If the arguments of the French Government were accepted it would be difficult to understand the expulsion measures taken in 1944 and subsequent years against Italian nationals who had left Tunisian territory. The revocation of an expulsion order had retroactive effect, as was recognized by the French Ministry of Foreign Affairs on October 22, 1948, at least so far as concerned all revocations previous to that date.

The Commission gave decisions in a number of cases, of which the following are representative:

I. *Persons in category* (1) (*a*).—S. and his wife were Italian nationals, holders of *cartes d'identité*, who at one time lived in France. They were not on French territory on September 15, 1947; they were in Italy. S. returned to France in January 1948 and in June 1948 to Italy; his wife had gone there early in 1947. It was contended on behalf of the French Government that the mere holding of an identity card on September 15, 1947, unaccompanied by effective residence on that date, was not sufficient to involve the application of Article 79 (6) (*c*) of the Peace Treaty.

Held: that both were entitled to have their property restored to them. The Commission recalled that in its decision of June 25, 1952, it had defined residence as mentioned in Article 79 (6) (*c*) of the Treaty. " Residence . . . is not domicile, which the Treaty mentions expressly in other provisions . . . Domicile is a juridical conception; residence is a general, material, conception, or one of fact. The essence of domicile is the stable character of the [individual's] establishment. Residence does not require that stability; it is the relationship between a person and a territory during a temporary stay. That relationship cannot be simply one of physical presence; a passing through or a sojourn is not sufficient; the stay must have a habitual character, even if it is not continuous, together with an element of intent (*animus*), namely, the intention to remain (but not necessarily to establish oneself) in the place in question."

If mere presence was not sufficient to create between a person and a territory the relationship constituted by residence, lack of such presence was not sufficient to terminate that relationship. That was what the Commission meant in its decision of June 25, 1952, when it emphasized that a stay may be sufficiently habitual to constitute residence " even if it is not continuous ". A resident in country A did not cease to be one because he makes a journey to country B on business, for pleasure, etc., or otherwise, if he retained the intention of returning to country A to remain there in the same circumstances as previously.

Article 79 (6) (*c*) of the Treaty of Peace made special provision for " Property of natural persons who are Italian nationals permitted to reside within the territory of the country in which the property is located or to reside elsewhere in United Nations territory." The only two conditions imposed were the Italian *droit de cité* (freedom to live in a town) and residence authorized within one of the States in question. The provision did not, moreover, require physical and effective presence in one of the countries at the date of the coming into force of the Treaty, and that was self-evident: it would have been inequitable to cause an Italian national regularly residing at Menton to lose the benefit of Article 79 (6) (*c*) because he happened to spend the twenty-four hours of September 15 at Ventimiglia by reason of a bereavement (*pour des raisons de deuil*). On the other hand, permitted residence did not, according to French law, cease because of a journey abroad with an exit and re-entry visa. When he returned from his journey within the time specified in the visa, the alien would continue to be a résident (*privilégié, ordinaire*, or *temporaire*) until the expiry of his *carte* (which was not withdrawn when he left the country) and without his having to apply for a new *carte* for a new period. In this case, both S. and his wife applied for and obtained, before leaving France, an exit and re-entry visa, which clearly proved an intention to return and reside in that country. But S. had left France with an exit and re-entry visa dated March 6, 1947, and valid for six months. He did not return to France until January 1948, that is, after the expiry of the visa. Although his identity card was valid until 1950, he had lost the rights of a *résident ordinaire*. However, since his visa did not expire until November 6, 1947, he was a *résident ordinaire* on September 15, 1947. It is not relevant that he did not effectively return to France until January 1948; in order to establish his position with regard to Article 79 (6) (*c*) of the Peace Treaty, it must be looked at as at September 15, 1947. On the other hand, S. had before September 14, 1947, had his permission to reside cancelled by the French Government. But as a *carte de résidence ordinaire* could only be withdrawn in consequence of an expulsion order, then, assuming that the order cancelling his permission to reside had been regularly given on June 23, 1947, it cannot have caused him to lose the status of " permitted to reside " within the meaning of the Treaty. An expulsion order would, under French law, have been necessary to validate the cancellation. . . . S. is therefore entitled to have his property restored to him. His wife's visa, dated February 11, 1947, was for three months only, and she did not return to France within that time or at all. At the date of coming into force of the Treaty, September 15, 1947, she was, and had been since the expiry of her visa on May 11, 1947, no longer a *résident ordinaire*. By not applying for an extension of her visa, by not returning to France, she had, moreover, shown that she no longer wished to be habitually resident in France and one of the conditions of permitted residence, in the terms of the Treaty of Peace, was no longer fulfilled.

However, by a note dated May 9, 1951, the Resident-General of France at Tunis notified the Italian Consul at Tunis that " as a result of enquiries made by the French Ministry of the Interior, Mme S. can validly invoke the provisions of Article 79 (6) (*c*) of the Treaty of Peace. The Residency has therefore taken all measures necessary for the restoration of the property of this person to her. . . ." By this unilateral declaration of intention, relative to the interpretation of the Treaty of Peace with Italy, in a given case, the French Government, in promising to follow a given line of conduct, had assumed and had created in favour of the Italian Government the obligation which it had declared that it would undertake. The declaration, which was quite precise both as to its content and as to the intention to create an obligation, was made by a competent agency and was brought to the notice of an agent of the Italian Government competent to receive it. Mme S. had, therefore, the right to have her property restored to her.

II. *Persons in category* (1) (*b*).—A. and three others were Italian nationals who were *résidents temporaires* and who had before September 15, 1947, had their permission to reside cancelled by order of the French Government. The Commission recalled that in its decision of June 25, 1952,[1] it had laid down the principle that Italian nationals who, on September 15, 1947, had a *carte de résidence temporaire* in France were entitled to benefit under Article 79 (6) (*c*) of the Treaty of Peace and that it had held that " cancellation of permission to reside must be regarded in the same way as withdrawal, provided that it was ordered by the competent authority and in compliance with the provisions of the municipal law."[2] The Commission referred to the principal enactment in force relating to the admission of aliens to France and observed that there was no provision for cancellation of permission to reside. Such a measure " is an administrative act having the effect of enjoining an alien to leave French territory. It can be done in regard to one who has been refused permission to remain on French territory, or one who has not even applied for such permission, as well as to one who has received such permission which has expired and of which renewal or extension has not been applied for or has been refused. In so far as a cancellation order is given to an alien who is the holder of a *carte de séjour* which is still valid, it is, in reality, only the consequence of the withdrawal of the *carte de séjour* and its validity depends on the regularity of such withdrawal. A *carte de résident ordinaire* can be withdrawn only by an expulsion order. A *carte de résident temporaire* can be withdrawn only by an expulsion order except where the alien no longer fulfils the conditions which entitle him to receive one [*e.g.*, destitution or withdrawal of a work permit]. It results from the foregoing that a cancellation before September 15, 1947, of permission to reside affecting an ordinary national [*sic*] cannot have had the effect of causing him to lose the status of being ' permitted to reside ' within the meaning of Article 79 (6) (*c*) of the Treaty of Peace; and such an order affecting an ordinary national can have such an effect only in the event of failure to fulfil the conditions required for the issue of a *carte de résident temporaire* (insufficient resources or [withdrawal of] work permit)."

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[1] See *Re Rizzo and Others*: *International Law Reports*, 1952, Case No. 107.

[2] *Ibid.*, at p. 487.

It had been contended on behalf of the French Government that the Commission, sitting as a *collège arbitral*, was not entitled to examine the validity of cancellations of permission to reside under French law.

Held: that this contention must fail. The Commission said: "It is true that the *Collège Arbitral* cannot annul a cancellation order so that it loses its validity and can no longer be executed in France. But the *Collège Arbitral*, called on to decide whether a given Italian national fulfils the condition *ex jure conventionis* imposed by Article 79 (6) (*c*) of the Peace Treaty, can do so only after having resolved the preliminary question, whether the residence in France of the said national was 'permitted' under French law." The Commission had in its decision of June 25, 1952, held that the phrase "permitted to reside" comports a reference to the municipal legislation of the State of residence or alleged residence, and not to any arbitrary decision, prior to September 15, 1947, of the said State in regard to permission to reside. "The power of the *Collège Arbitral* ceases only where French municipal legislation itself gives a discretionary power to the French administration, as, for example, in regard to the occasion of an expulsion order or the emergency nature of such an order."

III. *Persons in category* (2) (*a*).—Rizzo and certain others had left Tunisia on various dates between 1939 and 1943, their names remaining, however, on the Aliens Register. In regard to them, the Commission had to consider the question whether the maintenance of the name of an Italian national on the Aliens Register of the Regency of Tunis was sufficient to enable the Italian to claim that he was "permitted to reside" within the territory on September 15, 1947, even if he had left Tunisia before that date. The Commission examined the Beylical Decree of April 13, 1898, already mentioned, setting up an Aliens Register in Tunis, and that of June 11, 1940, Article 1 of which replaced the extract from the Register handed to the alien by a *carte d'identité*. Article 2 of the Decree provided that the *carte* should be withdrawn from the alien on his leaving Tunisia and again handed to him on his return. Article 8 provided that the provisions of the Decree of 1898, so far as not inconsistent with the present Decree, should remain in force. Both the French and the Italian Government agreed that under the Decree of 1898 enrolment on the Aliens Register and the issue of an extract therefrom followed automatically upon the making of a *déclaration de résidence*. The parties were not, however, in agreement on the extent of the reform which had been effected by the Decree of 1940. According to the Italian Government, the only innovation was the replacement of the extract from the Register by an identity card, so as to facilitate the control of aliens. According to the French Government, seeing that without enrolment on the Register an alien could not apply for an identity card, enrolment was a formality essential for permission to reside, but was not in itself sufficient to establish the regularity of an alien's residence. The Decree of 1940 was a war-time measure and its *ratio* was to adapt the position of aliens in Tunisia to war-time circumstances.

Held: that despite the retention of their names on the Aliens Register, Rizzo and the others, who were out of Tunisia on September 15, 1947, could not be regarded as permitted to reside there. The Commission said: " The change in the name of the document issued to the alien corresponds, in reality, to a change in the very nature of the document. The issue of the extract from the Aliens Register does not presuppose any decision of the [issuing] authority, the extract being no more than a certified copy. The grant of an identity card presupposes, on the other hand, a decision made by the authority on an application, [namely] a ' *demande de séjour* ' . . ." The intention of the Decree of 1940 was clearly " to put an end to the permission to reside resulting from enrolment and certified by the extract, and to oblige all aliens to apply for . . . a new permission to reside which could be refused . . . [and which could be for a period not exceeding two years] . . . . The fact that an alien returning to Tunisia would receive back his identity card signifies juridically that the permission to reside had begun to take effect again without further formality. . . . The fact that expulsion orders have been issued in Tunisia against Italian nationals who had left the territory and handed in their identity cards had the object of preventing such cards being restored to them on their return to Tunisia and of causing their names to be struck off the Aliens Register, thus depriving them of the right of submitting a new *demande de séjour*.

" The contrary opinion expressed in the preamble [*considérants*] of a provisional order [*ordonnance de référé*] dated February 20, 1951, of the President of the Civil Tribunal of First Instance of Sousse (Tunisia) in the case of *Galante* v. *Service de Liquidation de Biens Italiens* cannot be binding on the *Collège Arbitral*.

" It results from the foregoing that Italian nationals who on September 15, 1947, were away from Tunisia but who, having previously resided there, remained enrolled on the Aliens Register, cannot be regarded as permitted to reside within the meaning of Article 79 (6) (*c*) of the Treaty of Peace."

IV. *Persons in category* (2) (*b*).—(i) C. was an Italian national against whom an expulsion order was made on October 25, 1946. The order was revoked following an order of house arrest made on July 28, 1948.

Held: that the expulsion order having been revoked by a subsequent order, it was annulled *ex tunc*. With regard to Italian nationals who, before September 15, 1947, had been made the subject of an expulsion order but who (according to the Italian Government) benefited by a revocation, express or necessarily implied, of the said order after that date, the Commission recalled what it had laid down in this regard in its decision of June 25, 1952:

"... Italian nationals ... against whom an expulsion order was made before September 15, 1947, cannot benefit under Article 79 (6) (*c*). It matters not if the order was not notified to the person in question until after September 15, 1947.... Exception must be made for the case in which objection, on the ground of illegality, to the expulsion order has been accepted, even after September 15, 1947, by the competent French authority ...

"It is similarly immaterial whether an expulsion order made before September 15, 1947, has or has not been executed, the French administration having, expressly or *de facto*, suspended it.... There can be no question of tacit renunciation of an administrative measure such as expulsion.

"If the expulsion order was made before September 15, 1947, under emergency procedure, it none the less comes within Article 79 (6) (*c*) of the Treaty, and an international tribunal cannot review the question whether there was or was not an emergency.... Expulsion can, in French law, be revoked by a subsequent order (Article 23 of the Ordinance ...). In that case, the expulsion order becomes a nullity *ex tunc*,... Such a case cannot be treated differently from a case in which the expulsion order, appealed against for illegality, has been cancelled by the competent French authority."[1]

In the present case, the Commission said: "This is not simply an instance of the abrogation, without retroactive effect, of an expulsion order. It matters not that after the order revoking the expulsion his original identity card was not restored to C., but that he was granted a new card, valid from the day of issue; the validity of the original card expired on November 8, 1947. C. is therefore entitled to have his property restored to him."

(ii) In the case of B., against whom an expulsion order was made on December 11, 1944, the order was not executed as B. became of unsound mind. The order was not revoked. B. nevertheless remained on the Aliens Register. The Resident-General restored to him the management of his property. The Italian Government claimed that the Resident-General had revoked the expulsion order by making an order inconsistent therewith (*acte contraire*).

Held: that such a contention must fail. The Commission said: "The French administration may, for example, for reasons of humanity, suspend the execution of an expulsion order without thereby renouncing the rights flowing to it from the fact that residence was no longer permitted on September 15, 1947. The restoration to the person concerned of the management of his property constitutes a benevolent concession, from which no renunciation of rights flowing from the Treaty to Italy [? *sc.* France] can be deduced, the less so seeing that B. had never been made the subject of a regularization in Tunisia of his administrative position which could be interpreted as an implied revocation, non-retroactive, of the expulsion order. It is true that the subjects of public international law have the power to enlarge, by a unilateral declaration of intention, a right which belongs to them, but the subject in question must show a clear and precise intention to do so; in that regard, international law is very strict (*cf.* Balladore Pallieri, *Diritto Internazionale Pubblico* (5th ed., 1948), pp. 251 and 252)."

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[1] See *International Law Reports*, 1952, at pp. 485, 486, 487.

[Report: *Recueil des Décisions,* Part 5, p. 57.]

Aliens—Expulsion of—Denial of Natural Justice—The Law of Canada.

REGINA *v.* SPALDING.

Canada, British Columbia Court of Appeal. July 6, 1955.

(O'Halloran, Robertson, Sidney Smith, Bird and Davey JJ.A.)

THE FACTS.—A special Inquiry Officer acting under the provisions of the Immigration Act made an order for the deportation of the respondent after a hearing from part of which the respondent was excluded while evidence was being taken. The respondent appealed to the Minister of Citizenship and Immigration, but instead of proceeding thereon she launched a motion for a writ of *certiorari.* On the return of the motion the deportation order was quashed by Manson J., and from that decision the Minister appealed.

Held: that the appeal must be dismissed. The deportation order made as a result of a hearing which constituted a denial of natural justice, was invalid and could properly be questioned by way of *certiorari*, notwithstanding that the appeal to the Minister had not been disposed of.

The Court said (*per* O'Halloran J.A.): " Counsel for the appellant Minister conceded in this Court that the hearing before the special Inquiry Immigration Officer was conducted in violation of the essentials of justice. The respondent had been excluded from the room while a witness was questioned. She had no opportunity to hear his testimony and to examine him thereon. Moreover, it does not appear she was informed of the reason for the special enquiry, nor of the specific ground upon which the deportation order was made. In true effect therefore it was not a valid legal hearing at all, and if the Inquiry Officer had been a court it would have been described as *coram non judice.* At the conclusion of this invalid hearing, or mishearing, and seemingly as part of it, the respondent when asked by the Special Inquiry Officer if she wished to appeal to the Minister of Citizenship and Immigration said ' yes ', and immediately signed the form of notice of appeal he proffered her. It contained no grounds for appeal let alone any provision or requirement therefor; and if respondent had not signed it, she would have been liable to immediate deportation. She was without legal counsel.

" The only point taken on this appeal by counsel for the appellant Minister was that Manson J. acted prematurely and in wrong exercise of discretion in quashing on *certiorari* the deportation order before the Minister had disposed of the ' appeal ' to him. Counsel was unable to cite any judicial decision relating to the Immigration Act, R.S.C. 1952, c. 325, to support his submission, but sought to rely on several decisions in which *certiorari* was refused, notably during an appeal pending from a Criminal Court to a constituted Court of Appeal.

" There is in my judgment no similarity or ground for analogy between an appeal to the Minister under the Immigration Act, and an appeal in its proper legal sense from a constituted Court of the land to a provincial Appellate Court.

[O'Halloran J.A. then examined some of the distinctions which deny any such similarity or analogy, and continued:] " Respondent's complaint on *certiorari* in essence was not against a wrong judicial decision as such by the Special Inquiry Officer, but it was a complaint that no proper hearing was held by the Officer to justify any decision right or wrong. To apply what Lord Parmoor said in *Local Government Bd.* v. *Arlidge* (1914), 84 L.J.K.B. 72 at p. 87, she contended the Officer did not determine her right of entry into Canada ' in a judicial spirit, in accordance with the principles of substantial justice '. The respondent said in effect that she had been deprived of the imprescriptible right of a British subject (she comes from Australia), see *Tyrrell* v. *Cole* (1918), 120 L.T. 156, to have a fair hearing in a matter which affects her civil status, and she sought the aid of the inherent jurisdiction of the Supreme Court of this Province to quash a ruling by the Immigration Officer which she alleges is a denial of justice according to law: and see *Innes* v. *Wylie* (1844), 1 Car. & Kir. 257, 174 E.R. 800, *per* Lord Denman C.J., and *Russell* v. *Russell* (1880), 14 Ch. D. 471 at p. 478, *per* Jessel M.R.

" Upon this understanding of the situation, the right to *certiorari* arose *ex debito justitiae* unhampered by considerations which might otherwise affect the exercise of discretion in a case where there is a pending appeal safeguarded by statute from a constituted Court to a provincial Appellate Court. On these grounds alone with deference the appeal is one that requires dismissal. . . . "

[Report: [1955] 5 D.L.R. 374.]

Aliens—Expulsion of—Procedure of—Effect of Revocation of Expulsion Order by Subsequent Order of Arrest—Effect of Non-execution of Expulsion Order " for reasons of humanity ".

See p. 500 (*Re Rizzo and Others* (*No.* 2)).

D—EXTRADITION

I.—In General

Extradition—In General—Expulsion in Lieu of Extradition—Detention as Preliminary to Expulsion.

See p. 497 (*Muller* v. *Superintendent, Presidency Jail, Calcutta, and Others*).

II.—Extradition of Nationals

Extradition—Of Nationals—Request by Saar to Germany—Extradition of German Nationals Prohibited by German Law—Whether Prohibition Precludes Compliance with Request—The Law of Germany.

RENDITION OF SUSPECTED CRIMINAL (SAAR TERRITORY) CASE.

German Federal Republic, Federal Constitutional Court. October 6, 1955.

THE FACTS.—The appellant, a German national, left Germany in 1946 to take up residence in the Saar. In 1954 he left the Saar and returned to Germany. Shortly thereafter, the Saar authorities requested his rendition by the authorities of the Federal Republic of Germany as he was suspected of having committed certain criminal offences while resident in the Saar and it was desired to put him on trial there. Article 16 (2) of the Constitution of the Federal Republic of Germany provides that " no German shall be extradited to a foreign country ". The appellant relied on this provision and contended that he could not be handed over to the Saar authorities as the territory of the Saar was a foreign country within the meaning of Article 16 (2) of the Constitution and his extradition therefore prohibited. The Public Prosecutor contended that the Saar was part of Germany and that the courts exercising jurisdiction there were German courts, and accordingly the request of the Saar authorities was a request for rendition within the same country, to which Article 16 (2) of the Constitution did not apply.

Held: that the Saar was German territory and the courts exercising jurisdiction there were German courts, and that the appellant must therefore be handed over. This was a request for rendition within the same territory, and not a request for extradition addressed by one country to another.

The Court said: " The contentions put forward on behalf of the appellant do not compel us—contrary to the true legal position—to regard the German territories outside the field of application of the Constitution as foreign countries within the meaning of Article 16 thereof, and to extend to them the prohibition relating to extradition. The fact that after the collapse [of Germany] there arose in parts of Germany conditions which might create the risk that proceedings undertaken against a German national might not be conducted in accordance with the same democratic principles as in the Federal Republic, causes conflict between the legal and the factual position. Such conflict must not be removed by ignoring the true legal position and regarding these territories as foreign countries. . . .

" The handing over of a person to the courts exercising jurisdiction in the Saar could indeed constitute a violation of Article 16 (2) of the Constitution if those courts had to be regarded as foreign courts, by reference to their nature. This, however, is not the case. The old German judicial organization has been retained in the Saar. Not only is the language of the courts German, but the law in force there is equally German, as regards both its basic concepts and the overwhelming part of its specific legal enactments. The jurisprudence of the Saar is founded on the same legal-democratic principles as that of the Federal Republic. The legal provisions applicable to the trial of the appellant largely coincide with those in force in the Federal Republic. The German Criminal Code and the German Code of Criminal Procedure are in force in the Saar, as well as in the Federal Republic. The amendments of substantive criminal law and the law of criminal procedure introduced [in Germany] since 1945 are of subordinate significance. Although it is true that the Saar has mixed Franco-Saar courts by virtue of the ' Judicial Treaty ' of May 20, 1953, their jurisdiction being referred to as ' Union jurisdiction ', we need not determine whether these courts can be regarded as German courts within the meaning of the relevant Law concerning Judicial Assistance, because there is no indication whatsoever that these courts are competent in the proceedings against the appellant. The German character of the other courts, in any event, remains unaffected by this special jurisdiction, which is concerned, above all, with the Economic Union between France and the Saar ".[1]

[Report: JZ, 10 (1955), p. 670.]

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[1] The Saar became part of Germany as from January 1, 1957.

III.—Conditions of Extradition. Extraditable Crimes

Extradition—Conditions of—Offence Time-Barred by Law of Requested State—Treaty Providing for Exercise of Discretion of Requested State in respect of Time-Barred Offences—Municipal Law of Requested State Prohibiting Extradition in respect of Time-Barred Offences—Whether Discretion may be Exercised—The Law of France.

Re PLEVANI.

France, Court of Cassation. January 7, 1955.

THE FACTS.—Article 5 of the French Extradition Law of March 10, 1927, provides that extradition shall not be granted if a sentence imposed in the requesting State has, before the arrest of the extradited person in the requested State, become time-barred by the law of the requested State. Article 10 of the Franco-Italian Extradition Treaty of May 12, 1870, provides that " extradition may be refused if, according to the law of the country of refuge, the sentence has become time-barred ". In 1946 Plevani, an Italian subject, was sentenced to two terms of imprisonment in Italy. Shortly thereafter, he escaped from the Italian prison in which he was serving his sentence and took up residence in France. There he was arrested in 1953, by which time his sentence had become time-barred according to French law. It was, however, contended on behalf of the prosecution that the French Government was entitled, in its discretion, to grant the Italian request for Plevani's extradition, on the ground that Article 10 of the Franco-Italian Extradition Treaty provided in such cases that extradition " may be refused ".

Held: that Article 10 of the Treaty must be read in conjunction with Article 5 of the Extradition Law which was categorical in prohibiting the extradition of persons whose sentences had become time-barred under French law, and that extradition must accordingly be refused.

The Court said: " Even if the Law of March 10, 1927, according to Article 1 thereof, lays down rules for extradition only in the event of there not being a treaty, and even if, where there is a treaty, it deals only with matters not provided therein, its Article 5 nevertheless makes extradition subject to general rules which constitute the general law of extradition and which are binding on the Executive as well as the Judiciary whenever the peremptory provisions of a treaty do not expressly provide to the contrary. These rules include paragraph 5 of Article 5, according to which extradition can never be granted where, according to the law of the country of refuge, as in the present case, the sentence has become time-barred before the arrest of the extradited person. The appellant contends that this latter provision cannot apply in this case because Article 10 of the Franco-Italian Treaty of May 12, 1870, makes express provision for the case where a sentence has become time-barred by the law of the requested State. Article 10 of the Treaty provides as follows:

> 'Extradition may be refused if the sentence has become time-barred according to the law of the country in which the extradited person has taken refuge.'

The appellant contends that this provision of the Treaty must be applied to the exclusion of Article 5 (5) of the Law of March 10, 1927, because the extradition of an Italian subject is being requested by the Government of his home State, and that accordingly the French Government is entitled, by virtue of the Treaty, to exercise its discretion which the Law, in the absence of a treaty, would not permit it to do. Article 10 of the Franco-Italian Treaty, which came into existence at a time when municipal law did not govern the subject of extradition, did not create any right for the benefit of the Italian Government to obtain the extradition of an Italian subject who had taken refuge in France because, according to French law, the sentence was time-barred. On the contrary, Article 10 confined itself to conferring upon the French authorities the right unilaterally to refuse to hand over the person whose delivery was requested. It follows that this Article, which concerns only the French authorities, far from ousting the provision contained in Article 5 (5) of the Law of March 10, 1927, must be read in conjunction with it. This latter provision, which is binding on the Executive as well as the Judiciary, has only had the effect of turning into a positive duty to refuse extradition the right which the French Government derived from the Treaty, without thereby modifying the rights of the Italian Government."

[Report: *Bulletin de la Cour de Cassation*, 1955, p. 7.]

Extradition—Conditions of—Principle of Speciality—Limit of Time during which Prosecution for Another Crime Prohibited—Jurisdiction—Offences Committed Abroad—Offences Committed in One Country with Effect in Another.

NOVIC *v.* PUBLIC PROSECUTOR OF THE CANTON OF BASEL-STADT.

Switzerland, Court of Cassation. October 27, 1955.

THE FACTS.—The appellant was in May 1948 sentenced to ten months' imprisonment in Basel-Stadt, but escaped to France before serving the sentence. In 1950 he wished to renew his Swiss passport, but as a fugitive from justice was unable to do so through the normal channels. He accordingly persuaded a former official of the passport office in Basle, one Buser, whom he had invited to France for the purpose, to ask an official of that office to renew the passport. At the instance of Buser, an official named Frei on September 17, 1950, placed the necessary official stamps on the passport. The required indications on the passport were then completed in France, in particular by the addition of the signature of the head of the passport office.

In August 1952 the appellant was extradited from France to Switzerland for the purpose of serving the sentence imposed on him in 1948. He was conditionally released from prison on February 18, 1953, and placed on probation for a year.

On January 25, 1955, Frei was sentenced to six months' imprisonment for forgery; Buser was given a similar sentence for inciting an official to commit forgery; and the appellant was sentenced to six months' imprisonment for inciting an official to commit forgery. These sentences were confirmed by the Court of Appeal of Basel-Stadt on July 8, 1955.

The appellant now asked the Federal Tribunal to set aside the decision of the lower Court. It was contended on his behalf, firstly, that the offence was committed in France and was not listed in the Franco-Swiss Extradition Treaty, and that Swiss criminal law was therefore not applicable. Secondly, it was contended that the appellant had been extradited from France for the exclusive purpose of serving the sentence imposed on him in 1948, and that according to the principle of speciality he could not be prosecuted for any other offence.

Held: that the appeal must be rejected. An offence which takes effect in Switzerland must be considered to have been committed there. The principle of speciality does not prevent prosecution once the person concerned has been at liberty for one month and has not left the country.

The Court said: "(a) The principle of speciality, according to which extradition is subject to the condition that the person extradited shall not be prosecuted or sentenced for any offence committed prior to extradition other than the one for which extradition is granted, is expressly recognized by both the Swiss Extradition Law of 1892 (Article 7) and the Franco-Swiss Extradition Treaty of 1869 (Article 8). The Treaty, which governs extradition of an offender from France to Switzerland, permits exception to that principle in only two cases: when the accused expressly and voluntarily consents and the extraditing State is given notice of that fact; and when the agreement of the extraditing State has first been obtained and the offence in question is extraditable. According to the letter of that Treaty the absence of the consent of the accused and the impossibility of obtaining the consent of the extraditing State in respect of an offence which is not extraditable would enable the accused to invoke the principle of speciality without limit of time. However, it cannot be the purpose of the pertinent provision to exempt the extradited person indefinitely from punishment for all offences committed prior to extradition which are not extraditable. The protection against such punishment afforded by the principle of speciality cannot continue for an unlimited period of time. Since the Extradition Treaty is silent on the question of how long the principle of speciality is to apply, reference must be made to national law. Both the French and the Swiss Extradition Laws provide for a protective period of one month. The application of that provision by analogy to cases of extradition between France and Switzerland is accordingly justified.

" Novic was fully at liberty as from February 18, 1954. He did not leave Switzerland within one month. In these circumstances the principle of speciality is not an obstacle to his prosecution.

" (b) Article 7 of the Penal Code provides that an offence must be deemed to have been committed not only in the place where it is carried out, but also in the place where it takes effect. This provision applies also to incitement to commit an offence. Article 24, para. 1, of the Penal Code defines incitement as deliberately inciting another person to the offence ' committed ' by that person. Incitement is therefore only complete when the person incited has either carried out the act or has attempted to do so. For incitement to take effect it is not only necessary that another person should have formed the intention to commit the offence, but also that he should have begun to put that intention into execution.

" Buser formed the intention to incite Frei to forge the passport in France, but executed that intention only in Switzerland. Since Novic's incitement thus took effect in Switzerland, his offence must, according to Article 7 of the Penal Code, be regarded as having been committed there. Swiss law is accordingly applicable. . . ."

[Report: *Arrêts du Tribunal Fédéral Suisse*, 81 (1955), IV, p. 285.]

Extradition—Conditions of—Refusal of Extradition for Procedural Reasons—Second Request for Extradition—The Law of Venezuela.

Re DÍAZ.

Venezuela, Federal Court. February 19, 1954.

THE FACTS.—Spain requested the extradition of Fernández Díaz or Díez on a charge of swindling (*estafa*). The Federal Court denied the request, in a decision of August 7, 1953,[1] on the ground that the request did not conform to the procedure set forth in Article 8 of the Extradition Treaty between Venezuela and Spain of January 22, 1894. The extradition request was revised in the light of this decision and re-submitted by Spain on December 1, 1953, and transmitted to the Federal Court on January 1, 1954.

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[1] *Re Díaz: Gaceta Forense* (2a Étapa), No. 1 (April–August 1953), p. 180.

Held: That the extradition must be refused. Where an extradition request had been refused for procedural reasons, a second request for the surrender of the same person for the same offence would not be entertained by the Court.

The Court said: "There is no provision in the extradition treaties which have been concluded by Venezuela nor in the positive law of the country which is expressly and definitively applicable to the case under consideration. The juridical basis for examination of the question raised must be found in general principles of international law and in other legal concepts which are recognized in Venezuela.

"In the Extradition Treaty between Venezuela and Bolivia of September 21, 1883, Article 16 provides:

> 'If the Government which requests extradition or its agents do not take custody of the fugitive within three months, counted from the date of notification, the fugitive shall be released from custody, and no further claim to his surrender can be made on the charge which gave rise to the original extradition request.'

A similar provision appears in Article 16 of the Extradition Treaty with Belgium of March 13, 1884. Article 12 of the Extradition Treaty with Spain of January 22, 1894, provides that if within the time limit therein established '. . . the diplomatic agent of the demanding State has not taken custody of the fugitive, the fugitive will be set free, and he may not be detained again on the same grounds.' The same principle is to be found in Article 14 of the Extradition Agreement concluded by Venezuela, Ecuador, Bolivia, Peru, and Colombia (Bolivarian Convention) on July 18, 1911. The Treaty of Extradition and Judicial Assistance in Penal Matters, concluded by Venezuela and Italy on August 23, 1930, includes an identical provision in Article 14, which states:

> 'If the requesting State does not take custody of the person whose extradition has been sought, within a period of 180 days counted from the date on which the official notice was received to the effect that the fugitive has been placed at its disposition, the fugitive shall be set free. Extradition of the same person will not be conceded *de novo* on the same charges.'

"Thus it is evident from an examination of Treaties concluded by the Republic that as a general principle an extradition request once granted ceases to be effective if the requesting State does not take custody of the fugitive within a fixed period of time and, as a result, the extradition of the fugitive may not be again requested for the same offence. This is the universal rule of *non bis in idem*, that is, that two successive judgments may not be made in regard to an extradition request for the same offence. The State of asylum, acting through its competent authorities, may render only one judgment because, among other reasons, an extradition proceeding is neither an ordinary nor an extraordinary judicial proceeding. It is simply a means of making the accused available for criminal proceedings. Only in regular judicial proceedings may consideration be given to a new request where the original request had been denied because of a procedural defect.

"Venezuela has affirmed this principle with the utmost precision in its public law by ratifying without reservation Article 381 of the Code of Private International Law (Bustamante Code),[2] signed at the Havana Conference on February 20, 1928. This Article provides: 'If the extradition of a person has been refused, a second request on account of the same crime cannot be made.'

"The text cited refers in definite and categorical terms to the case of refusal of extradition and makes no distinction as to the reasons for such refusal. It is quite clear that the general principles of international law applicable in this case reject the possibility of a new request where the first one has failed or where extradition was denied, no matter what the reason may have been for its refusal."

[Report: *Gaceta Forense* (2a Étapa), No. 3 (January–March 1954), p. 71.]

IV.—Procedure of Extradition

Extradition—Procedure of—Government of Requested State Refusing Extradition—Enactment of Subsequent Law in Requesting State—Whether Such Law Constitutes a New Fact Justifying Requested State to Re-open Proceedings—Procedural Requirements on Re-opening Proceedings—The Law of France.

Re PETALAS.

France, Conseil d'État. November 18, 1955.

THE FACTS.—The Greek Government requested the extradition of Petalas, a Greek national, and in accordance with French law the *Chambre des mises en accusation* (of the Court of Appeal) considered the merits of the Greek request. It came to the conclusion that the Greek request was justified and accordingly recommended P.'s extradition. The French Government, however, disregarded the recommendation and ordered P.'s release. The French Extradition Law of March 10, 1927, provides that extradition proceedings may be re-opened on new facts coming to light, and the French Government, considering the subsequent enactment of a new Greek Law to be such a new fact, ordered the extradition of P., without first consulting the *Chambre des mises en accusation.*

Held: that the order of extradition was void and must be rescinded, on the ground that the *Chambre des mises en accusation* had not been consulted; the original refusal of the French Government to extradite P. had finally concluded the first set of proceedings, with the result that the proceedings could only be re-opened thereafter by observing the requirement of prior consultation of the *Chambre des mises en accusation.*

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[2] *L.N.T.S.*, vol. 86 (1929), p. 111.

The Court said: "The *Chambre des mises en accusation* gave its views on March 3, 1954. Thereafter, although this view was in favour of granting extradition, the Government decided, on November 10, 1954, to refuse the request. Thereupon M. Petalas was set free. Even assuming that the enactment of a new Greek Law of Criminal Procedure constituted a new fact such as to give the French Government the right to modify its original decision, it was nevertheless under a duty, in a case of this kind, again to comply with the provisions of the Law of March 10, 1927, and in particular again to submit the matter to the *Chambre des mises en accusation,* in order that the latter might consider the new fact and decide whether it justified the re-opening of the proceedings.

"The *Chambre des mises en accusation* was not consulted before the order of October 31, 1955, for the extradition of Petalas was made. The appellant is therefore right in contending that the said order was made irregularly and is of no effect. The order of October 31, 1955, is hereby rescinded."

[Report: *Gazette du Palais,* December 21–23, 1955.]

V.—Political Crimes

Extradition—Political Offences—Meaning of—Alleged Offence Accompanied by Murder—Claim of Person whose Extradition is Sought to Asylum in Requested Country—Right of Asylum Guaranteed by Constitution of Requested Country—Whether Person to be Extradited Entitled to Asylum Notwithstanding Alleged Murder—The Law of Germany.

EXTRADITION OF GREEK NATIONAL (GERMANY) CASE.

German Federal Republic, Federal Supreme Court. July 12, 1955.

THE FACTS.—The Greek Government requested the Government of the German Federal Republic to extradite one S., a Greek national, who had been sentenced to death *in absentia* by a Greek Court for having taken part in the murder of a number of Greek and non-Greek nationals in August 1944. In making the request the Greek Government undertook not to carry out the death sentence but to put S. on trial as if the previous sentence had not been passed. The request for the extradition of S. was received while S. was on a Finnish ship in German waters, and the German authorities took S. into custody pending extradition proceedings. After his arrest S. contended that he had not taken an active part in the alleged murders and that, in any event, the offence with which he was charged was a political offence, alternatively an offence connected with political events, and that quite apart from that, he was entitled to claim the right of asylum in accordance with Article 16 (2) of the Constitution of the German Federal Republic which provides that " politically persecuted persons are entitled to claim the right of asylum ".

The Court considered the following questions: (i) whether S., who had entered the territory of the Federal Republic not in order to seek asylum, but as the result of being apprehended by the German authorities in pursuance of a request for his extradition, was nevertheless entitled to claim the right of asylum; (ii) whether Article 6 of the Extradition Treaty between Germany and Greece, which precludes the extradition of persons charged with political offences, took precedence of section 3 of the German Extradition Law of December 23, 1929, which permits the extradition of such persons if they have also committed crimes against the life of others; (iii) whether S. was a " politically persecuted person " within the meaning of Article 16 (2) of the Constitution of the Federal Republic and therefore entitled to claim asylum.

Held: (i) that if S. could prove that he was a " politically persecuted person " within the meaning of Article 16 (2) of the Constitution, he would be entitled to claim asylum, irrespective of whether he had entered German territory for that or any other purpose; (ii) that this question need not be determined in the present case; and (iii) that, notwithstanding that there were certain international usages in the matter of granting asylum, there was no definition of a " politically persecuted person " in international law. The Court was therefore compelled to define the term by reference, *inter alia*, to extradition treaties between Germany and other countries. As most of these treaties provided that no asylum was to be granted to political offenders who had committed offences against the life of others, the term " politically persecuted person " contained in Article 16 (2) of the Constitution must be interpreted in that sense, and the request of the Greek Government for the extradition of S. must accordingly be granted.

The Court said: " S. did not escape to the territory of the Federal Republic for the purpose of seeking asylum. By request of the Greek Government he was taken into temporary custody pending extradition while on a Finnish merchant vessel in German waters. It was only thereafter that he claimed the right of asylum. This circumstance is immaterial for the application of Article 16 (2) of the Constitution. Irrespective of whether Article 16 of the Constitution confers upon a foreign national a personal right to claim asylum, or whether it contains only the expression of a sovereign right to grant protection against political persecution, and also irrespective of the extent of such asylum, there is no justification for refusing asylum in cases where the persecuted person does not enter federal territory in the capacity of a person seeking asylum. The special circumstances of transit of persons in course of extradition and of re-delivery where promised by the Federal Government need not be considered here. When the occasion arises they will be considered. However this may be, there is no reason to refuse asylum merely because a foreign national may have occasion, subsequent to his entering the territory of the Federal Republic, to claim asylum, whether he has entered the territory for other reasons or whether he came here as the result of deportation or other events and only learnt of the ' persecution ' after his arrival.

" It follows that the legality of extradition in the present case depends on whether S. can claim the right of asylum in accordance with Article 16 (2) of the Constitution, notwithstanding that he is charged with participation in crimes against the life of others, which deprive him of the protection of section 3 of the Extradition Law. This question must be answered in the negative (*i.e.*, S. cannot claim the right of asylum). The preliminary question which arises in this context as to the supremacy of the Extradition Treaty between Germany and Greece over section 3 of the Extradition Law and Article 16 (2) of the Constitution, which were both enacted after the ratification of the Treaty, need not be determined, having regard to the terms of the Treaty. The unrestricted wording of Article 6 of the Treaty precludes any right of the requesting Government to claim extradition for political offences or offences connected with political events. Neither the provisions of German municipal law limiting the prohibition of extradition in respect of political offences nor the most extensive right of asylum forming part of German law can affect the Treaty rights of the Greek Government. The readiness of the Federal Government, which may possibly have become apparent in this case, to grant the Greek request for extradition, and the statement of the Greek Government of an intention to act in the same manner in reverse circumstances, indicate an agreed change in the manner of dealing with requests concerning deliberate offences against the life of others, but they do not constitute an amendment of the Treaty; they only foreshadow possible subsequent developments. For this reason we need not consider the question whether the Treaty takes precedence of conflicting German law. The whole problem depends on the extent of the right of political asylum according to Article 16 (2) of the Constitution. The Constitution does not contain anything to indicate the persons who are ' politically persecuted persons ' within the meaning of the law governing asylum. Nor does any other Federal Law give reliable guidance on this matter. The provision contained in Article 16 (2) of the Constitution must therefore be interpreted in the light of its own content, its relationship to other legal provisions, and its history and purpose. It appears from the debates of the Parliamentary Commission concerned with Article 16 that a definition of politically persecuted persons was eschewed and that, instead, reference was made to international law. However, international law does not contain an all-embracing definition of the term, although there is ample proof that with regard to certain cases of persecution there may have emerged a generally valid opinion, or even a usage recognized as law, that certain persons are to be regarded as politically persecuted. In any event, the special legal situation of the Federal Republic, having regard to existing extradition treaties, to section 3 of the Extradition Law, and to Article 16 of the Constitution, would not permit us to take into account a definition framed by international law. Even if such definition were to exist, it would still be necessary in individual cases to reconcile the various provisions here referred to.

" The Federal Government, as the authority which deals with extradition, and the courts which co-operate with the Government in matters of extradition, must therefore define the term ' politically persecuted person ' in such a manner as to do justice to the fundamental and constitutionally guaranteed right of asylum, the legitimate protection against political persecution of the person seeking asylum, and the reputation and position of the Federal Government as a Contracting Party to agreements between States. It follows that, without there being any need to determine this question in the present case, all those can be regarded as politically persecuted persons whose rights are adversely affected—or who may reasonably fear that their rights may be so affected—within the meaning of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950. This, according to the plea of the person concerned, is obviously not the case here. It is therefore unnecessary to give a more detailed definition in this respect. For this reason we are also not concerned with the general question whether, and to what extent, Article 16(2) of the Constitution ' goes beyond ' the provision contained in section 3 of the Extradition Law in that it grants wider protection than the latter against criminal prosecutions and executions of sentences in foreign countries. On the other hand, it is of decisive importance for the interpretation of Article 16 (2) that, as far as can be seen, treaties concluded by Germany exclude from extradition political crimes and offences, subject however to limitations concerning deliberate offences against human life. These limitations are modelled on similar provisions contained in foreign laws and on section 3 of the German Extradition Law. Notwithstanding that treaties do not always agree on this matter and that there is no general rule of international law governing it, we can infer from such treaties, as well as from the objects pursued by Contracting Parties thereto, that there is a general principle to the effect that asylum is to be refused to political offenders who have committed crimes against human life. It is this principle which, as appears from section 3 (3) of the Extradition Law, governs German law, with the exception of deliberate crimes against human life which have been committed in open combat. There is nothing to suggest that the Legislature intended to depart from this principle when introducing the institution of political asylum. The chairman of the Parliamentary Commission explained the provision governing asylum—without, apparently, meeting any opposition—by saying that political offenders against human life were not entitled to asylum, and that according to international law they were subject to the application of the '*Attentats* clause', with the result that they could be extradited and—where there was an extradition treaty—had to be extradited. It is true that the '*Attentats* clause' does not apply generally, but only by virtue of a treaty, that it is not a general rule of international law, and that, moreover, it is concerned only with attacks against Heads of State or leading statesmen. The comment of the chairman of the Commission, on the other hand, which was not contradicted, shows that the Parliamentary Commission intended to grant asylum, not to an unlimited extent, but without deviating from the view generally held at the time. We need not determine the question whether there is a right of asylum 'in the widest sense', as suggested by Mangoldt. The debates of the Commission contain little to suggest that there is. In this context, the debates were mainly concerned with the question whether German nationals were entitled to 'asylum' and whether it was advisable to restrict the right of asylum to desirable foreigners or to specific causes of political persecution. All efforts at limiting the right of asylum in this direction failed because they would have deprived that right of any value, and it was only with regard to these efforts that the Commission stressed asylum 'in the widest sense'. It does not follow, however, that the Parliamentary Commission intended, by means of the enactment of a general constitutional right, to restrict or abolish any international undertakings of the Federal Government, such as were contained in extradition treaties—albeit not in the Treaty with Greece—and reflected the international principle of suppressing political offences against human life, a principle which the German Reich adopted in the German Extradition Law. Moreover, Article 14 of the United Nations Declaration of Human Rights of December 10, 1948, which the Federal Constitution seeks, generally speaking, to follow, contradicts any such interpretation. Article 14 deals with the right of asylum in the face of unjust persecution; it excludes the right of asylum, however, 'in the case of persecutions generally arising from non-political crimes or from other acts contrary to the purposes and principles of the United Nations'. The Federal Government adopted this view in the explanatory memorandum accompanying the draft of a Law to implement the

Franco-German Extradition Treaty. Meanwhile, this Law has been enacted, without any voices having been raised against this view in the course of the parliamentary debates.

"Lastly, our view is supported by the requirement of reciprocity. The more extensive the right of asylum granted by the Federal Republic, the more limited will be—in the reverse case—the guarantee of reciprocity by requested States."

[Report: NJW, 8 (1955), p. 1365.]

Extradition — Notion of — Political Offence — Requirement of — Political Motive—The Law of Argentina.

Re PEYRE.

Argentina, Cámara Nacional Especial. December 20, 1955.

THE FACTS.—France requested the extradition of François R. Peyre on charges of swindling and bribery. In the absence of an extradition treaty between the two States, the bases for Argentine consideration of the request were Extradition Law No. 1612[1] and pertinent provisions of the Code of Criminal Procedure. It was charged that Peyre had conspired with agents of Ho Chi Minh to influence by bribery the selection of a candidate for the post of High Commissioner for Indo-China. On behalf of Peyre it was contended, *inter alia,* that the offences with which he was charged were political offences for which he could not be extradited, that he was liable to trial only under Argentine law as he had been naturalized in Argentina in 1953, that he should only be triable on a charge of bribery, and that the bribery charge was outlawed by passage of time according to Argentine law. The Court of first instance refused extradition on the ground that the offences in question were political in character.

Held: that extradition must be granted. To be classified as a political offence and hence non-extraditable, an offence must be clearly motivated by political considerations.

The Court said: "The conclusions regarding the legality of the action and the immateriality of the allegation of prescription which are stated in the report to the Court by the Fiscal de Cámara are correct. In fact, in order that extradition be conceded, it is necessary, as the Fiscal points out, that the charges fulfil the requirement of being offences according to the law of both States, although the description of the offences need not be identical in both penal codes. The charges made against Peyre are founded on Articles 177–179 of the French Penal Code and are comparable to similar offences described in Articles 172 and 258 of our Penal Code.

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[1] *Anales de Legislación Argentina,* 1881–1888, p. 169.

" It follows, also, that the penal action moved against Peyre has not been outlawed by lapse of time, in view of the facts that Article 655, clause 5, of the Code of Criminal Procedure provides that prescription must be determined in accordance with the laws of the demanding State and that under the French Penal Code the requisite time for an allegation of prescription has not passed.

" Furthermore, no account can be taken of Peyre's plea that he should be tried in Argentina because he was naturalized in this country after the commission of the offences which gave rise to the extradition request for which he is answerable, according to Article 3, clause 1, of Law No. 1612.

" In short, we must reverse the judgment under appeal that extradition should not be granted

" The petitioner argues that the extradition request is without merit because Article 3, clause 2, of the above Law provides that extradition may not be granted for ' delicts having a political character or related to political offences '. In this case, however, as the Fiscal de Cámara has pointed out, the record does not warrant the description of the charges against the accused as political offences. These acts, as described by the demanding State, are the offences of ' *corruption et trafic d'influence* ' (Articles 177–179 of the French Penal Code), which are comparable to the offences of swindling and bribery as comprehended in Articles 172 and 258 of our Penal Code. Peyre is charged with having received large sums of money from the Delegate of the Government of Viet-Nam, Hoang Van Co, for the purpose of bribing generals and functionaries of the French Republic in order to bring about the replacement of the French High Commissioner in Indo-China, Pignon, by General Charles Mast.

" Such deliveries of funds made to the fugitive in consideration of the influence which he claimed to have in high military and Government circles of his country, and the actual disposition of the funds by Peyre—for it is not clear from the record whether he simply and clearly swindled Hoang Van Co with the tale of his influence or whether it is true, as the fugitive states, that he divided the money among Generals Mast and Revers and President Le Troquer—constitute common crimes which by no means have a political character nor may be considered as offences related to political offences [*delitos conexos*].

" This conclusion is based on analysis of the characteristics necessary to constitute a political offence, characteristics which do not exist in the present case. According to publicists on the subject, an act constitutes a political offence if it is motivated by political interests (subjective criterion), or involves a direct attack on the Governmental order in a State (objective criterion), or involves definite and special historical circumstances which warrant such classification (relative criterion). None of these characteristics is found in the facts on record, nor do any of these criteria lead to the conclusion that the present case is the type of case envisaged in Article 3, clause 2, of Law No. 1612.

" The fugitive has not been motivated by any consideration other than his own profit. The acts in which he engaged did not constitute an attack on the political order in France, nor does an analysis of the considerations and special circumstances under which these acts were committed lead to the conclusion that they are political offences or offences related thereto.

" On the other hand, the circumstance, which has been incontrovertibly shown in the record, that Peyre delivered a confidential report from General Georges Revers to two Indo-Chinese agents (Hoang Van Co and Vin Xa) who represented opposing interests in the war in Indo-China, demonstrates the absence of political motives and ideals on the part of the accused, leaving no doubt as to the fact that his actions were motivated by purely personal and financial considerations."

[Report: *Revista Jurídica Argentina La Ley*, vol. 81 (January–March 1956), p. 648.]

Extradition — Political Offences — Treason — Crimes against Security of the State—The Law of Brazil.

In re De Bernonville.

Brazil, Supreme Court. September 28, 1955.

The Facts.—In 1952 the French Embassy in Rio de Janeiro requested the extradition of de Bernonville, a French national domiciled in Brazil, who had been sentenced to death by a French court on a charge of committing acts against the external security of the State or, more precisely, of treason consisting in participation in acts aimed at the demoralization of the army or the country in time of war. The French Embassy had stated that, in addition to treason, the defendant was charged with " torture, theft, arson and looting ", as well as other non-political crimes, including participation in murders. In 1955, when, more than three years after the request, the case came up for consideration, the Embassy had not yet supplied documents to support the request. On the other hand, according to the documents attached to the request for extradition, the defendant had been convicted of the crime of treason, as provided in Article 75 and others of the French Penal Code.

Held: that extradition must be refused. The offence in question was recognized as being of a political nature by Brazilian legislation (Law No. 1.802 of January 5, 1953) and also by French law, which describes as political crimes against the external security of the State.

The Rapporteur emphasized that since Brazilian law is the one to be considered in the present case, and since it expressly includes "treason to country" among political crimes, "the authors of which are not subject to extradition", he was in favour of the accused being set free, with the proviso that he might be re-arrested later should the request for his extradition be subsequently supported by documents showing that he had been convicted in the requesting country also for "deeds which, notwithstanding their alleged political reason or purpose, are mainly a violation of ordinary law"—in conformity with the theory of predominance provided for in Article 2, para. 1, of the Brazilian Law of Extradition.

The decision of the Court accepting the conclusions of the Rapporteur was unanimous.

[Report: *Archivo Judiciário*, vol. CXVII (January–March 1956), p. 246.]

Extradition — Political Offences — When Combined with Common Crimes—The Law of Chile.

Re García Zepeda.

Chile, Supreme Court. April 14, 1955.

The Facts.—Guatemala requested the extradition of García Zepeda, a Guatemalan national, on a charge of murder. It was contended that the accused had shot Captain Víctor Manual Archila Vallejo while the latter was a prisoner in his custody during a political uprising in the capital city. According to the Guatemalan request, the offence was a common crime, punishable in Chilean law, and the charge was not void by lapse of time. It was argued on behalf of García Zepeda that extradition should be refused on the grounds, *inter alia*, that the accused was charged with a political offence for which extradition may not be granted according to Article 355 of the Code of Private International Law, 1928 (Bustamante Code)[1] and Article 3 (*e*) of the Montevideo Convention of 1933 on Extradition.[2]

Held: that extradition must be refused. Extradition could not be granted for an offence characterized by both political and common crime elements.

The Court said: "It appears from the evidence submitted in conjunction with the request for the extradition of Amadeo García Zepeda that he was implicated in the events which took place in the Guatemalan Palace of Government on July 18, 1949, in the course of which Captain Víctor Archila Vallejo was killed. An examination of these facts does not warrant the conclusion that the extradition request must be granted.

"Article 355 of the Code of Private International Law provides that 'political and related offences as defined by the State of asylum are not extraditable offences '. This principle is reiterated in the Extradition Convention concluded at Montevideo on December 26, 1933, which provides that the asylum State is under no obligation to concede extradition ' for political offences or offences related thereto ' (Article 3 (e)).

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[1] *L.N.T.S.*, vol. 86 (1929), p. 111.
[2] *Ibid.*, vol. 165 (1936), p. 45.

" There is apparently no definition of political offence in the applicable national law nor in the 1933 Convention; however, it is generally accepted that a delict committed against the constitutional order of a country is a political offence. From an objective point of view, then, this type of delict includes offences directed against the political organization of the State, the political rights of its citizens, as well as acts committed for the purpose of changing the established political or social order in a country.

" Considering the proceedings in the Court below and given the judicial concepts to which reference has just been made, the factual situation of the death of Captain Víctor Manual Archila does not constitute a political offence. The alleged responsibility of the accused in regard to this act, however, would have to be characterized as an offence related to a political offence [*delito conexo*], that is, an offence which although not immediately identified with the political events occurring in the capital of Guatemala on July 18, 1949, was, nonetheless, committed in the course of these events.

" Given the facts under consideration, the conclusion cannot be avoided that the death of Captain Archila, which is described as ' murder ' in the extradition request, involves both political and common crime elements, and that this act was closely tied to political objectives, notwithstanding the fact that by its intrinsic nature it could be regarded as a common crime.

" It remains only to point out that according to our municipal law, which is applicable in these proceedings, the charge against the accused is comprehended within that provision of Article 131 of the Penal Code concerning ' offences committed by private persons during an insurrection or in connection therewith, in which there is the element of political motivation '."

[Report: *Revista de Derecho, Jurisprudencia y Ciencias Sociales y Gaceta de los Tribunales*, vol. 52 (January–April 1955), p. 34.]

Extradition — Political Offences — Expulsion in Lieu of Extradition—Detention as Preliminary to Expulsion.

See p. 497 (*Muller* v. *Superintendent, Presidency Jail, Calcutta, and Others*).

VI.—Miscellaneous

Extradition — Miscellaneous — Extradition to Occupied Territory —Effect of Termination of Occupation with Reservation of Certain Rights.

See p. 987 (*In re Kraussman*).

PART VII

DIPLOMATIC AND CONSULAR INTERCOURSE AND PRIVILEGES

A—PERMANENT DIPLOMATIC ENVOYS

II.—Position and Functions of Diplomatic Envoys

Diplomatic Immunities—Diplomatic Representative Succeeding to Estate of Person Domiciled in Receiving Country—Liability to Estate Duty—Duty to Supply Information on Value of Estate—Whether Duty to Supply Information Confined to Estate in Receiving Country or Extending to Estate Elsewhere—The Law of Austria.

Re Nijdam, Deceased.

Austria, Administrative Court. February 16, 1955.

The Facts.—In 1946 one N., a subject of the Netherlands, died domiciled in Austria. Under his will his widow, who was also domiciled in Austria, succeeded to the whole of his estate. The first appellant, however, became entitled to a *legitima portio* of three-sixteenths of the estate, and the Austrian revenue authorities accordingly assessed him provisionally for Austrian estate duty. They also requested him to supply information on the estate left by the deceased in the Netherlands, in order that the value of that estate might be taken into account in assessing the estate duty which would ultimately become payable in Austria. The first appellant refused to supply the information on the following grounds: (i) that he was a Netherlands citizen entitled to diplomatic immunity in Austria; and (ii) that by virtue of the Double Taxation Agreement concluded between Austria and the Netherlands before the incorporation of Austria into the German Reich, which (as the appellant contended) was again applicable between Austria and the Netherlands, the deceased's estate in the Netherlands could not be taken into account in assessing liability to Austrian estate duty.

Held: (i) that the first appellant was not entitled to rely on his diplomatic immunity so far as concerned his duty to supply information on the value of the deceased's estate; and (ii) that the Double Taxation Agreement between Austria and the Netherlands had not been revived after the reconstitution of an independent Austrian State, and that the first appellant was accordingly not entitled to refuse to supply information on the value of the estate left by the deceased in the Netherlands.

The Court said, in part: " In proceedings intended to ascertain whether a person is liable to tax, the taxpayer is under a duty to make a return. By virtue of section 170 of the Tax Act he is under a duty, *inter alia*, to supply information to the revenue authorities to the best of his knowledge and belief. These duties exist quite independently of the question whether or not the proceedings result in an assessment to tax. It is precisely the co-operation of the taxpayer which is required to determine the question whether, and if so to what extent, he is to be assessed to tax. The contention put forward in the appeal that the revenue authorities are entitled to demand information only from the person who has made a return, *i.e.*, in the present case the testator's widow, is therefore misconceived. Nor can the first appellant rely on the right of exterritoriality to which he is entitled as a member of a diplomatic mission. By virtue of this right he is exempt from a duty to supply information only to the extent that he is not subject to Austrian law. Within the limits hereinbefore set out, however, he is subject to Austrian revenue law. The authorities did not, therefore, act in violation of the law when they requested him to supply information on the value of his claim, nor when they asked him to make known the estate which is situate abroad. In the absence of a treaty between the Republic of Austria and the Kingdom of the Netherlands providing for the avoidance of double estate duty, the whole estate is, in principle, liable to estate duty in Austria. The appellants are accordingly under a duty to supply information on the estate which is situate abroad."

[Report: *Amtliche Sammlung* No. 1105 (F).]

III.—Privileges and Immunities of

i.—Diplomatic Envoys and their Staff

Diplomatic Immunities—Ambassadors—Exemption from Subpoena as Witness—Whether Exemption Waived by Institution of Suit by Foreign Sovereign—Relevance of Showing of Expected Testimony—The Law of the United States of America.

PANG-TSU MOW *ET AL.* *v.* REPUBLIC OF CHINA.

United States, Court of Appeals, District of Columbia Circuit.
June 30, 1955.

THE FACTS.—This was an action for an accounting initiated by the Republic of China against Mow and others in connection with funds and records which the defendants had in their possession for the purpose of making purchases for the Chinese Air Force and the Chinese civil aviation industry in the United States. Previous proceedings in this case are reported in *International Law Reports*, 1951, p. 57, and *ibid.*, 1952, p. 195 (*sub nom. Republic of China* v. *Pang-Tsu Mow et Al.*)

The District Court awarded the Republic of China judgment in the amount of $6,368,503.47, plus interest and costs, on June 21, 1954. The defendant appealed, maintaining, *inter alia*, that the District Court had erred in denying his motion to compel the attendance and testimony of the Chinese Ambassador before the Court. The motion had alleged that the Ambassador had personal knowledge of many of the transactions involved in the case, that he was in possession of certain of the funds in issue, that the United States Marshal had refused to serve a subpoena on him, that the Ambassador had refused to appear voluntarily, and that the Republic of China had waived the Ambassador's immunity by initiating this suit. A later motion to compel the attendance and testimony of the Ambassador on deposition had likewise been denied.

On appeal,

Held: that the decision of the District Court must be affirmed. The case of *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955)[1] afforded no basis for the conclusion that the immunity of an ambassador from the service of civil process was waived by the institution of a suit by the sovereign. In any event, no error had been committed, since there had been no demonstration that the testimony of the Ambassador was relevant or necessary.

After disposing of a procedural point, the Court said: " The Supreme Court, in *National City Bank* v. *Republic of China*, 348 U.S. 356, 75 S.Ct. 423, decided March 7, 1955, recognized that a counterclaim directed to a sovereign's suit ' is allowed to cut into the doctrine of immunity ', id. 348 U.S. at page 364, 75 S.Ct. at page 429. In that case, the Republic of China had sued the National City Bank of New York in Federal District Court to recover $200,000.00 deposited in the bank by a governmental agency of the Republic. The bank interposed counterclaims seeking an affirmative judgment for $1,634,432.00 on defaulted Treasury Notes of the Republic. On a plea of sovereign immunity, the District Court dismissed the counterclaims. 108 F.Supp. 766. The Court of Appeals for the Second Circuit affirmed, 208 F.2d 627, on the ground that the counterclaims were not based on the subject matter of respondent's suit (whether the claims were treated as requests for affirmative relief or as set-offs) and, therefore, it would be an invasion of respondent's sovereign immunity for our courts to permit the counterclaim to be pursued.

" On appeal the Supreme Court noted that the case did not present an attempt to bring a recognized foreign government into court as a defendant and subject it to the rule of law to which non-governmental obligors must bow.

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[1] See *supra*, p. 210.

'We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice.' Id. 348 U.S. at page 361, 75 S.Ct. at page 427.[1]

In reversing, the Court said:

'Thus it seems only fair to subject a foreign sovereign, coming into our courts by its own choice, to a liability substantially less than our own Government long ago willingly assumed.' Id. 348 U.S. at page 363, 75 S.Ct. at page 428.

"But that case affords no basis for a conclusion that the immunity of an ambassador from service of civil process is waived by the institution of a suit by the sovereign. And we think it unnecessary to decide the matter here.[2]

"The motions to compel the attendance of the Ambassador contained no proper showing as to the necessity or the nature of the testimony expected to be obtained from him. The Auditor's proceedings involved only a statement of the account of Mow in connection with his dealings with the Republic of China. In the absence of a demonstration to us that the proposed testimony of the Ambassador was relevant or necessary in the proceedings before the Auditor, we cannot say that the District Court erred in denying the motions."

[Reports: 96 App. D.C. 243; 225 F.2d 543.]

Diplomatic Envoys—Privileges and Immunities of—Acts of a Private Law Nature—Origin and Development of Privilege—Comparison with Immunities of Foreign States—International Law—Sources of—Treaties—Effect on Municipal Law—The Law of Italy.

LAGOS *v.* BAGGIANINI.

Italy, Tribunal of Rome. March 24, 1953.

(Condemi, President.)

THE FACTS.—This was an appeal from a judgment of the Pretorial Court of Rome awarding damages against the appellant, who was Third Secretary at the Chilean Embassy in Italy, in an action brought by the respondent, an Italian national, arising out of a collision between her car and that of the appellant. The Court below had based its ruling on the ground that a diplomatic agent's immunity from the jurisdiction of the civil courts does not extend to actions arising out of his private acts.

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[1] Cf. *United States* v. *National City Bank of New York*, 2 Cir., 83 F.2d 236, *certiorari* denied, 1936, 299 U.S. 563, 57 S.Ct. 25, 81 L.Ed. 414 [*Annual Digest*, 1935–1937, Case No. 82].

[2] See, generally, IV Hackworth, *Digest of International Law* 513–555 (1942).

Held: that the appeal must be allowed. Italian courts had no jurisdiction in an action against a foreign diplomatic agent whether or not the action arose out of acts of a private character.

The Court said: " As his first and most important ground of appeal, the appellant contends that the judgment of the Pretore, in ordering Mr. Lagos, Third Secretary of the Embassy of Chile in Italy, to pay damages to the respondent as a consequence of a traffic accident involving Mr. Lagos's car, limits the field of immunity from jurisdiction of foreign agents to acts connected with the diplomatic function, and excludes from it all acts not performed in the carrying out of that function. Such a decision constitutes a return to the earlier case-law regarding the limits of diplomatic immunities, precedents which have long since been discredited. The Court of Cassation followed that practice in its decision dated January 21, 1922.[1] This attempt to limit the sphere of immunity from civil suits to official acts caused a strong reaction on the part of the Diplomatic Corps accredited to the Italian Government. The French Ambassador in Rome, the Doyen of the Corps, in a formal note of protest, stated:

> ' Cette décision est en contradiction avec la règle communément admise jusqu'ici et suivie en pratique par tous les Etats: cette règle est qu'en principe les agents diplomatiques sont exempts de la juridiction non seulement pénale mais civile, dans les pays où ils sont accrédités.'

Some years afterwards, the decision of the United Chambers of the Court of Cassation of January 18, 1940, No. 220[2] formally acknowledged the ' generally accepted rule ' to which the protest referred. The Court, noting the personal character of the diplomatic privilege in question and, therefore, the fact that it could not be considered without taking into due account the person of its holder, decided in favour of the existence of an international custom concerning the exemption from civil jurisdiction of diplomatic agents, both for acts performed in their official capacity and for those connected with their private affairs.

" There is a theory—evolved as a consequence of the restrictive tendency which exists and has been applied in the decisions of some inferior courts—which holds that the problem of diplomatic immunity can be rightly examined only in relation to acts performed *extra officium*; immunity in respect of official acts is connected with the general question of exempting foreign States from jurisdiction in respect of acts performed by their organs *jure imperii*. According to that theory, it is not the person of the diplomatic agent which is to be taken into consideration, but the foreign State represented by him. This would be an application of a principle similar to that which exempts the Italian State from the jurisdiction of its own courts for all those acts through which, in its capacity of a public body, it exercises the attributes of sovereignty (*jure imperii*). On the other hand, the same principle entails the submission of the State to the ordinary courts for all those acts of an economic nature which it enters into with individuals on a basis of equality.

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[1] [*Comina* v. *Kite*: *Foro Italiano*, 1922, I, p. 344; *Annual Digest*, 1919–1922, Case No. 202.]

[2] [*De Meeus* v. *Forzano*: *Foro Italiano*, 65 (1940), I, p. 336; *Annual Digest*, 1938–1940, Case No. 164.]

" Such a theory, which links together the question of exempting foreign States from jurisdiction and the question of jurisdictional immunity of diplomatic agents in respect of their official acts, does not appear to be acceptable, on account of the substantial difference in the persons who would benefit from the privilege. In fact, one of the parties to the legal proceedings is, as far as the first problem is concerned, a foreign State, and, in the case of the second problem, always a diplomatic agent. If we now consider the difference in the evolution of the two institutions in both international and municipal practice, we will see that the identification of the two problems would lead us to anomalous consequences connected with the historical development of the rules governing immunity.

" Adverting to this theory of identification of the two institutions, we observe the fact that the international custom, generally accepted in the past, under which States were under an obligation to recognize each other's immunity from jurisdiction, is, in the light of recent judicial decisions and of the legislative acts of many States, tending to disappear or to be confined within very restricted limits. From this, we are driven to the conclusion that if the above-mentioned identification is correct, diplomatic immunity from jurisdiction would also disappear or would be restricted to very narrow limits. But it is the present practice of the courts, in particular of the Supreme Court, to grant exemption from the jurisdiction of the Italian courts in respect of the private acts of a diplomatic agent. It can therefore be affirmed, as matters now stand, that there is no sign of the existence in Italy of any such development of the rules regulating diplomatic immunities, in respect of either official or private acts.

" The problem of the immunity from jurisdiction, in its widest sense, of diplomatic agents must, therefore, be kept quite distinct from the problem of the immunity of foreign States from jurisdiction.

" The reasons for the existence of diplomatic immunities can be traced back to the earliest times and summarized in the representative character of the envoy (*legatus habetur pro persona mittentis: maiestatem eius a quo missus est repraesentat*). The envoy brings abroad with him the marks of the absolutism of his sovereign *legibus solutus* with respect to the legal system of his own State. Those reasons appear also in the following principles: the fiction in *jus gentium* of considering *extra territorium*, and therefore withdrawn from local sovereignty, the person and the residence of the envoy; the necessity of granting the envoy a protection greater than that granted to the ordinary alien, to ensure the performance of his diplomatic mission; and the necessity—which arose with the development of the constitutional form of the modern State—of maintaining peaceful relations in the international community.

"The origin and the historical evolution of the institution [of diplomatic immunity] may, therefore, be traced back to these factors; the modern *ratio* is expressed in the words *ne impediatur legatio,* which explains also how wide is the sphere within which the immunity must be applied; and this may be supported by other reasons, such as (i) the difficulty often experienced in distinguishing the official from the private sphere; (ii) the inequality in degree of civilization of the various States (it is sufficient to refer to some oriental States) which necessitates the giving of juridical guarantees of immunity; and (iii) the avoidance of any impairment of international relations which might result from any coercive action taken against foreign diplomatic agents.

"The respondent has complained that the appellant affirmed the existence of an established judicial practice according exemption from suit to all members of foreign embassies without pointing to any special rule under which such exemption could be granted. We must note, in this respect, that the matter is one of public international law and therefore it cannot be regulated by the legal system of a single State; it must depend on written or customary sources of international law. Once we have established the existence in international law of a rule concerning diplomatic immunity from jurisdiction, we must ascertain whether there is in our own legal system a rule of adaptation to the rule of international law. This is not a difficult task, because Article 10 of the Constitution states: 'The Italian legal system conforms to the generally accepted rules of international law,' and Article XII of the Lateran Treaty grants to diplomatic agents of foreign States accredited to the Holy See the benefit within Italy of all the privileges and immunities conferred on diplomatic agents by international law.

"The existence, even before the new Constitution and the Lateran Treaty, of a rule parallel to international law in the matter under consideration could also be deduced from various written sources of law such as Article 11 of the Law of Guarantees, of May 13, 1871 (no longer in force), and Law No. 575 of December 28, 1902.

"Having proved the conformity of Italian municipal law to the rules of international law, we must see whether there exist written agreements declaring the collective willingness of the members of the international community to exempt diplomatic agents from civil suits in respect of acts connected with their private life as well as in respect of acts connected with their official duties.

"Both the writings of acknowledged authorities and decisions of courts commonly refer to the Havana Convention of 1928 on the Rights and Duties of Diplomatic Officers which, in Article 19, provides that diplomatic agents are exempted from the civil and criminal jurisdiction of the State to which they are accredited; unless they waive this immunity, with the due authorization of their Government, they cannot be prosecuted or sued except before the courts of their own country. Then Article 20 provides for the extension of their immunity with respect to official acts performed after the termination of their diplomatic mission. From this, we may again deduce the recognition of immunity in its wider meaning.

" The Agreement dated September 20, 1926, between the Swiss Federal Council and the League of Nations, is decisive in this matter. It accords to officials of the ' first category ' ' l'immunité civile et criminelle en Suisse ', and to those of the ' second category ' (service personnel) immunity limited to ' actes accomplis officiellement et dans la limite de ses attributions '. We may deduce from the latter restriction the wide limits of jurisdictional exemption granted to official personnel of a diplomatic mission.

" Another Agreement, to which Italy was a party, was signed on May 28, 1928, between the Government of the Netherlands and the Permanent Court of International Justice. This Agreement granted full diplomatic privileges to the members, the Registrar and officials of the Court, while limiting it as far as those members and officials who were of Netherlands nationality were concerned: immunity was granted to the latter only in respect of acts performed by them in their official capacity and within the limits of their duties.

" A similar Convention was signed on August 18, 1938, at Sinaja, between the Roumanian Government and the European Commission for the Danube, which granted full immunity from jurisdiction to the Heads of Service of the Commissions and their deputies who did not possess Roumanian nationality, while for all other officials the immunity was limited to their official acts.

" There is no doubt that diplomatic agents can, for our purposes, be assimilated in all respects to the officials of international organizations to which the above-mentioned Agreements refer.

" Mention may also be made of laws of States which grant immunity on a wide basis, sometimes by reference to rules of international law; such are the Austrian Decree Laws of 1811 and subsequently, the German legislation of 1924, the Civil Code of Colombia, the Decree of the Union of Soviet Socialist Republics of June 30, 1921, and the Constitution of the United States of America.

" Sufficient examples have been given of conventions and laws to leave no room for doubt as to the existence of a *consensus gentium* and of an international custom, the binding force of which is recognized by the family of nations and which ensures full jurisdictional immunity to diplomatic agents in the States in which they carry out their duties.

" This principle must be applied in Italy, and this Court, holding that the Court of first instance had no jurisdiction to hear the action brought by Miss Baggianini against Lagos, must quash the judgment of the Pretor."

[Report: *Revista di diritto internazionale*, 37 (1954), p. 111.]

Diplomatic Immunities—Embassy Staff—Employees of Embassy —The Law of Argentina.

CABAÑEZ *v.* RAMÍREZ.

Argentina, Supreme Court. April 14, 1955.

THE FACTS.—In an action brought by Juana Cabañez against Juan Ramírez, it was argued on behalf of the defendant that as an employee of the American Embassy he had diplomatic status and that the suit should be tried in the Supreme Court, which has original and exclusive jurisdiction over controversies involving ambassadors, ministers, and foreign consuls.[1]

Held: that the proceedings did not fall within the original jurisdiction of the Supreme Court.

The Court said: "It has been officially reported to the Court that the defendant, Juan Ramírez, is an administrative employee of the Embassy of the United States of America, in which capacity he is not invested with diplomatic status. Where a party to an action does not possess the diplomatic status required by Article 24, clause 1, paragraph (d) of Law 13.998,[2] the action does not fall within the original jurisdiction of this Supreme Court."[3]

[Report: *Revista Jurídica Argentina La Ley*, vol. 79 (July–September 1955), p. 633.]

Diplomatic Immunity—Member of Embassy Staff—Waiver of Immunity—Withdrawal of Waiver—The Law of Argentina.

Re HILLHOUSE.

Argentina, Supreme Court. April 14, 1955.

THE FACTS.—The Canadian Embassy at Buenos Aires agreed, but later withdrew its consent, to the appearance of Williams F. Hillhouse, Agricultural Secretary of the Embassy, in an action in the

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[1] Constitution of 1949, Article 96 (*Anales de Legislación Argentina*, IX–A, p. 18; Constitution of 1853, Article 101 (*ibid.*, 1852–1880, p. 79).

[2] *Anales de Legislación Argentina*, X–A, p. 221.

[3] The Supreme Court of Argentina decided several cases in 1955 concerning its original jurisdiction in matters involving diplomatic personnel. See, *e.g.*, *Ghossein* v. *Vila Alquila* (*infra*, p. 539), and *Re Borges da Fonseca* (*infra*, p. 557). In several cases concerning the official status of personnel associated with diplomatic missions the Supreme Court decided that its original jurisdiction did not comprehend a person who was not continuously employed by a legation—see, *e.g.*, *Re Hillhouse* (below) and *Re Norell* (*infra*, p. 539).

Supreme Court (which has original jurisdiction over cases involving ambassadors, ministers, and foreign consuls).[1]

Held: that the Court lacked jurisdiction in the absence of consent by the Embassy.

The Supreme Court said: " According to a note on the record, the Canadian Embassy has not given its consent for Williams F. Hillhouse, Agricultural Secretary, to submit to the jurisdiction of the Court. In accordance with the provisions of Article 24, clause 1, of Law 13.998[2] and the repeated jurisprudence of this Court,[3] the suit is outside the Court's jurisdiction."

[Report : *Revista Jurídica Argentina La Ley*, vol. 79 (July–September 1955), p. 24.]

NOTE.—See also *Ghossein* v. *Vila Alquila* (*S. de L.R.*), decided by the same Court on November 30, 1955 (*ibid.*, vol. 82 (April–June 1956), p. 262), in which it was *held* that Chedade Ghossein, Envoy Extraordinary and Minister Plenipotentiary of the Lebanon, having instituted an action in the Supreme Court, this implied submission to the original jurisdiction of the Court.[4] The Editor of the *Revista Jurídica Argentina La Ley* appends the following Note to the report: " As is well known, ambassadors, ministers plenipotentiary, etc., have *diplomatic immunity*, which in our opinion may not be founded in the fiction of extraterritoriality but rather in the attributes of sovereignty of the State and not of the person, for the ambassador or minister must have the consent of his Government in each case in order to renounce his immunity. The renunciation may be express or tacit. The act of filing suit constitutes tacit renunciation. This appears to be the present case."

Diplomatic Immunities—Members of Diplomatic Staff—" Civil Attachés "—Necessity for Certification of Diplomatic Status by Sending State—The Law of Argentina.

Re NORELL.

Argentina, Supreme Court. November 16, 1955.

THE FACTS.—Gunnar O. Norell was Civil Attaché of the Swedish Legation at Buenos Aires. His duties appear to have been of a part-time nature only. In an action for tort against him, he failed to produce, as required by Law 13.998,[5] a certificate of the Government of Sweden that he had diplomatic status.

Held: that the case could not be heard by the Supreme Court, which had original jurisdiction only in matters concerning ambassadors, ministers and foreign consuls.[6]

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[1] Article 96 of the Constitution of 1949, *Anales de Legislación Argentina*, IX–A, p. 18.

[2] *Ibid.*, X–A, p. 221.

[3] *Fallos de la Corte Suprema de la Nación*, vol. 226, p. 516, and cases cited therein.

[4] Article 96 of the Constitution of 1949, *Anales de Legislación Argentina*, IX–A, p. 18; Article 24, clause 1, of Law 13.998, *ibid.*, X–A, p. 221.

[5] *Anales de Legislación Argentina*, X–A, p. 221.

[6] Article 96 of the Constitution of 1949 (*ibid.*, IX–A, p. 18).

[Report: *Revista Jurídica Argentina La Ley*, vol. 83 (July–September 1956), p. 539.]

NOTE.—The Editor of the *Revista Jurídica Argentina La Ley* appends a Note which reads in part as follows: " Diplomatic immunity is founded on the international law principle of sovereignty of States and is not a personal attribute of the individual enjoying this protection, for such immunity is not only *ratione personae* but also *ratione loci*. Thus a diplomat in this broad sense may not renounce his immunity without the consent of his Government. The provisions of Article 24, clause 1, of Law 13.998 simply restate the jurisprudence of the Court emerging from uniform decisions during the course of almost a century (see *Fallos de la Corte Suprema de la Nación*, vol. 19, p. 108; vol. 22, p. 190). A person must be a member of an embassy or legation. It is not sufficient that a person serve part time or that he not be in close association with the mission. See Ruíz Moreno, *El Derecho Internacional Público ante la Corte Suprema*, Buenos Aires (1941), pp. 185 ff."

Diplomatic Immunities—Legation Staff—Activities of a Private Character—The Law of Chile.

CASTILLO *v.* ZALLES.

Chile, Supreme Court. August 19, 1955.

THE FACTS.—Juan Enrique Zalles, Economic Counsellor of the Bolivian Embassy at Santiago de Chile, moved for the dismissal of a suit concerning a servitude on water rights of certain real property. He pleaded that as a diplomat he was immune from the civil jurisdiction of Chile according to Articles 19 and 20 of the Convention on Diplomatic Officers, signed at Havana on February 20, 1928.[1] He further stated that, as a principle of international jurisprudence, this plea to the jurisdiction might be made at any stage in the proceedings. The complainant, Filomena Castillo, replied that by submitting to the jurisdiction Zalles had waived his diplomatic immunity. It was brought out in proceedings in the Court of first instance that Bolivia had not ratified this Convention. The Court of Appeals of Santiago denied Zalles' motion and he appealed.

Held: that the motion must be denied. Where a diplomat has acted in his private capacity, he is subject to the local jurisdiction according to the provisions of the Code of Private International Law, 1928[2] (Bustamante Code).

The Supreme Court said, in part: " The charge that the Court lacks jurisdiction in this case is based on provisions of an international Convention which has not been ratified by the Government of Bolivia, according to information received from our Ministry of

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[1] *L.N.T.S.*, vol. 155 (1934–1935), p. 259.

[2] *Ibid.*, vol. 86 (1929), p. 111.

Foreign Relations. Consequently, this Convention may not be invoked by a functionary of that Government in order to challenge the jurisdiction of courts in the State in which the property in question is located. International conventions, like private contracts, are only valid when both parties have signed and ratified them. The enforcement *de facto* of this Convention by Chile, to which reference was made in the appeal, does not change this situation *de jure* and does not obligate the courts to regard the Convention as having the effect of law.

" Given the fact that Bolivia has not ratified the Havana Convention, it follows that the Convention cannot be invoked in the present case. Nor may Article 19 of the same Convention be invoked as evidence of a universally recognized principle of international law in preference to more pertinent legal sources. Actually, in disputes of this kind, international conventions, whether general or particular, and international custom take precedence over general principles of law, according to Article 38 of the Statute of the International Court of Justice which is law in the Republic (No. 8402). There is a Convention, signed and ratified by Chile and Bolivia, which is pertinent to the present action. This is the Code of (American) Private International Law,[1] which must be invoked here. That Code provides that an American diplomatic officer shall be exempt from civil jurisdiction in an American country to which he is accredited in regard to personal or real actions brought against him in his official capacity (Articles 333 and 334); if, however, he has acted in a private capacity, then he is subject to the local jurisdiction in regard to real or mixed actions brought against him (Article 335). The litigation in question has the character of a real action with respect to water rights and to the servitude which is the principal object of the suit, and a personal action in regard to the injury which the complainant would suffer through deprivation of these rights."

[Report: *Revista de Derecho, Jurisprudencia y Ciencias Sociales y Gaceta de los Tribunales*, vol. 52, Nos. 5–6 (July–August 1955), p. 249.]

Diplomatic Immunities—Legation Staff—Assistant Naval Attaché —Exemption from Judicial Process—The Law of Ceylon.

APPUHAMY *v.* GREGORY.

Ceylon, Supreme Court. October 8, 1953.
(Rose C.J.)

THE FACTS.—In this case Appuhamy, the appellant, sued Gregory, the respondent, for the recovery of a sum of Rs.300 in respect of wages which, he alleged, were due to him for services rendered as personal servant. The respondent at the trial contended that he was a member of the staff of the American Embassy in Ceylon and therefore immune from the jurisdiction of the Court of Requests. The Court of Requests, Colombo, gave judgment in favour of the defendant (respondent herein). The plaintiff (appellant) appealed to the Supreme Court. He contended that the respondent, a clerk and assistant to the United States Naval Attaché in Colombo, was only an employee of the American Navy and as such not covered by diplomatic immunity.

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[1] *L.N.T.S.*, vol. 86 (1929), p. 111.

Held: that the appeal must be dismissed. Diplomatic privileges were extended not only to the Ambassador but also to his family, his suite, and his servants. Accordingly, an assistant to a Naval Attaché was covered by the immunity.

The Court said (*per* Rose C.J.): " The test which appears to have been applied in the English cases and which I agree with the learned Commissioner would seem to be applicable to the position now existing in Ceylon is that immunity from judicial process is extended not only to the person of the Minister or Ambassador but to his family, suite and servants. That was stated by McCardie J. in the case of *Assurantie Compagnie Excelsior* v. *Smith.*[1] On appeal, Scrutton L.J. in the same case said:

> ' The Court must observe the rules of international comity which gave diplomatic immunity from judicial process and must hold that the defendant was entitled to the immunity which he claimed on the ground that he was on the official staff of the Embassy carrying out official duties.'

" [The plaintiff] contends that there would seem to be logical reasons for holding that a military or naval attaché should not be covered by this rule in that he is not one of the Ambassador's staff. That matter, however, appears to be decided by authority; and in the case of *Hemeleers-Shenley* v. *The Amazone, Re the Amazone*[2] Slesser L.J. held that an assistant military attaché to the Belgian Embassy was entitled to the same immunity as a member of the Ambassador's staff, the test apparently being whether the attaché in question was performing duties in the Embassy to assist the Ambassador. If, therefore, in principle a military or naval attaché can be regarded as covered by the immunity, it seems to be that the same rule should apply to an assistant to an attaché, provided that he in fact works in the Embassy.

" Now the respondent, Mr. James Ashley Gregory, gave evidence, and there was no evidence called by the appellant in the lower Court to the contrary, that he is a clerk and assistant to the Naval Attaché in the American Embassy, Colombo. He stated that he is an American citizen on the staff of the American Embassy. In cross-examination he said: ' I came to Ceylon on the 6th of November, 1950, and since then I have been attached to the Naval Attaché in the U.S. Embassy. I am paid by the U.S. Navy.' It seems to me that the fact that an attaché is not paid by the Embassy but is paid in fact by the United States Navy in whose employ he is does not remove him from the immunity, if in fact he is doing work on behalf of the Ambassador and is working in the Embassy.

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[1] (1923) 40 Times L.R. 105 [*Annual Digest*, 1923–1924, p. 302].

[2] [1940] 1 All E.R. 269 [*Annual Digest*, 1938–1940, Case No. 162].

"The learned Commissioner accepts the evidence of Mr. Gregory and comes to the conclusion that having regard to his position in the Embassy he is immune from civil process. I agree with that view. That being so, the appeal is dismissed . . ."

[Report: New Law Reports, Ceylon, vol. LV, p. 235 (S.C. 158—C.R. Colombo, 35,008).]

Note.—The above case was decided without reference to the Diplomatic List issued by the Ministry of External Affairs of Ceylon.

Diplomatic Envoys—Privileges and Immunities of—Acts of a Private Law Nature—The Law of Italy.

See p. 544 (*Società Arethusa Film* v. *Reist*).

ii.—Subordinate Members of the Diplomatic Staff

Diplomatic Immunities—Subordinate Officials—Attaché of Embassy—Liability to Taxation—Income Derived from Private Business Ventures in Receiving State—Diplomatic Representatives as Non-resident Aliens—Effect on Liability to Taxation.

Van Der Elst *v.* Commissioner of Internal Revenue.

United States, Court of Appeals, Second Circuit. June 21, 1955.

The Facts.—Baron Van Der Elst, the petitioner in this action, came to the United States in 1940 as an Attaché of the Belgian Embassy. Upon his arrival he was stationed in New York. In 1944 he moved to San Francisco, where he became the Acting Belgian Consul-General but retained his position as Attaché of the Embassy. During the years he was in the United States, he held a diplomatic visa. He left the United States at the end of June 1946, by reason of his appointment as Belgian Ambassador to Portugal.

While in New York in 1943 he was employed by and became vice-president of Heller Candy Company, Inc., a position which he retained until his departure from the United States. Although he was paid $2500 in salary for the first six months of 1946, the president of the Candy Company testified that the Baron did not render any services to the Company during that period.

Under section 211(b), as amended, of the Internal Revenue Code, 26 U.S.C. § 211(b), the petitioner was taxed as a non-resident alien engaged in trade or business in the United States during the first six months of 1946. He contended that he was not so engaged and that in any event he was not subject to tax on his capital gains realized after his departure from the United States. On appeal from a decision of the Tax Court of the United States adverse to the petitioner,

Held: that the decision of the Tax Court must be affirmed. The petitioner was engaged in business in the United States during 1946, even though he did not perform services for his employer. He was likewise subject to taxation on the capital gains realized after his departure from the United States.

In rejecting the contention that a corporate officer is engaged in business only while he is active in the work of the company, the Court said: ". . . The taxpayer never decided to quit as vice-president of the company until he was called away to become Ambassador to Portugal. Up to that time he was receiving pay for services or for a call on his services. Hence he was ' engaged in business ' within the United States. He was an alien, and because of his diplomatic status was a nonresident alien, despite his presence in this country.[1] The Tax Court was correct in holding him taxable under section 211(b)."

The Court then went on to state that the change in the petitioner's status from a non-resident engaged in business within the United States to that of a non-resident not so engaged would not justify splitting up the petitioner's " taxable year " into fractions and departing from the normal principle that the taxable year is the calendar year.

[Report: 223 F. 2d 771.]

Diplomatic Envoys—Privileges and Immunities of—Subordinate Members of Diplomatic Staff—Relevance of Reciprocity on Part of Sending State—Statement of Foreign Office—International Law—Sources of—Treaties—Effect on Municipal Law—The Law of Italy.

Società Arethusa Film *v.* Reist.

Italy, Tribunal of Rome. July 13, 1953.

The Facts.—The defendant was a member of the staff of the United States Embassy in Rome, with the rank of Chancellor. He was sued for breach of a contract into which he had entered with the plaintiff company. The defendant objected that the Italian courts had no jurisdiction over him because of (a) the diplomatic immunity to which he was entitled under international law and (b) the reciprocity granted by the Government of the United States with regard to the staff of diplomatic envoys accredited in Washington. Letters from the Ministry of Foreign Affairs were produced (1) certifying the defendant's status as chancellor in the United States Embassy and (2) stating that the United States Government granted, on a basis of reciprocity, immunity from jurisdiction to the members of the subordinate staff of foreign missions accredited to it, including immunity for acts unconnected with the official functions of such members; but that Italy had, however, no agreement with the United States, or with any other State, for the granting of jurisdictional immunities to subordinate members of Embassy staffs in Italy.

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[1] See O.D. 198, 1 Cum.Bull. 164 (1922); *Jamvold* v. *Commissioner*, 11 T.C. 122; Treas.Reg. 111, § 29.211–2(b).

Held: that the objection must fail. The Italian courts had jurisdiction over the defendant because his contract with the plaintiff company had been entered into by him in his private capacity.

The Court said: " The Court observes, in the first place, that the Court of Cassation—as far as diplomatic immunities are concerned—had given many decisions on the exemption of diplomatic agents from civil jurisdiction and how that exemption can be limited, but it has never yet been concerned with fixing the same limits with regard to the retinue and subordinate staff of foreign missions.

" The Court of Cassation of Rome, in its decision of April 20, 1915[1] held that diplomatic agents were protected by an immunity which exempted them from territorial jurisdiction for acts performed by them in their official capacity, but the Court made it clear that such an immunity could not cover acts done by them in their private capacity. Later, the Court of Cassation, in its decision of January 31, 1922,[2] confirmed this opinion and added that the immunity granted to diplomatic agents was not absolute, but covered the agent only in those cases when he acted as a representative of a foreign State, or upon instructions from his Government; in such a case, acts performed by him would not have a private character. More recently the Court of Cassation (United Chambers)—in its decision of January 18, 1940, No. 220[3]—having remarked that immunity from jurisdiction was a privilege of a personal character and ' by its nature indivisible and, consequently at all times inseparable from the person of its holder ', held that diplomatic agents accredited to Italy were exempt from Italian civil jurisdiction ' even in respect of acts relating to the necessities of their private affairs '.

" Following the above mentioned decisions of the Court of Cassation, we must observe that there has never been any doubt

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[[1] *In re Rinaldi*: *Giurisprudenzia Italiana*, 1915, I, 1, p. 776; *Foro Italiano*, 1915, I, p. 1330.]

[[2] *Comina* v. *Kite*: *Foro Italiano* (1922), I, p. 344; *Annual Digest*, 1919–1922, Case No. 202.]

[[3] *De Meeus* v. *Forzano*: *Foro Italiano*, 65 (1940), I, p. 336; *Annual Digest*, 1938–1940, Case No. 164.]

about the granting of immunity for acts performed by diplomatic agents in their capacity of representatives of the foreign State, on instructions from their Government, in performing their public functions connected with relations between the two States. On the other hand the question arises whether such immunity—as far as the exemption from civil jurisdiction is concerned—should be regarded as absolute, that is, whether it extends to cover acts connected with the private life of the diplomatic agent in the State to which he is accredited. The recent attitude of the Court of Cassation tends to extend exemption from civil jurisdiction to acts performed by diplomatic agents as private citizens.

" The point in the present case is, whether such an extension of the immunity granted to diplomatic agents also applies to members of the staff of a diplomatic mission who are nationals of the sending State.

" The defendant, Mr. Wilbur H. Reist, who holds the post of Chancellor in the American Embassy in Rome (as is stated in a Note of the Ministry for Foreign Affairs dated November 21, 1951), contends that he cannot be sued for breach of contract by the Arethusa Film Company, because he enjoys diplomatic immunities and, therefore, is exempted from the jurisdiction of the Italian courts. In support of his claim, he has stated to the Court that the American Government grants immunity from jurisdiction, on a reciprocal basis, to the subordinate staff of foreign missions accredited to Washington, and this includes immunity for acts having no connection with their official functions. This point is officially confirmed by the information supplied by the Ministry for Foreign Affairs in a letter of November 18, 1952, which is on the file of this case.

" It must be observed that, for subordinate personnel and diplomatic agents alike, the problem of immunity from jurisdiction is one which arises only in regard to acts performed by them in their private capacity; for acts done by them in their public capacity diplomatic agents and the subordinate personnel cannot be made personally responsible, for the reason that it is not the diplomatic agent or the member of his staff but the foreign State for which they act which has to be regarded as responsible.

" If we examine now the question of extending immunity from jurisdiction to the subordinate personnel of diplomatic missions, and also the question whether the treatment granted, on a reciprocal basis, by the American authorities is relevant to it, we must bear in mind, first of all, that the extension of the immunity from jurisdiction of the subordinate personnel, who do not enjoy diplomatic status, to acts entirely unconnected with their functions, does not seem to be in keeping with the origin and the historical evolution of the institution of diplomatic immunity.

" The principle of the inviolability of members of Embassies has been recognised from earliest times. With the progress of civilization and the improvement of international relations there arose from this principle the rule of immunity from jurisdiction; it was generally held that if the representative of a foreign State were to be submitted to the jurisdiction of the receiving State, this would restrict that liberty of action which must be granted to the representative as a necessary requisite enabling him to look after the interests of the sending State. Considering, now, the origin and the historical evolution of the institution of immunity, one can see the reasons which historically justify the exemption from immunity of diplomatic agents for acts performed in their private capacity—they are based on the mainly representative nature of their functions. In the case of the subordinate personnel of a mission, however, the reasons which justify the extension of immunity from jurisdiction to acts having no connection with their functions, are not so evident. In fact, in view of the essentially clerical or secretarial nature and character of their work, it does not appear that to submit the subordinate members of the staff of an embassy to the jurisdiction of the receiving State for acts done by them in their private capacity, would constitute a restriction of their freedom of action in the exercise of the functions connected with the Mission to which they are attached.

" On the other hand, if one considers the rules on the matter, it becomes even more evident that it is impossible to extend immunity from suit to acts done by the employees of embassies otherwise than in their official capacity. In Italy, there being no law regulating the immunities of diplomatic agents, the scope and content of such immunities are regulated by international custom. Rules of international law on the matter were evolved very early in history. Under Article 10 of the Constitution of the Italian Republic, the generally accepted rules of international law form part of Italian law; therefore, in order to ascertain whether there exists a valid rule concerning diplomatic immunity from jurisdiction, we must first of all ascertain whether there are explicit international instruments which embody a custom or usage on the subject, and then we must prove the existence of rules for the adoption into municipal law of the relevant rules of international law.

"As to the first point, we note, with reference to diplomatic agents, that Article 19 of the Havana Convention of February 20, 1928, definitely states that ' diplomatic agents are exempt from the civil and criminal jurisdiction of the State to which they are accredited '. Similarly, the Agreement of September 20, 1926, between the League of Nations and the Swiss Federal Council provides that ' Les fonctionnaires des organismes de première catégorie, ou personnel extra-territorial, jouiront de l'immunité de juridiction civile et criminelle en Suisse '. And, more recently, the Agreement signed at Sinaja on August 18, 1938, between the European Danube

Commission and the Roumanian Government, grants exemption from suit to diplomatic agents, including immunity for their private acts. Therefore, there cannot be any doubt of the existence of a rule of international law—embodied in many international agreements—which imposes on States the duty of exempting diplomatic agents, *i.e.*, persons having a full and true diplomatic status, from civil jurisdiction, and this includes exemption for acts done by them in their private capacity.

"As far as the second point is concerned, namely, the existence of a rule of municipal law for the adoption of international law, it is possible to see from various enactments (such as Article 11 of the repealed Law of Guarantees of May 13, 1871, and Law No. 575 of December 28, 1902) the willingness of Italy to observe, in this matter, the duties imposed by international law regarding the treatment of diplomatic agents, and, therefore, to see the existence of corresponding rules adopting rules of international law into Italian law. The same can be deduced from Article 12 of the Lateran Treaty which grants to diplomatic agents of foreign States accredited to the Holy See the benefit, in Italy, of all privileges and immunities granted, under international law, to diplomatic agents.

" While these concurring elements show the existence of a rule of international law—which is applicable in Italy—according to which exemption of diplomatic agents from civil suit can be extended to acts connected with their private life, the same cannot be said with regard to the subordinate personnel of embassies. Article 7 of the above-mentioned Agreement of September 20, 1926, between the League of Nations and the Swiss Federal Council, after establishing the principle of immunity—including immunity for their private acts—of officials of the ' first category ', states: ' Le personnel de seconde catégorie jouit des mêmes privilèges pour les actes accomplis officiellement et dans la limite de ses attributions. Il reste soumis aux lois et à la juridiction locale pour les actes de sa vie privée.' Again, in the Agreement signed at Sinaja on August 18, 1938, between the European Danube Commission and the Roumanian Government, while immunity from civil and criminal jurisdiction was granted to Heads of Service and their deputies, for the other members of the personnel there are rules similar to those already mentioned in the Agreement between the League of Nations and the Swiss Federal Council.

" From the foregoing analysis we may conclude that there is no proof of the existence of a rule embodied in agreements between subjects of international law, concerning the extension of the immunity from suit of the subordinate personnel of a mission to acts done by them in their private capacity; there exists, however, in so far as it is evident from certain agreements, proof to the contrary.

" At this point, the Court observes that the treatment accorded by the American Government, on a reciprocal basis, to the subordinate personnel of foreign missions accredited to Washington, in regard to acts having no connection with the exercise of their functions, is irrelevant to the Italian legal system. The latter does not contain, by virtue of the constitutional principle of the adoption by municipal law of international law, a customary rule, generally accepted and regarded as valid for the relations between subjects of international law, concerning the exemption from civil jurisdiction of subordinate members of the staffs of embassies for acts done by them in their private capacity. This treatment accorded—on a reciprocal basis—by the American Government, is just one single instance, from which it is impossible to deduce the existence of a rule of customary international law having binding force for Italy; moreover, the Ministry for Foreign Affairs, in its Note of November 18, 1952, No. 10756, states that no agreements have ever been made by Italy with the United States (or, indeed, with any other States), under which the Italian authorities are bound to grant jurisdictional immunities to the subordinate personnel of the United States Mission accredited in Rome.

" From the foregoing considerations we must conclude that the privilege of jurisdictional immunity, for acts having no connection with their official functions, cannot be extended to subordinate members of embassies: both because such an extension does not appear to be in keeping with the origin and the historical evolution of diplomatic immunities, and because we cannot ascertain the existence on the matter of a rule of customary international law, having binding force with regard to Italy."

[Report: *Foro Italiano*, 1954, I, p. 135.]

iii.—The Family and Retinue of Diplomatic Envoys

Diplomatic Privileges—Envoys and Their Families—Wife of Envoy—Action for Recovery of Debt Incurred by Wife Prior to Marriage—Whether Wife Entitled to Exemption from Jurisdiction.

SOCIÉTÉ DE CONSTRUCTION À PARIS *v.* GUIROYE, WIFE OF DE AYALA.

France, Court of Appeal of Paris. January 11, 1955.

THE FACTS.—The defendant was the wife of a foreign envoy. Prior to her marriage to the latter she had incurred certain debts which the creditors, plaintiffs herein, sought to recover by action in the French courts. The defendant claimed exemption from the jurisdiction of the French courts on the ground that she was the wife of a foreign envoy.

Held: that the claim to immunity from jurisdiction must be rejected; the action was concerned with private debts incurred by the defendant at a time when she was not the wife of a foreign envoy.

The Court said: " While, having regard to the basic principle underlying immunity from jurisdiction, which is to enable the representatives of foreign States to perform their functions in complete independence, it is legitimate to extend that privilege to the spouses of such representatives, it would nevertheless be an abuse of the status of the wife of a diplomatic agent to allow her to resist a claim concerning personal debts incurred before her marriage which are entirely unrelated to the functions of her husband. In this case we are concerned with a debt incurred in 1952, when the defendant was the wife of a certain D. It is not apparent how the independence of De Ayala can be compromised by a claim relating to matters which do not concern him in any way and in respect of which he is summoned only as a matter of procedure in regard to his wife and, ' if necessary ', in his own name, in respect of liabilitites for which he may be liable by virtue of the marriage contract. Mrs. De Ayala's claim to immunity from the jurisdiction, which cannot protect her against the claims of her creditors, is therefore ill-founded."

[Report: *Clunet*, 82 (1955), p. 390.]

iv.—The Official Residence of a Diplomatic Envoy

Diplomatic Envoys—Privileges and Immunities of—The Official Residence—The Fiction of Exterritoriality—Rejection of—The Law of Italy.

See p. 240 (*La Mercantile* v. *Kingdom of Greece*).

v.—Miscellaneous

Diplomatic Immunities — Miscellaneous — Diplomatic Status according to Special Agreement—Mutual Defence Assistance Agreement—Statement of Ministry for Foreign Affairs—Binding Force of—The Law of Denmark.

In re HENDERSON.

Denmark, Western Provincial Court. March 22, 1955.

THE FACTS.—The accused, an American citizen, was employed as a radar engineer by a private American company. He also worked for the Danish Air Force in Aalborg. By a decision of the lower Court in Aalborg of October 1, 1954, he was found guilty of driving a motor-car while under the influence of drink, and sentenced to 20 days' detention. During the hearing he stated that he did not enjoy diplomatic immunity.

In a letter dated November 26, 1954, the Danish Ministry for Foreign Affairs requested the Public Prosecutor to appeal against the decision of the lower Court on the ground that the accused, in view of his status in Denmark, enjoyed immunity from criminal jurisdiction. In the letter it was stated that he belonged to the group of persons mentioned in the " Mutual Defense Assistance Agreement between

Denmark and the United States of America" of January 27, 1950 (Annex b, section c) who "will receive the same status as the clerical personnel of the Diplomatic Mission".[1]

Held: that "according to the circumstances in the case the decision of the Court must be based on the declaration of the Foreign Office regarding the status of the accused" and the decision of the lower Court must therefore be rescinded.

[Report: *Ugeskrift for Retsvaesen*, 1955, p. 571.]

Diplomatic Immunities — Miscellaneous — Interpretation of the Term "Treatment".

See p. 705 (*In the matter of International Bank for Reconstruction and Development and International Monetary Fund* v. *All America Cables & Radio, Inc. and Other Cable Companies*).

D—CONSULS

I.—Appointment and Exequatur

Consuls—Exequatur—Necessity of Proof of—Representation of Nationals in Administration of Estate.

See below (*In re Bedo's Estate*).

II.—Position and Functions of Consuls

Consuls—Functions of—Right to Represent Nationals—Right As Created by International Law Rather Than by Treaty.

In re BEDO'S ESTATE.

United States, Surrogate's Court, Bronx County, New York.
January 7, 1955.

THE FACTS.—The attorneys retained by the Embassy of Czechoslovakia to act on behalf of the nationals of that country in this proceeding filed proof of the commission issued to the consular officer by his Government but failed to furnish evidence of the issue of an exequatur. The administrator contended that in the absence of a treaty between the United States and Czechoslovakia a consular officer of the latter country did not have authority to appear for nationals of that country. On motion to examine the administrator,

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[1] That Annex provided as follows:

"In recognition of the fact that personnel who are nationals of one country, including personnel temporarily assigned, will in their relations with the Government of the country to which they are assigned, operate as a part of the Embassy under the direction and control of the Chief of the Diplomatic Mission of the Government of such country, it is understood, in connection with Article VI, paragraph 2, of The Mutual Defense Assistance Agreement, that the status of such personnel, considered as part of the Diplomatic Mission of such other Government, will be the same as the status of personnel of corresponding rank of that Diplomatic Mission who are nationals of that other country.

"The personnel will be divided by the Government assigning such personnel into 3 categories ... (c) The third category of personnel will receive the same status as the clerical personnel of the Diplomatic Mission."

Held: that the determination of the motion must be withheld until proof of the recognition of the consular officer by the Department of State should be furnished. The rights of a consul to represent nationals of his country arose out of customary international law and were not dependent upon the existence of a treaty provision to that effect.

The Court said : " The court is of the opinion that proof of the consular officer's recognition by the Department of State should be furnished (see Hackworth's *Digest of Int. Law*, [vol. iv], p. 671).

" The time to file such proof will be extended to February 7, 1955, and determination of this motion to examine the administrator pursuant to section 263 of the Surrogate's Court Act will be withheld until such time.

" The contention of the administrator that in the absence of a treaty between the United States and the present Republic of Czechoslovakia, a consular officer of Czechoslovakia has no authority to appear for his nationals, is without merit.

" The rights, powers and duties of consuls and consular officers rest on international law as well as on statute, regulation and treaty stipulations (3 C. J. S., Ambassadors & Consuls, p. 1026).

" Our courts have consistently given recognition to the power of a foreign consular officer recognized by our Government to assert or defend the property rights of his nationals irrespective of whether or not he has been accorded the right to represent them in court by provision of treaty or otherwise (*Matter of Zalewski*, 282 N. Y. 332, 339, 340[1])."

[Reports: 207 Misc. 35; 136 N.Y.S. 2d 407.]

Consuls—Position and Functions of—Consular Jurisdiction—By Treaty—Disputes Concerning Seamen's Wages—Discharge of Seaman—Law Concerning Internal Order of Vessel.

See p. 282 (*McQuade* v. *Compania de Vapores San Antonio, S.A., and the S.S. Eurystheus*).

[[1] *Annual Digest*, 1943–1945, p. 245.]

III.—Privileges and Immunities of Consuls

Consuls—Privileges and Immunities of—Whether Required to Give Evidence in Court—Matters Within Scope of Official Duties—Determination of—Conclusiveness of Determination by Consul—Amenability to Subpoena—Effect of Consular Convention.

SAMAD *v.* THE S.S. *ETIVEBANK ET AL.*

United States, District Court, Eastern District, Virginia.

September 29, 1955.

THE FACTS.—This was was an action for damages by a citizen of Pakistan signed aboard a British vessel, on account of injuries sustained by him while the vessel was in drydock in the United States. From the date of his injury, the libellant had been confined to hospital.

Amongst the claims made by the libellant was one for his earned wages at the time of his injury. Pursuant to sections 37, 38, and 39 of the British Merchant Shipping Act, 1906, 6 Edw. 7, c. 48, his wages had been deposited with a British Vice-Consul. Under sections 4529 and 4530 of the Revised Statutes of the United States, 46 U.S.C. §§ 596, 597, the refusal or neglect of the master or owner to make payment of wages directly to the seaman was subjected to a penalty of a sum equal to two days' pay for every day during which payment might be delayed. A sum equal to the sailor's accrued wages had been paid into court during the course of the proceedings.

The British Consul and Vice-Consul (presumably in Norfolk, Virginia) were served with subpoenas to appear as witnesses on behalf of the respondents. The Consul appeared in the United States District Court and refused to be recognized for his appearance the following day. The Consul was thereupon ordered into the custody of the United States Marshal. He was released in a matter of minutes after agreeing to be recognized for his appearance in Court the next day. When the Consul and Vice-Consul were called as witnesses they refused to testify on the ground of their immunity under Article 10, paragraph 4, of the Consular Convention between the United Kingdom and the United States, signed at Washington on June 6, 1951, 3 U.S.T. 3426, 3434; T.I.A.S. No. 2494, the text of which is reproduced in the body of the opinion, *infra*. The proctor for the libellant moved to hold the witnesses in contempt.

Held: that the motion must be denied. Under the terms of the Consular Convention, the Consul was under an obligation to respond to a subpoena. However, he would not be obliged to give evidence relating to matters within the scope of his official duties. Whether a matter was within the scope of the Consul's official duties was for determination by him.

After discussing the law of the United States applicable to the seaman's libel and concluding that it would prevail over that of Great Britain, the Court said in part, with respect to the immunity of the British Consul:

"No advance request was made by the Consul to the Judge of this Court seeking relief from appearing as a witness, although it appears that in January, 1955, the Consul then knew that his testimony would be sought. There is nothing in the Consular Convention which exempts a Consul from responding to a subpoena. In fact, until the questions are propounded to the witness, it is impossible to determine whether immunity exists under Art. 10 (4) which reads:

> 'A consular officer or employee shall be entitled to refuse a request from the courts or authorities of the territory to produce any documents from his archives or other official papers or to give evidence *relating to matters within the scope of his official duties*. Such a request shall, however, be complied with in the interests of justice if, in the judgment of the consular officer or employee, it is possible to do so without prejudicing the interests of the sending state. A consular officer is also entitled to decline to give evidence as an expert witness with regard to the laws of the sending state.' [Emphasis supplied by the Court.]

Other than as hereinabove provided, a consular officer or employee may be required to give testimony in either a civil or criminal case. How, then, is any court to determine whether the evidence relates to matters within the scope of official duties until the questions are propounded or, at least, until the matter is officially brought to the attention of the presiding judge in advance of trial, thereby enabling the court to convene counsel and explore the nature of the contemplated inquiries? While there is no doubt but that the Consul was advised by one or more attorneys in this case as to the testimony sought, it is certainly not incumbent upon the court to examine the list of witnesses and to speculate as to the nature of their testimony.

"Letters were written by the Consul and Vice-Consul addressed to the Clerk of the Court in which it is stated that immunity was claimed. These letters were received by the Clerk on the afternoon of the first day of trial and not transmitted to the Judge until late that afternoon. Had the Consul requested the courtesy of an advance interview as to his status in this case, the Court would have been glad to have granted same after arranging for the presence of the interested attorneys. In the absence of permission from the Court to disregard the subpoena, any Consul must appear in answer thereto.

"The High Contracting Parties saw fit to place 'Shipping' as a separate part of the Consular Convention. Art. 22 provides in part:

> 'The judicial authorities of the territory may, however, exercise any jurisdiction which they may possess under the law of the

> territory with regard to disputes as to wages and contracts of service between the master and members of the crew.'

Thus we note that the right to exercise jurisdiction as to wage disputes (partially involved in this case) is unquestioned. The British law on the subject of wages is, in certain respects, directly in conflict with our 46 U.S.C.A. §§ 596, 597. The master of a British vessel is required to pay over to the Consul the wages of a seaman left in a foreign port, yet the Consul is cloaked with apparent immunity from disclosing the details of such payment. How the interests of the sending state could be prejudiced in such a situation is unknown to the Court. It is also noted that the terms of the Consular Convention specify compliance by the Consul when, in the interest of justice it is possible to do so without prejudicing such interests, but this clause vests in the Consul the sole determination as to his course of action. Furthermore, Art. 27 (2) of the Convention provides that where the consular officer is given the right to perform any functions, it is for the sending state to determine to what extent its consular officers shall exercise such right.

" It is apparently well settled that consular officers are entitled to such privileges and immunities as may be accorded to them by treaty, as where they are by convention exempted from compulsion to appear as witnesses in a court proceeding. 3 *C.J.S.*, Ambassadors and Consuls, § 12 (c), p. 1025. The Consular Convention in question grants such immunity under certain circumstances and it is not the function of any court to question the exercise of the discretionary judgment reserved to the Consul. In the absence of any provision in the Convention removing the obligation of the Consul to respond to the subpoena, he has a duty to appear, but the propriety of his testifying in a matter within the scope of his official duties rests upon him. The Consul and Vice-Consul were accordingly entitled to immunity from testifying with respect to their official duties and the motion to hold said parties in contempt of court is denied . . . "

[Report: 134 F. Supp. 530.]

Consuls—Privileges and Immunities of—Immunity in respect of Official Acts—Traffic Offences—The Law of Argentina.

RE BORGES DA FONSECA.

Argentina, Supreme Court. November 30, 1955.

In a case involving the question whether an action arising out of a traffic incident involving a Brazilian consular official could be brought in the Supreme Court in first instance, the Supreme Court said: " It does not appear from the record that the act giving rise to the proceedings occurred in the course of the exercise of the official functions of the Brazilian Consular Attaché, Mario T. Borges da Fonseca. Under such conditions and in conformity with the provisions of Article 24, clause 4, part (d), of Law 13.998,[1] the action is outside the original jurisdiction of this Court."[2]

[Report: *Revista Jurídica Argentina La Ley*, vol. 82 (April–June 1956), p. 50.]

NOTE.—A Note by " Próculo " is appended to the report of this case: " Consuls do not have diplomatic immunity. They are commercial agents, and even though they may intervene in matters of civil status, contracts, etc., that is in private law; they do not represent their country politically. The Supreme Court has limited its original jurisdiction to cases concerning the privileges and immunities of consuls acting in their public capacity, for example, issue of passports, or other official acts.[3] The lower federal Courts have original jurisdiction in civil and criminal cases involving consuls or vice-consuls acting in their private capacity."

Consuls—Privileges and Immunities of—Consular Premises—The Law of Argentina.

CIRO FERREIRA AQUINO *v.* NESTOR P. ARISTICABAL.

Brazil, Court of Justice of Pôrto Alegre. November 9, 1955.

THE FACTS.—The plaintiff requested that notice be served on Nestor P. Aristicabal, Consul of Argentina in São Borja (State of Rio Grande do Sul, Brazil), in order to recover property owned by the plaintiff and rented to the defendant for use as the Argentine Consulate. The Court of first instance declared itself without competence on the ground that there were interests of another country at stake seeing that a foreign Consulate was involved. According to Article 55 of the Code of Judicial Organization of the State, actions to which foreign countries and persons domiciled abroad are parties, are subject to the exclusive jurisdiction of the capital of the State. The plaintiff appealed. The State Attorney gave an opinion to the effect that leave to appeal should be granted on the ground that " a consulate cannot strictly be considered as a foreign country ".

Held: that the appeal must be allowed. Consuls are not direct representatives of the sovereignty of their State, as is the case with diplomatic envoys, nor do they enjoy the same privileges and immunities as the latter.

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[1] *Anales de Legislación Argentina*, X–A, p. 221.

[2] Article 96 of the Constitution of 1949, *Anales de Legislación Argentina*, IX–A, p. 18. See also *Fallos de la Corte Suprema de la Nación*, vol. 224, p. 117, and the cases cited therein.

[3] *Ibid.*, vol. 170, p. 128; vol. 181, p. 24.

The Court said: "Their acts are subject to the local law, with the exception of those performed in their official capacity. The premises of consulates do not enjoy the privileges granted to the premises of diplomatic missions. The real estate the vacation of which was sought, though occupied by the Argentine Consulate, had been rented to the consular representative residing in it and not to his country as a juridical person of public international law."

[Report: *Revista Forense*, vol. 169 (January–February 1957), p. 265.]

Consuls—Consular Privileges—Consular Office in Residential Building—Right to Designate Office by Affixing Plate to Building —Right to Affix Flagpole.

CONSULAR PREMISES (AUSTRIA) CASE.

Austria, Supreme Court. May 11, 1955.

THE FACTS.—The plaintiff was the Consul of the Republic of Paraguay in Vienna and the tenant of a flat, forming part of a house owned by the defendants, in which he performed his consular functions. In the present action the plaintiff claimed the right to affix to the exterior of the house a plate depicting the arms of the Republic of Paraguay, and a flagpole on which he might hoist the flag of Paraguay on official holidays observed by the laws of that country. The Court of first instance dismissed the action, and the Court of Appeal allowed the plaintiff's appeal on the ground that a tenant was entitled to affix to a part of the building not forming the subject-matter of the demise certain fixtures which neither resulted in damage to the building nor infringed the legitimate rights of neighbours. On further appeal to the Supreme Court, the defendants contended that a tenant was not entitled to make any use whatsoever of parts of a building of which he was not the tenant.

Held: that it was customary to permit a plate to be affixed to the exterior of a building to indicate that part of the building was being used as a consular office, but that it was not customary to permit a flagpole to be affixed thereto; accordingly, the plaintiff's action succeeded in so far as concerned his claim to affix a plate, but failed in so far as concerned his claim to affix a flagpole to the building.

The Court said: "According to the decisions of the Supreme Court, the tenant of premises is entitled to require the landlord to permit him, the tenant, to affix to the exterior of the building such plates indicating the tenant's profession or office as are customary or serve the paramount interests of the tenant, provided that no damage is caused to the house or to the legitimate interests of the landlord or other tenants, and provided that there is no express provision to the contrary in the lease. In this case the defendants themselves do not contend that the lease expressly precludes the plaintiff from affixing a plate depicting the arms of a country. The defendants contend that the premises were expressly let for residential purposes, and that in the case of such premises it is neither customary nor permissible to affix plates to the exterior of a building. Against this contention it must be pointed out that neither the consulting rooms of a doctor who carries on his practice in his flat, nor the chambers of a barrister who practises in his flat, are regarded as business premises. They are regarded as residential premises because in cases of this kind the residential and professional requirements are of equal weight. This must apply with even greater force to the flat of a consul of a foreign State who performs his official functions in his flat. In his case, the two purposes are not of equal weight because a consul performs part-time duties other than for the purpose of gain. The designation of a room in the plaintiff's flat as a consular office does not, therefore, result in changing the character and object of the demised premises, which cannot in any way be deprived of their character as a flat.

" In contending further that the plaintiff is entitled to perform his functions as honorary consul in his flat but is not obliged to designate his flat as a consular office by means of a plate, the defendants overlook the fact that it is necessary and customary to designate the office of a consul by means of a plate in order to facilitate the identification of the consulate by interested persons. In a case such as the present we must accord to the tenant the right to designate his office to the outside world by affixing a plate with the arms of the State which he represents. Such plate cannot detract from the appearance of the defendants' building even if the latter is situate in a select neighbourhood. On the other hand, the defendants' appeal is well-founded so far as concerns the plaintiff's claim to be allowed to affix a flagpole to the exterior of the defendants' house. Notwithstanding that according to customary international law a consul is entitled to designate his office by means of a plate and a flagpole, it cannot really be said that a device for hoisting a flag is appropriate to indicate the office of a consul. A plate depicting the arms of the country concerned is sufficient for this purpose, but quite apart from that the plaintiff's purpose in affixing a flagpole is to hoist a flag on official national holidays. This purpose could be achieved without affixing a flagpole to the exterior of the building. It is neither customary nor necessary in the legitimate interests of the tenant to affix a flagpole to the exterior of the building. As, according to the foregoing, the plaintiff has failed to prove a legitimate interest in claiming the right to affix his own flagpole to the exterior of the defendants' building, the appeal must be allowed to that extent, and the action must be dismissed so far as concerns the claim to affix a flagpole. The action must, however, succeed so far as concerns the duty of the defendants to permit the affixing of a plate bearing the arms of the Republic of Paraguay."

[Report: J.B., 77 (1955), p. 499.]

PART VIII

TREATIES

A—IN GENERAL

II.—Forms of International Agreements: Treaties, Conventions, Governmental Agreements. Exchanges of Notes. Other Forms of Treaties

Treaties—Forms of—Agreement between Ministries of Contracting Parties—Non-Observance of Constitutional Requirements for Conclusion of Treaties — Whether Agreement Constitutes a " Treaty "—The Law of Germany.

Prosecution for Misdemeanours (Germany) Case.

German Federal Republic, District Court of Coburg. July 6, 1955.

The Facts.—Section 6 of the German Criminal Code provides that " misdemeanours committed abroad are to be punished only if provision has been made to this end by special laws or by treaties ". It was alleged that the accused had committed a misdemeanour in Austria, and the Public Prosecutor (the appellant herein) contended that the accused was subject to prosecution before a German court. On behalf of the lower Court, which had refused to grant the requisite warrant for the trial of the accused, it was contended that there was no treaty between Austria and Germany which provided that misdemeanours committed in one country could be the subject of prosecution in the other, but that there was only an agreement between the Ministries of Justice of the two countries providing that prosecutions could be undertaken in one country in respect of misdemeanours committed in the other.

Held: that in the absence of a treaty in the strict sense of the term, *viz.*, an international agreement concluded in accordance with the requirements of the Federal Constitution,[1] there was no " treaty " within the meaning of section 6 of the Criminal Code providing for the prosecution of the accused, and the appeal of the Public Prosecutor must accordingly be dismissed.

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[1] These requirements are the same as those for the enactment of a federal law, *viz.*, consent of both Houses of Parliament and signature of the President of the Federal Republic.

The Court said: "The Ministries of Justice of Austria and the Federal Republic are agreed that a prosecution can be taken over by one country in respect of a misdemeanour committed in the territory of the other. They have recorded this agreement in identical notes. Such agreement, however, does not constitute a treaty within the meaning of section 6 of the Criminal Code. Agreements within the sphere of international law are not, in principle, subject to any requirements of form. Legal relations between individual States may even be created by implication, as the result of acts undertaken in a conclusive manner. The latter rule, however, applies only where the respective municipal laws of the Contracting Parties do not make provision to the contrary. Before the coming into operation of the Federal Constitution there was no treaty with Austria within the meaning of section 6 of the Criminal Code. Accordingly, a treaty could only have come into existence in the manner provided in Article 59 of the Constitution, *viz.*, the President must conclude the treaty in the name of the Federal Republic, and the Upper and Lower Houses of Parliament must co-operate in the manner provided in Articles 77 and 79.[1] Whether, and how far, an agreement made without observing these rules of procedure can be effective in international law need not be determined in the present case. It can, in any event, only become part of municipal law by means of the requisite legislative act. The informal agreement between the two Ministries of Justice therefore lacks the force and effect of a Law. Accordingly, the act committed by the accused lacks the requirement of being an offence punishable by law. For this reason we are unable to accept the view of Grützner contained in his article on 'Legal Assistance in Criminal Matters between the Federal Republic and Austria'. This view is based on the 'legal state of affairs which has developed in practice in the course of the last few years'. This Court is unable to determine whether such a development has taken place. Even if it had it would constitute an inadmissible application of customary law and would involve a violation of the rule prohibiting interpretation by analogy. The latter rule would be infringed if we substituted for a provision enacted by 'special law or treaty' a general interpretation of the law brought about by general practice and reinforced by an informal agreement. Moreover, the development to which Grützner refers is limited to a period of time (1945 to 1953) too short to justify the view that customary law has been created. Nor is there anything to support the view that such a development had previously taken place in relations with other States. The appeal of the Public Prosecutor is therefore ill-founded, and the lower Court was right in refusing to issue the warrant. There is no punishable offence in the present case."

[Report: NJW, 8 (1955), p. 1408.]

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[1] See *supra* p. 560, n. 1.

Treaties—Forms of—Executive Agreements Made by the United States of America—Effect on Constitutional Rights.

See p. 398 (*Seery* v. *United States*).

Treaties—Forms of—Interpretative Exchange of Notes—Absence of Publication of Exchange of Notes—Whether Contents of Notes Applicable in Municipal Courts—The Law of France.

See p. 604 (*Sanzogni* v. *Caisso*).

Treaties—Forms of—" Conclusion " Reached at Conference—Conclusions of Pan-American Conference of 1945 on Problems of War and Peace.

See p. 913 (*In re Peters*).

B—CONCLUSION AND OPERATION OF TREATIES

I.—Signature. Accession and Adhesion. Tacit Renewal

Treaties—Conclusion and Operation of—Ratification—Entry into Force—Effective Date—Distinction between General Effect of Treaty and its Effect on Private Rights.

United States *v.* City of Kodiak.

United States, District Court, Alaska, Third Division, Anchorage.

June 22, 1955.

The Facts.—This was an action brought by the United States Government on behalf of certain Indian and Eskimo natives, residents of the city of Kodiak, to enjoin the City of Kodiak from foreclosing certain alleged tax liens on the real property of these natives. The natives on behalf of whom the action was brought had been issued with restrictive deeds pursuant to Section 1 of the Act of May 25, 1926, 44 State. 629, 48 U.S.C. § 355a, which authorized the issue of deeds, upon the survey of a town-site, to Indians and Eskimos claiming or occupying lands in Alaska and prohibited the taxation of lands as to which such deeds had been granted. Among the defences set up by the City were the contentions that the United States had never had any vested interest in certain of the parcels of land for which it had issued deeds pursuant to the cited statute and that the lands in question had been privately owned by the natives at the time that Alaska had been ceded to the United States pursuant to the Convention ceding Alaska, signed at Washington on March 30, 1867, 15 Stat. 539, T.S. No. 301. Article II of the Treaty provided:

> " In the cession of territory and dominion made by the preceding article, are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property. . . . "

The City of Kodiak maintained that one of the present owners of the real property in issue could trace his title through a conveyance made by one Slaksoutoff, the Governor of the Russian colonies in America, to a predecessor in title on April 24, 1868, a date subsequent to that of the signature of the Convention of Cession but prior to the exchange of ratifications, and that the land, being thus " private individual property ", could not lawfully have been granted and given a tax-free status by the United States.

Held: that the lands in question must be stricken from the petition of sale, on which they had been placed for non-payment of taxes, and that the City of Kodiak must be enjoined from placing the lands on the tax rolls. The Russian Governor was without power to convey title to any property on Kodiak Island on a date subsequent to the signing of the Convention of Cession but prior to the exchange of ratifications. As between the parties, a treaty takes effect, in the absence of any provision to the contrary, from the time it is signed, with its subsequent ratification relating back to that date; but in its application to private rights, a treaty is effective only from the exchange of ratifications.

After discussing the constitutional issues in the case, the Court said: " . . . [It] is apparent that property which could be classed as ' private individual property ' did not pass as public lands. Thus, such land as was ' private individual property ' at the time of the Treaty of Cession and has continued to be such would not be within the jurisdiction of the townsite trustee. *King* v. *McAndrews*, 8 Cir., 1901, 111 F. Supp. 860, 863–864.

" I find that lot 8 in block 18 of the Kodiak Townsite now owned by Mr. William or Willie A. Anderson, Sr., is not private individual property owned by him or his progenitors, for the reason that the treaty concerning the cession of the Russian possessions in North America, which was signed on the 30th day of March 1867 by the respective parties, and which was thereafter ratified by the United States on May 28, 1867, and the ratifications exchanged on June 20, 1867, and the proclamation thereof made by the United States on the same date under Article I, which provided as follows:

> ' Territory ceded. His Majesty the Emperor of all the Russias agrees to cede to the United States, by this convention, immediately upon the exchange of the ratifications thereof, all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands . . .'

and Article 2, which provides as follows:

> ' Public property ceded. In the cession of territory and dominion

> made by the preceding article, are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property. It is, however, understood and agreed, that the churches which have been built in the ceded territory by the Russian government, shall remain the property of such members of the Greek Oriental Church resident in the territory, as may choose to worship there. Any Government archives, papers and documents relative to the territory and dominion aforesaid, which may now be existing there, will be left in the possession of the agent of the United States.'

and Article 4, which is as follows:

> 'Formal delivery. His Majesty, the Emperor of all the Russias shall appoint, with convenient despatch, an agent or agents for the purpose of formally delivering to a similar agent or agents appointed on behalf of the United States, the territory, dominion, property, dependencies and appurtenances which are ceded as above, and for doing any other act which may be necessary in regard thereto. But the cession, with the right of immediate possession, is nevertheless to be deemed complete and absolute on the exchange of ratifications, without waiting for such formal delivery.'

and Article 6, which is as follows:

> 'Payment: Effect of cession. In consideration of the cession aforesaid, the United States agree to pay at the Treasury in Washington, within ten months after the exchange of the ratifications of this convention, to the diplomatic representative or other agent of His Majesty the Emperor of all the Russias, duly authorized to receive the same, seven million two hundred thousand dollars in gold. The cession of territory and dominion herein made is hereby declared to be free and unincumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property-holders; and the cession hereby made, conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto.
>
> 'Ratification. When this convention shall have been duly ratified by the President of the United States, by and with the advice and consent of the Senate, on the one part, and on the other by His Majesty the Emperor of all the Russias, the ratifications shall be exchanged at Washington within three months from the date hereof, or sooner, if possible.' Treaty concerning the cession of the Russian possessions in North America, vol. I, pages 35–38, 1949 Alaska Compiled Laws Annotated.

precluded P. Slaksoutoff, the late governor of the Russian colonies in America, from conveying title to any property at Saint Paul's Harbor, Kodiak Island, on the 25th day of April 1868[1] for the reason that, as between the parties, a treaty takes effect, in the absence of any provision to the contrary, from the time it is signed, with its subsequent ratification relating back to that date; but in its application to private rights, a treaty is effective only from the exchange of ratifications. 87 C.J.S.,[1] Treaties, § 14, p. 941. . . ."

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[1] In the statement of facts by the Court, the date of the conveyance was stated to be April 24, 1868.]

[Report: 132 F.Supp. 574.]

Treaties—Conclusion of—Contracting Party—Meaning of—Withdrawal from Treaty—General Agreement on Tariffs and Trade, 1947.

George E. Bardwil & Sons *v.* United States.

United States, Court of Customs and Patent Appeals. February 8, 1955.

The Facts.—This was an appeal from a judgment of the United States Customs Court, overruling the protests filed by the plaintiff against the rate of duty applied by the Collector of Customs on an importation from Portugal of table cloths and napkins made of cotton or flax. The Collector of Customs had fixed the rate of duty at 90 per centum *ad valorem* pursuant to paragraph 1529 (a) of the Tariff Act of 1930. The importer contended that the merchandise should have been classified at 70 per centum *ad valorem* under the provisions of the above paragraph as modified by Schedule XX of the General Agreement on Tariffs and Trade, dated at Geneva, October 30, 1947, 61 Stat. A1313, *T.I.A.S.* No. 1700, 61 *U.N.T.S.* 159 (referred to *infra* as " paragraph 1529 (a)—twelfth " by reason of its being the twelfth recital under that paragraph in Schedule XX).

Since not all the States participating in the negotiation of the General Agreement on Tariffs and Trade at Geneva in 1947 were in a position to sign the Agreement there, the Protocol of Provisional Application, 61 Stat. A1365, *T.I.A.S.* No. 1700, 55 *U.N.T.S.* 308, provided that it might be signed later at the Headquarters of the United Nations. The Republic of China was one of the States not signing at Geneva. It was anticipated that not all the negotiating States would become, or remain, contracting parties to the General Agreement. The General Agreement on Tariffs and Trade therefore provided in Article XXVII thereof for the withholding or withdrawing of concessions granted.

The President of the United States, in proclaiming the modifications in rates of duty necessary to carry out the terms of the General Agreement, withheld certain concessions from becoming effective on the date when the Agreement was to go into effect. The concession listed in " paragraph 1529(a)—twelfth " was not withheld. On April 21, 1948, the Republic of China signed the Protocol of Provisional Application and became a contracting party under the terms of the General Agreement. The President then issued Proclamation No. 2784, May 4, 1948, 13 Fed. Reg. 2439, in which some of the concessions previously withheld were granted.

[1 *Corpus Juris Secundum*, an American legal encyclopedia.]

Subsequently, the Republic of China notified the Secretary-General of the United Nations that it had decided to withdraw from the General Agreement on Tariffs and Trade in accordance with paragraph 5 of the Protocol of Provisional Application, which provided:

> "Any Government applying this Protocol shall be free to withdraw such application, and such withdrawal shall take effect upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Secretary-General of the United Nations."

The President then published Proclamation No. 2908, October 12, 1950, 15 Fed. Reg. 6981, withdrawing certain concessions, including that in " paragraph 1529 (a)—twelfth ". The Proclamation provided in part:

" 3. WHEREAS, the Secretary General of the United Nations has informed the Secretary of State that on March 6, 1950, he was notified that it was the decision of the Government of the Republic of China, which was then a contracting party to the said General Agreement, to withdraw from the General Agreement on Tariffs and Trade, in accordance with paragraph 5 of the Protocol of Provisional Application of the General Agreement and the Government of China is therefore no longer such a contracting party.

" 4. WHEREAS the said section 350 (a) of the Tariff Act of 1930, as amended, authorizes the President to terminate in whole or in part any proclamation carrying out a trade agreement entered into under such section;

" 5. WHEREAS Article XXVII of the said General Agreement referred to in the first recital of this proclamation provides as follows:

> "Any contracting party shall at any time be free to withhold or *to withdraw* in whole or in part any concession, provided for in the appropriate Schedule annexed to this Agreement, in respect of which such contracting party determines that it was *initially negotiated* with a government which has not become, or *has ceased to be, a contracting party*. The contracting party taking such action shall give notice to all other contracting parties and, upon request, consult with the contracting parties which have a substantial interest in the product concerned." (Italics added.)

" 6. WHEREAS the concessions provided for in Part I of Schedule XX of the said General Agreement which are identified in the following list were initially negotiated with the Government of the Republic of China within the terms of the said Article XXVII:

Item (paragraph)	*Rates of Duty*
. . .	. . . .
1529 (a) [twelfth]	70% ad val. (both such rates)
. . .	. . . .

" NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution and the statutes, including the said section 350 of the Tariff Act of 1930, as amended, do proclaim as follows:

" PART I

" The said proclamation of December 16, 1947, as amended and rectified, and the said proclamations supplemental thereto referred to in the second recital of this proclamation are hereby terminated to the extent that, on and after the sixtieth day following the date of this proclamation they shall be applied as though the items and parts of items identified in the sixth recital of this proclamation were deleted from Part I of Schedule XX of the said General Agreement, . . ."

The importer contended that, since the concession was never withheld and was in effect before the Republic of China became a contracting party to the General Agreement, the concession could not be withdrawn under Article XXVII as a consequence of the fact that the Republic of China had withdrawn from the General Agreement.

On appeal,

Held: that the judgment appealed from must be affirmed. The Republic of China was a contracting party to the General Agreement on Tariffs and Trade, and the concession "paragraph 1529 (a)—twelfth" was initially negotiated with the Republic of China, notwithstanding the fact that it became effective before China became a contracting party to the Agreement. The concession was accordingly subject to withdrawal by the United States, pursuant to Article XXVII of the Agreement, by reason of its having been " initially negotiated with a government which . . . has ceased to be, a contracting party ".

" The Court said: " It is to be noted from the above stated facts that the concession, ' paragraph 1529 (a)—twelfth,' was not originally *withheld* from the General Agreement on Tariffs and Trade, but was *withdrawn* from the General Agreement by Presidential Proclamation 2908, *supra.* It is upon this particular aspect of the above facts, as they relate to Article XXVII, *supra*, that appellant primarily bases his case. More specifically, appellant contends that there is an inconsistency between the fact that ' paragraph 1529 (a)—twelfth ' was not withheld from the General Agreement while the Republic of China was only a negotiating party and not a contracting party thereto, and the fact that ' paragraph 1529 (a)—twelfth ' was withdrawn by Presidential Proclamation 2908 because the Republic of China ceased to be a contracting party to said General Agreement. Thus appellant in essence contends that since the concession was never withheld and was in effect before the Republic of China was a contracting party to said General Agreement, the concession could not have been withdrawn under Article XXVII because of the fact that the Republic of China withdrew from the General Agreement.

" The question which appellant states is to be resolved by this court is:

" Did the President's Proclamation of October 12, 1950 (T. D. 52587) terminate the concession identified as item 1529 (a) (twelfth) in Schedule XX of the General Agreement on Tariffs and Trade, where such concession was made effective before the Republic of China signed the Protocol of Provisional Application and where such concession was not withheld under Article XXVII of the said General Agreement ?

" The answer to the question presented by appellant depends on the interpretation of Article XXVII, *supra*. However, before appellant's question can be answered, it is deemed that two questions which are ancillary to appellant's question must be answered. These questions are:

" (1) Was the Republic of China a contracting party to said General Agreement within the meaning of Article XXVII ?

" (2) Was the specific concession ' paragraph 1529 (a)—twelfth ' initially negotiated with the Republic of China ?

If both of these questions, (1) and (2), *supra*, are answered in the affirmative, then it must be held, in answer to appellant's question, that the President's Proclamation terminated the concession ' paragraph 1529 (a)—twelfth ' in accordance with Article XXVII. The purpose of finding the answers to questions (1) and (2) is to determine whether the actual facts are in conformance with the provisions of Article XXVII. More specifically, the only conditions for a contracting party's withdrawal of a specific concession, as set forth in Article XXVII, are that the concession must have been *initially negotiated* with a nation which has not become or has *ceased to be a contracting party*. The answers to questions (1) and (2), *supra*, will reveal if these conditions exist.

" Relative to question (1), *supra*, there is no doubt that the Republic of China was one of the original nations which negotiated generally with respect to the General Agreement on Tariffs and Trade. (See the Final Act of the General Agreement on Tariffs and Trade, *supra*.) Notwithstanding the fact that the Republic of China had not yet become a contracting party to the General Agreement on January 1, 1948, the date it went into effect, the Republic of China did become a contracting party on May 22, 1948 by signing the Protocol of Provisional Application on April 21, 1948 in accordance with paragraph 4 thereof, *supra*. Thus in view of the above stated facts, the Republic of China, which was only a negotiating party relative to the General Agreement on January 1, 1948, became a contracting party to said General Agreement subsequent to this date, namely, on May 22, 1948, by virtue of its compliance with paragraph 4 of the Protocol of Provisional Application. That the Republic of China did become a contracting party, and was considered such by the United States, is stated in paragraph 5 of T. D. 51909, *supra*. Thus it can be seen that the Republic of China was both a negotiating party and a contracting party with respect to the General Agreement, and therefore a contracting party within the meaning of Article XXVII. The answer to question (1), *supra*, must therefore be in the affirmative.

" Relative to question (2), *supra*, it remains to be ascertained whether the specific concession, ' paragraph 1529 (a)—twelfth,' was initially negotiated with the Republic of China, which ceased to be a contracting party. If this concession was *initially negotiated* with the Republic of China, a *contracting party* to said General Agreement, then all of the conditions necessary for the withdrawal of the concession by the United States under Article XXVII, *supra*, have been met.

" The sixth recital of Proclamation 2908, *supra*, states as a fact that the concession in question was initially negotiated with the Republic of China. Appellant has introduced no evidence to the contrary. Whenever a statute gives discretionary power to any person, to be exercised upon his own opinion of certain facts, the statute constitutes him the exclusive judge of the existence of those facts. *United States* v. *George S. Bush & Co., Inc.*, 310 U. S. 371. Therefore it must be held that all of the facts set forth in Presidential Proclamation 2908, *supra*, exist, especially in view of no evidence to the contrary, and that the concession in issue, ' paragraph 1529 (a)—twelfth,' was initially negotiated with the Republic of China.

" However, in addition to the statement in the sixth recital of Presidential Proclamation 2908, *supra*, which states as a fact that the specific concession in question was initially negotiated with the Republic of China, there are publications which substantiate this fact.

" The first of these publications is published by the United States Tariff Commission, which is the body which advises the President and supplies him with information relative to imports into the United States of commodities which may be included in trade agreement negotiations. Section 4, act of June 12, 1934, 48 Stat. 943, 945, as amended July 5, 1945, c. 269, § 4, 59 Stat. 411. (For a history of the function of the United States Tariff Commission, see *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294.) This tariff Commission publication is: *Operation of the Trade Agreements Program, June* 1943 *to April* 1948, Report No. 160, second Series, Washington, 1949.

" In Part III of this publication, which relates to concessions granted by the United States, the foreword, page III, states:

> '. . . This report reviews the operation of the trade agreements program from its initiation on June 12, 1934 to April 1948. It covers all trade agreements completed during that period, including the General Agreement on Tariffs and Trade entered into at Geneva, Switzerland, . . .'

On page 87, Part III, it is stated:

'. . . In tables 33–35 information is given as to countries with which concessions relating to the rates of duty (whether reductions or bindings) were negotiated.[5] . . .'

Footnote 5 states:

'The Geneva agreement was signed simultaneously with 22 countries in addition to the United States, . . . However, as to each article, negotiations were conducted exclusively, or chiefly, with some one country, that country being indicated in tables 33 and 35 by an asterisk (*).'

Table 33, beginning on page 88 of Part III is entitled:

'United States imports in 1939 of principal articles on which the Geneva agreement fixed rates lower than those in effect before any changes were made by trade agreements
(*=Country with which bargaining was conducted at Geneva. . . .).'

On page 111 of table 33 under paragraph 1529 (a) which relates to the concession in issue in this case, China is listed with an asterisk beside it indicating that this concession was negotiated with China at Geneva.

"Since publications of the Tariff Commission have been used by this Court in the past for obtaining pertinent information relative to trade agreements, *United States* v. *Good Neighbor Imports, Inc.*, 33 C. C. P. A. (Customs) 91; *United States* v. *Weigert-Dagen et al.*, 39 C. C. P. A. (Customs) 58, we feel that the above cited report must be used in this case for the purpose of complementing the sixth recital of Presidential Proclamation 2908, *supra*, which states as a fact that the negotiations relative to the concession in issue in this case were initially carried out between the Republic of China and the United States.

"The following publication was also cited in the briefs as indicating that negotiations relative to the concession in issue were carried out with the Republic of China: 'General Agreement on Tariffs and Trade Schedule XX. United States of America. Annotated to show Countries with which Concessions were Initially Negotiated at Geneva in 1947. The Department of State.' On page 157 of this publication the concession in issue in this case is listed as having been initially negotiated with the Republic of China. However, since we have already determined that such negotiations were carried out, we deem it unnecessary to discuss this publication further.

"Therefore, since both the above publications and recital 6 of Presidential Proclamation 2908, *supra*, state that the concession in issue was initially negotiated with the Republic of China, our answer to question (2), *supra*, must be in the affirmative.

"As set forth above, it can be seen that the Republic of China was both a *contracting party* to said General Agreement, and that the concession 'paragraph 1529 (a)—twelfth' was *initially negotiated* with said Republic of China. The above facts also show that the

Republic of China *ceased to be* a contracting party to said agreement.

" Keeping these facts in mind, we will now analyze Article XXVII, *supra*, of the General Agreement on Tariffs and Trade, paying special attention to the italicized portions thereof. The only conditions for withdrawing a concession by a contracting nation, according to Article XXVII, are that the specific concession must have been (1) *initially negotiated* with a government which (2) has not become, or *has ceased to be*, (3) a *contracting party* to said General Agreement. Therefore, Article XXVII rephrased and applied to the present case states, in our opinion, that if the United States, one of the negotiating and contracting parties to said General Agreement, *initially negotiated* said concession ' paragraph 1529 (a)—twelfth ' with the Republic of China, another of the negotiating parties, and later a *contracting party*, then the United States is free to withdraw said concession if the Republic of China *ceased to be a contracting party*. There is no statement in Article XXVII that the nation against which a concession is to be withdrawn must have been a contracting party to said General Agreement at the time it went into effect on January 1, 1948, or that a concession, which was in effect prior to a foreign nation's becoming a contracting party to said General Agreement, cannot be withdrawn after said foreign nation ceases to be a contracting party.

" There is one other contention made by appellant which we feel that we must discuss. This contention relates to the fourth recital of Presidential Proclamation 2908, *supra*. Appellant in essence states that section 350 (a) of the Tariff Act of 1930, *supra*, does not authorize the President to terminate any concession made pursuant to the Geneva agreement. We feel that this contention is without merit. The President entered the General Agreement by proclamation under the authority of section 350, *supra*, and it follows that he may *at any time terminate* any such agreement *in whole or in part*, this provision for termination being expressly made in said section. It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of facts calling for that action is not subject to review. *United States* v. *George S. Bush & Co., Inc., supra*. Furthermore, neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed. *Norwegian Nitrogen Products Co.* v. *United States, supra*. Appellant has not contended or shown that the prescribed forms of legislation were not observed. We must therefore assume that the prescribed forms of legislation were observed.

" We therefore feel, in view of the foregoing holdings, that the action of the President in withdrawing the concession in issue from the General Agreement on Tariffs and Trade is both within the scope of section 350 of the Tariff Act of 1930 and within Article XXVII of the General Agreement on Tariffs and Trade."

[Report: 42 C.C.P.A. (Customs) 118.]

NOTE.—In *United States* v. *Metropolitan Petroleum Corp.* (1954), 42 C.C.P.A. (Customs) 38, it was *held* that a Trade Agreement with Venezuela and the Presidential Proclamation issued pursuant thereto, reducing the duty on imported petroleum, was suspended but not terminated by a Trade Agreement with Mexico fixing the duty at a still lower rate. Upon the termination of the Agreement with Mexico, the Agreement with Venezuela and the Presidential Proclamation in implementation thereof again became operative *ex proprio vigore*.

II.—Conditions of Validity of Treaties. Registration of Treaties

Treaties—Conditions of Validity of—Relevance of Element of Constraint and Absence of Equality—Treaties of Peace.

See p. 443 (*Mergé Claim*).

VI.—Ratification of Treaties. Entry into Force

Treaties—Ratification of—Effect of Multilateral Convention Ratified by Some Parties Only.

See p. 443 (*Mergé Claim*).

VII.—Operation and Enforcement of Treaties. Necessity for Municipal Legislation

[*See also* PART I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; *and* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.]

Treaties—Operation of—Necessity for Municipal Legislation—Construction Consistent with Municipal Law—Intention of Parties—Rights of Individuals Under a Treaty—Treaty Concerning International River.

HIDALGO COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT No. 7 *ET AL.* v. HEDRICK *ET AL.*

United States, Court of Appeals, Fifth Circuit. September 30, 1955.

THE FACTS.—This was an action by two Water Control and Improvement Districts, political subdivisions of the State of Texas, and two individuals seeking a declaratory judgment concerning the plaintiffs' asserted rights and an injunction to prevent the taking of waters from the Rio Grande by the defendants in derogation of the rights claimed by the plaintiffs. In the complaint it was asserted that, prior to the Treaty between the United States and Mexico respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, signed at Washington on February 3, 1944, 59 Stat. 1219, T.S. No. 994, waters of the Rio Grande were being diverted and used in the Counties of Hidalgo, Willacy and Cameron (Texas) for the irrigation of some 500,000 acres of land and for supplying water for domestic, municipal and industrial purposes to a population of 250,000. Of the water so diverted and used, a substantial portion had its origin in Mexico. The claim of the plaintiffs was grounded in alleged appropriative rights for use of the water on lands not adjacent to the river, while the defendants claimed riparian rights based upon ownership of land adjoining the river.

The claim of the plaintiffs was based solely upon the Treaty between the United States and Mexico, and more particularly upon Article 9 of the Treaty, which provides:

> "(a) The channel of the Rio Grande (Rio Bravo) may be used by either of the two countries to convey water belonging to it.
>
> "(b) Either of the two countries may, at any point on the main channel of the river from Fort Quitman, Texas to the Gulf of Mexico, divert and use the water belonging to it and may for this purpose construct any necessary works. However, no such diversion or use, not existing on the date this Treaty enters into force, shall be permitted in either country, nor shall works be constructed for such purpose, until the Section of the Commission in whose country the diversion or use is proposed has made a finding that the water necessary for such diversion or use is available from the share of that country, unless the Commission has agreed to a greater diversion or use as provided by paragraph (d) of this Article. The proposed use and the plans for the diversion works to be constructed in connection therewith shall be previously made known to the Commission for its information.
>
> "(c) Consumptive uses from the main stream and from the unmeasured tributaries below Fort Quitman shall be charged against the share of the country making them.
>
> "(d) The Commission shall have the power to authorize either country to divert and use water not belonging entirely to such country, when the water belonging to the other country can be diverted and used without injury to the latter and can be replaced at some other point on the river.
>
> "(e) The Commission shall have the power to authorize temporary diversion and use by one country of water belonging to the other, when the latter does not need it or is unable to use it, provided that such authorization or the use of such water shall not establish any right to continue to divert it.
>
> "(f) In case of the occurrence of an extraordinary drought in one country with an abundant supply of water in the other country, water stored in the international storage reservoirs and belonging to the country enjoying such abundant water supply may be withdrawn, with the consent of the Commission, for the use of the country undergoing the drought.

> "(g) Each country shall have the right to divert from the main channel of the river any amount of water including the water belonging to the other country, for the purpose of generating hydro-electric power, provided that such diversion causes no injury to the other country and does not interfere with the international generation of power and that the quantities not returning directly to the river are charged against the share of the country making the diversion. The feasibility of such diversions not existing on the date this Treaty enters into force shall be determined by the Commission, which shall also determine the amount of water consumed, such water to be charged against the country making the diversion.
>
> "(h) In case either of the two countries shall construct works for diverting into the main channel of the Rio Grande (Rio Bravo) or its tributaries waters that do not at the time this Treaty enters into force contribute to the flow of the Rio Grande (Rio Bravo) such water shall belong to the country making such diversion. . . ."

In the Preamble to the Treaty, its purpose was recited as being

> " to fix and delimit the rights of the two countries with respect to the waters . . . of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, United States of America, to the Gulf of Mexico, in order to obtain the most complete and satisfactory utilization thereof . . ."

The International Boundary Commission, set up under a prior Treaty, was continued with new powers and duties under the name of the International Boundary and Water Commission. An allotment of the waters of the Rio Grande was made between the two countries. Regulations were contemplated to provide for water conservation programmes.

In the Resolution of the United States Senate giving its consent to the ratification of the Treaty (59 Stat. 1263), it was stipulated:

" Resolved, . . . That the Senate advise and consent to the ratification of . . . a treaty between the United States of America and the United Mexican States, . . . subject to the following understandings, and that these understandings will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will in effect form a part of the treaty: . . .

" (b) Insofar as they affect persons and property in the territorial limits of the United States, the powers and functions of the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, the United States Section of said Commission, and any other officer or employee of the United States, shall be subject to the statutory and constitutional controls and processes. Nothing contained in the treaty or protocol shall be construed as impairing the power of the Congress of the United States to define the terms of office of members of the United States Section of the International Boundary and Water Commission or to provide for their appointment by the President by and with the advice and consent of the Senate or otherwise.

" (c) That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the

Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States."

The complaint averred that, except for a few periods of flood flow, the waters of the Rio Grande had been inadequate to supply uses existing prior to the Treaty, and that notwithstanding this fact and without any allocation of water by the United States Section of the International Boundary and Water Commission, the defendants had diverted and used water from the river for irrigation purposes. These diversions and uses were begun subsequent to the Treaty. The complaint stated:

> "There is not now, nor is there any present prospect for, a supply of water adequate to supply both the diversions and uses existing on November 8, 1945 [the effective date of the Treaty] and the defendants' diversions and uses."

The respective contentions of the parties are more fully set out in the portion of the opinion of the Court set forth below.

The District Court for the Southern District of Texas dismissed the action on the grounds of lack of jurisdiction over the subject matter and failure to state a claim upon which relief could be granted. The plaintiffs appealed.

Held: that the order of dismissal entered by the District Court must be affirmed. The Treaty between the United States and Mexico, if construed in accordance with the intent of the parties, apportioned the water of the Rio Grande between the two countries but left to the laws of the two nations what persons would be entitled to the use of the waters secured to each of the parties to the Treaty. The defendants had vested property rights as riparians, prior to the conclusion of the Treaty, to divert water from the river, which rights were not altered by the Treaty.

If the plaintiffs' contentions were to be adopted, they would acquire property rights which they did not have before and the defendants would be divested of rights which they possessed prior to the Treaty. Since the power to regulate the tenure of real property was left by the Constitution of the United States to the individual states, such a construction of the Treaty would bring it into conflict with the Constitution. Construction of the Treaty as not affecting the rights of individual natural or juridical persons avoided any such possible conflict. The record of the consideration of the Treaty by the United States Senate, to which resort could properly be made only in the event that the Treaty were ambiguous, and the resolution of the Senate consenting to the ratification of the Treaty were fully consistent with the interpretation placed upon the agreement by the Court.

The Court said: "It is apparent that the original claims of the plaintiffs had their origin under appropriative rights for use on lands not adjacent to the river, while the defendants claim riparian rights based upon ownership of land adjoining the river. The primary issue arises from the assertion by the plaintiffs that they have a right, created or protected by the treaty, to continue to divert and use the waters of the Rio Grande to the same extent as was done by them at the time of the treaty date without any diminution of such waters by the defendants. The defendants counter with the position that their riparian rights were at all times paramount to the appropriative rights of the plaintiffs, that such rights were vested property rights, that it was not intended that the treaty should create or protect any individual rights to water or the use thereof, and that if the treaty be construed to give it the effect of lessening the incidents of the riparian ownerships of defendants, the treaty provision so construed would be a deprivation of property without due process of law under the Fifth Amendment to the Constitution of the United States.

" Since there is no diversity to support Federal jurisdiction, the action can be maintained only if some right, title, privilege or immunity dependent upon the treaty is set up or claimed so as to require the Court to apply, construe or pass upon the treaty in determining the right asserted. *Muse* v. *Arlington Hotel Co.*, 168 U.S. 430, 18 S.Ct. 109, 42 L.Ed. 531. See also *Crystal Spring Land & Water Co.* v. *City of Los Angeles*, 177 U.S. 169, 20 S.Ct. 573, 44 L.Ed. 720; *Devine* v. *City of Los Angeles*, 202 U.S. 313, 26 S.Ct. 652, 50 L.Ed. 1046. In their complaint, after outlining the basis of the allocation of the waters of the Rio Grande between the United States and Mexico, the plaintiffs aver:

> 'Thus the investments and activities of these plaintiffs and other American users perfected a claim to the share of the flow of the lower Rio Grande which was allotted to the United States by the treaty, which claim was cognizable in international practice and was recognized in and given effect by the treaty.'

In their brief the plaintiffs say that

> 'The sole right asserted against the Appellees and the sole basis of relief sought by appellants is the protection of their water supply conferred on them by said treaty provisions.'

It was held at an early date that

> 'A case . . . may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either '. *Cohens* v. *Commonwealth of Virginia*, 6 Wheat. 264, 19 U.S. 264, 5 L.Ed. 257.

This rule still prevails and applies to cases arising under treaties as well as under the Constitution or laws. The case before us meets the test.

" Since plaintiffs insist that their asserted priority of right to divert and use waters of the Rio Grande arises from the treaty, it necessarily follows that under plaintiffs' theory the rights of defendants would be paramount in the absence of the treaty. Absent the treaty the appropriative right of plaintiffs ' is in the nature of a hereditament appurtenant to the tract for the benefit of which the appropriation was made '. 44 Tex. Jur. 60, Water § 44. On the other hand, no treaty intervening, the right of each of the defendants would be defined as:

> ' The right of the owner of riparian land to use the water of the stream upon or bordering his tract is an appurtenance thereof in the nature of an incorporeal hereditament. It constitutes property within the meaning of the Constitution, and cannot be taken without his consent, save, perhaps, by condemnation and the payment of a just compensation.' 44 Tex.Jur. 47, Water § 34.

The observation made in an earlier case by the District Judge whose order is under review that ' the Texas water laws and decisions are in hopeless confusion ', is quoted in our opinion in *Martinez* v. *Maverick County Water Control & Improvement District*, 5 Cir., 1955, 219 F.2d 666.

" We have no choice but to agree with the defendants that if we should adopt the plaintiffs' theory of the construction of the treaty the result would be a holding that by the treaty the plaintiffs had acquired property rights which they did not have before and that defendants had been divested of property rights which they owned prior to the treaty. To so hold would bring the treaty into collision with the Constitution. In a case involving an earlier treaty between the United States and Mexico this Court, in an opinion by Judge Waller, said:

> ' We should seek to avoid, if possible, a decision adjudging a treaty to be in conflict with the Constitution. It is not necessary to a decision in this case for us to pass upon the question of whether the treaty is violative of the prohibitions of the Federal Constitution, as we would be compelled to do if the treaty required the construction contended for by Appellants.' *Amaya* v. *Stanolind Oil & Gas Co.*, 5 Cir., 1946, 158 F.2d 554, 557, *certiorari* denied 331 U.S. 808, 67 S.Ct. 1191, 91 L.Ed. 1828, rehearing denied 331 U.S. 867, 67 S.Ct. 1530, 91 L.Ed. 1871 '.[1]

In the case before us, as in the *Amaya* case, we would avoid the question as to conflicts between treaty and Constitution. Under our view there is no such question presented.

" The rule for construction of treaties has been thus stated: ' Treaties are to be construed as other contracts according to the intent of the parties.' *The Yulu*, 5 Cir., 1934, 71 F.2d 635, 636,[2] *certiorari* denied *The Yulu* v. *United States*, 293 U.S. 589, 55 S.Ct. 104, 79 L.Ed. 684. Cited in the case of *The Yulu* is *Wright* v. *Henkel*, 190 U.S. 40, 23 S.Ct. 781, 785, 47 L.Ed. 948, where it is held that

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[1] *Annual Digest*, 1946, p. 178.]

[2] *Ibid.*, 1933–1934, p. 454.]

> ‘ Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose.’

Other like holdings might, if need be, be cited at length.

" Plaintiffs, in their brief, say that the ‘ treaty provision is clear and needs no construction, it was intended to mean just whati t says.’ We do not read into the treaty that which plaintiffs contend it says. The manifest purpose of the contracting parties is declared in the preamble to the treaty to be, among other things, ‘ to fix and delimit the rights of the two countries with respect to the waters . . . of the Rio Grande ’. The language of the Treaty relied upon by plaintiffs is:

> ‘ Either of the two countries may . . . divert and use the water belonging to it. . . . However, no such diversion or use, not existing on the date this Treaty enters into force, shall be permitted in either country . . . .’

The plaintiffs with plausibility insist that as used in the treaty, ‘ government ’ and ‘ country ’ have different meanings and that ‘ country ’ refers to the land and people. There is, we agree, a difference in the meaning of the two words. Like many another term the word ‘ country ’ cannot be given a hard and fast definition applicable alike to every situation in which it is employed. *Commissioner of Internal Revenue* v. *Chicago Portrait Co.*, 7 Cir., 1931, 50 F.2d 683. We cannot say that it has an identical meaning in each of the instances where it is used in the treaty under consideration. We conclude, however, that as used in the last quoted portion of the treaty it means the two nations, the United States and Mexico. The word ‘ government ’, as used in the treaty, refers to the political agency through which the sovereignty of the nation is expressed and exercised.

" The treaty apportioned the water of the Rio Grande and allocated the share that might be diverted and used on each side of the river, but without making or intending to make any provision as to how or by whom the water so apportioned and allocated should be used upon being diverted. Increases in diversion to and use upon either side is prohibited except upon the conditions stated. We think it was intended by the parties to the treaty that to each nation should be left the power of making determinations, pursuant to its own law, of those who are, may become, or cease to be, entitled to the use of the waters secured by the treaty to such nation, and their relative rights among themselves. If any intent had been present to create or protect or give a priority to individual property rights of one group resulting in the diminution or divestment of those of another group, the operative language would have been couched in more explicit terms.

" The United States Supreme Court has set forth some of the generally applicable limitations on the Federal power by saying:

> ‘ The power of the State to regulate the tenure of real property within

her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick* v. *Sullivant*, 10 Wheat. 202 [6 L.Ed. 300]. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the State.' *United States* v. *Fox*, 94 U.S. 315, 24 L.Ed. 192.

The doctrine of the *Fox* case has been held applicable in cases involving treaties. *Amaya* v. *Stanolind Oil & Gas Co., supra*. We do not say, and there is no need for saying, that a treaty cannot in any event supersede the laws of a State with respect to property rights and the manner of their transfer both voluntary and by operation of law, nor do we hold that a treaty may not change the method by which such rights may be determined or enforced. We only say that the treaty in question does not purport to have any such effect as to the respective water rights of the parties to this cause. We find nothing in the protocol that has bearing on the problem submitted by this appeal.

" Our attention is directed to the hearings before the Senate Committee and to the evidence there adduced, to Senate discussions in the Committee room and on the Senate floor, to statements of the Secretary of State, of the Attorney General of Texas and others, and to other treaties involving other nations and other rivers. There is not, as we view the case, any need for a discussion of these matters. Such factors are to be considered and weighed when and only when the meaning of a treaty provision is uncertain and the treaty language is ambiguous or admits of more than one construction. See *Nielson* v. *Johnson*, 279 U.S. 47, 49 S.Ct. 223, 73 L.Ed. 607.[1] The language of that portion of the treaty involved in this appeal is neither uncertain, ambiguous nor susceptible of more than one construction. We find nothing in the hearings, discussions, statements or other extraneous matters that would impel us to a conclusion different than that which we have reached. But, we think, if any uncertainty did exist it would be dispelled, and if any ambiguity were present it would be removed by the ratifying resolution of the Senate which provides:

> ' That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the

[[1] *Annual Digest*, 1929–1930, p. 376.]

> Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the invididual States.'

" The treaty provides for the disposition of such waters as might, after its effective date, become available for diversion and use upon the impounding of flood flows by dams and other works. These treaty provisions and the disposition of such waters as might be made available by them are not in this cause."

[Reports: 226 F.2d 1; *certiorari* denied, 350 U.S. 983, 100 L.Ed. 851, 76 Sup. Ct. 469 (1956).]

Treaties—Operation and Enforcement of—Effect in Municipal Law—Treaty as Prevailing Over Inconsistent Municipal Statute—Self-executing Treaty—Treaty of Friendship, Commerce and Navigation—Non-discrimination against Aliens—Workmen's Compensation Benefits—The Law of the United States of America.

IANNONE *v.* RADORY CONSTRUCTION CORPORATION *ET AL.*

United States, Supreme Court of the State of New York, Appellate Division, Third Department.

May 11, 1955.

THE FACTS.—Death benefits under the New York Workmen's Compensation Law were awarded to the widow and minor daughter, both residents and nationals of Italy, of the decedent, a resident of the United States, who had sustained fatal injuries in an industrial accident. Section 17 of the Law provides:

> " Compensation under this chapter to aliens not residents . . . of the United States or Canada, shall be the same in amount as provided for residents, . . . except that the board, may at its option, or upon the application of the insurance carrier, shall, commute as of the date of death all compensation to be paid to such aliens, by paying or causing to be paid to them one-half of the commuted amount of such compensation as determined by the board."

Pursuant to this provision of law, the awards were commuted by the Workmen's Compensation Board to one half of the present value of all future payments. The claimant contended that the awards should not have been commuted to one half. She based her case on Article XII, para. 1, of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic, signed at Rome on February 2, 1948, 63 Stat. 2255, 2272, *T.I.A.S.* No. 1965, which provides:

> " The nationals of either High Contracting Party, regardless of alienage or place of residence, shall be accorded rights and privileges

> no less favorable than those accorded to the nationals of the other High Contracting Party, under laws and regulations within the territories of such other High Contracting Party that . . . (b) grant to a wage earner or an individual receiving salary, commission or other remuneration, or to his relatives, heirs or dependents, as the case may be, a right of action, or a pecuniary compensation or other benefit or service, on account of occupational disease, injury or death arising out of and in the course of employment or due to the nature of employment."

The Board contended that such commutation did not constitute less favourable treatment than that accorded to nationals of the United States but, on the contrary, was possibly more favourable. It also contended that Section 17 of the Law was not discriminatory in that it applied not only to non-resident alien dependents of a deceased alien-employee but also to non-resident alien dependents of a deceased citizen employee.

On appeal,

Held: that the award must be reversed and the case remitted to the Workmen's Compensation Board for further proceedings. The Law as applied extended less favourable treatment to non-resident Italian dependents than to dependents who were United States nationals and was therefore inconsistent with the Treaty of Friendship, Commerce and Navigation with Italy. A self-executing treaty must prevail over an inconsistent provision of State law.

The Court said: " . . . In our opinion, the payment to these non-resident alien dependents of one-half of the commuted amount of compensation does constitute less favorable treatment than accorded our own citizens.

" The widow was awarded $15.75 per week from the date of decedent's death. The then present value of her award was calculated by the Workmen's Compensation Board to be $14,517.06. The weekly rate, the mortality and remarriage tables and other factors were used in determining this figure. If the widow had been a United States citizen, she would have been entitled to receive the weekly sum awarded during widowhood with two years' compensation in one sum upon remarriage, Workmen's Compensation Law, § 16, or, in the event of commutation, the full present value of the award, Workmen's Compensation Law, § 25. The weekly award to the decedent's minor daughter was $10.50 and the present value of her award was computed to be $2,555.02 as of the date of death. If she were a citizen of the United States, she would have been entitled to receive the weekly sum awarded until she reached eighteen years or, in the event of commutation, the full present value of the award. To award to these non-resident alien dependents only one-half of the present value of such awards is obviously treatment different from and less favorable than that accorded nationals of the United States. The Board's contention that the commuted awards may 'quite possibly' constitute treatment 'more favorable than that accorded nationals of the United States' rests upon the supposition that *perhaps* the widow or child may not live as long as the actuary tables indicate or that the widow may be the one of approximately five hundred widows of her age who will remarry. See, Remarriage Tables, Dutch Royal Insurance Institution. In attempting to anticipate the future of the widow and child, it seems to us better to be guided by accepted statistics than to resort to speculation. Such statistics indicate little likelihood of the occurrence of any of the 'possibilities' that the Board must have considered.

"The respondents argue that section 17 is not discriminatory because it applies not only to non-resident alien dependents of a deceased alien-employee but also to non-resident alien dependents of a deceased citizen-employee. However, the rights of dependents to death benefits are created by law and not derived from any right conferred upon a deceased employee. Workmen's Compensation Law, § 16; *O'Esau* v. *E. W. Bliss Co.*, 186 App.Div. 556, 174 N.Y.S. 739, affirmed 227 N.Y. 597, 125 N.E. 921. The benefits accrue not to the deceased employee or his estate but directly to his dependents. The comparison to be made should be as to the treatment of non-resident Italian dependents and dependents who are United States nationals. When that is done, we find the treatment of non-resident Italian dependents less favorable and, therefore, in violation of the Treaty.

"The Constitution provides that a duly ratified treaty made by the United States 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' U.S. Const. art VI, § 2. In *Asakura* v. *City of Seattle*, 265 U.S. 332, 341, 44 S.Ct. 515, 516, 68 L.Ed. 1041,[1] Mr. Justice Butler said of the treaty-making power of the United States

> 'though it does not extend "so far as to authorize what the Constitution forbids," it does extend to all proper subjects of negotiation between our government and other nations. *Geofroy* v. *Riggs*, 133 U.S. 258, 266, 267, 10 S.Ct. 295, 33 L.Ed. 642; *In re Ross*, 140 U.S. 453, 463, 11 S.Ct. 897, 35 L.Ed. 581; [*State of*] *Missouri* v. *Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641.'[2]

The provision of the Treaty previously set forth contains subject matter proper for negotiation between sovereign governments and, as the Treaty is self-executing, it operates without the need of any legislation. Hence, it must be applied and given authoritative effect by the courts of this State. Courts of other states in applying similar treaties containing similar provisions have required state policy to bow before the national policy evidenced by such treaties.

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[1] *Annual Digest*, 1923–1924, p. 314.]

[2] *Ibid.*, 1919–1922, Case No. 1.]

Larson's *Workmen's Compensation Law* § 63.52; *Antosz* v. *State Compensation Commissioner*, 130 W.Va. 260, 43 S.E.2d 397.[1]

" In the circumstances of this case, section 17 of the Workmen's Compensation Law is inconsistent with the Treaty and must give way to superior national policy. To comply with such policy, the Workmen's Compensation Board must award the funeral expenses to the person entitled thereto and the periodic compensation benefits to the widow and minor child as prescribed by paragraph 2 of section 16 of the Workmen's Compensation Law or, if the Board deems it advisable to commute the periodic payments pursuant to section 25, it must cause to be paid the full present value of the awards in one or more lump sum payments as it would do for citizens."

[Reports: 285 App. Div. 751, 1208, 141 N.Y.S.2d 311; affirmed without opinion, 1 N.Y.2d 671, 133 N.E.2d 708 (1956).]

Treaties—Operation and Enforcement of—Effect in Municipal Law—Later Inconsistent Statute—Whether Prevailing over Treaty in Municipal Law—Commercial Conventions—Reciprocal Trade Agreements—Customs Duty—Preference—Meaning of—The Law of the United States of America.

MARIANAO SUGAR TRADING CORP. *v.* UNITED STATES.

United States, Court of Customs and Patent Appeals. March 23, 1954.

THE FACTS.—The plaintiff imported a quantity of Cuban sugar into the United States and was assessed customs duties under the Tariff Act of 1930, as modified by the Cuban Trade Agreements in force at the time of importation. These duties were not in dispute. In addition thereto, a tax on imported manufactured sugar was also assessed under the provisions of Sections 3500 and 3501 of the Internal Revenue Code of 1939, 53 Stat. 428 (quoted in the body of the opinion). The plaintiff contended that the collector of customs should have granted a 20 per cent. preferential reduction in the sugar tax pursuant to Article II of the Commercial Convention between the United States of America and Cuba, signed at Havana, December 11, 1902, 33 Stat. 2136, T.S. No. 427, which provides:

> " During the term of this convention, all articles of merchandise not included in the foregoing Article I and being the product of the soil or industry of the Republic of Cuba imported into the United States shall be admitted at a reduction of twenty percentum of the rates of duty thereon as provided by the Tariff Act of the United States approved July 24, 1897, or as may be provided by any tariff law of the United States subsequently enacted."

The plaintiff also contended that the preference should have been allowed under the Reciprocal Trade Agreement between the United

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[1] *Annual Digest*, 1947, Case No. 78.]

States and Cuba, signed at Washington on August 24, 1934, 49 Stat. 3559, E.A.S. No. 67, and that certain provisions of the Cuban Trade Agreements suspending or abrogating the Cuban Treaty of 1902 were beyond the powers granted to the President under the Act of June 12, 1934, 48 Stat. 943, as amended, 19 U.S.C. § 1351. The Government contended that any such preferential treatment was expressly prohibited by the terms of Section 3501 of the Internal Revenue Code. The plaintiff maintained that, as Section 3501 stated that the tax levied under Section 3500 was to be treated as a duty, the preferential reduction provided by Article II of the Treaty with Cuba should be applied.

The Customs Court denied the plaintiff's claim (29 Cust. Ct. 275). On appeal,

Held: that the judgment of the Court below must be affirmed. If there was an irreconcilable inconsistency between a treaty and a federal statute, the later pronouncement would prevail. Since the plaintiff sought what constituted a preference, the prohibition of preferences in the statute must accordingly prevail over Article II of the Treaty with Cuba, even though that treaty was based on " valuable consideration ". In any event, the President had already negotiated various Cuban Trade Agreements which modified and rendered inoperative the general 20 per cent. preference granted in Article II of the Treaty.

The Court said: " While the record and briefs present a somewhat involved situation, it is clear that the basic issue for determination relates principally to the meaning, effect, and extent of application of sections 3500 and 3501 of the Internal Revenue Code when the provisions thereof are read together with the terms of the Cuban Treaty in 1902. A number of interesting subsidiary questions, ably presented in the briefs and argued orally before this court, have been injected into the proceedings and, insofar as pertinent to the controlling issue, will be commented upon, *infra*.

" As previously indicated, the appellant's position is predicated on the belief that the Cuban Treaty of 1902 guarantees to it a 20 per cent. reduction in the assessment levied under section 3500, *supra*. That treaty, the constitutional validity of which is not itself in issue, provides, *inter alia*, that certain Cuban goods be admitted at a ' reduction of twenty per centum of the rates of duty thereon as provided by the Tariff Act . . . of 1897, or . . . by any tariff law . . . subsequently enacted.' That provision, found in Article II, and the significance to be assigned thereto, is of critical concern and forms the basis for appellant's claim. Article VIII of the treaty states that ' the rates of duty herein granted . . . shall continue . . . preferential in respect to all like imports from other countries,' with the proviso, however, that no Cuban sugar should come in ' at a reduction of duty greater than twenty per centum of the rates of duty thereon as provided by the Tariff Act of . . . 1897.' That proviso was repealed by the Tariff Act of 1913. Article IX of the treaty sets forth an understanding and agreement between the contracting parties relative to the products covered by the treaty to the effect that ' any tax or charge that may be imposed by the national or local authorities of either of the two countries upon the articles of merchandise embraced in the provisions of this convention, subsequent to importation and prior to their entering into consumption in the respective countries, shall be imposed and collected without discrimination upon like articles whencesoever imported.'

" Sections 3500 and 3501 of the Internal Revenue Code, originally sections 403 (a) and 403 (b) of the Sugar Act of 1937, read, in part, as follows:

> ' Sec. 3500. Rate of Tax
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> ' In addition to any other tax or duty imposed by law, there shall be imposed, under such regulations as the Commissioner of Customs shall prescribe, with the approval of the Secretary, a tax upon articles imported or brought into the United States as follows:
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> . . . .
>
> ' (2) On all manufactured sugar testing by the polariscope less than ninety-two sugar degrees 0.5144 cent per pound of the total sugars therein.'
>
> ' Sec. 3501. Assessment and payment.
>
> ' Such tax shall be levied, assessed, collected, and paid in the same manner as a duty imposed by the Tariff Act of 1930, 46 Stat. 590, 672 (U.S.C., Title 19, ch. 4) and shall be treated for the purpose of all provisions of law relating to the customs revenue as a duty imposed by such Act, except that for the purposes of sections 336 and 350 of such Act (the so-called flexible-tariff and trade-agreements provisions) such tax shall not be considered a duty or import restriction, *and except that no preference with respect to such tax shall be accorded any articles imported or brought into the United States.* [Italics ours.] '

" In overruling the appellant's protests, the court below was largely influenced by this court's holding in the case of *Faber, Coe & Gregg* (*Inc.*) v. *United States*, 19 C. C. P. A. (Customs) 8, T. D. 44851. Preliminary to our review of that case, however, it is well to repeat and, to some extent, amplify the respective contentions of the parties herein. On behalf of the Government, it is asserted that allowance of the 20 per cent reduction claimed by the importer is forbidden by the exception found in section 3501, *supra*, prohibiting preferences. This is clearly a preference, the Government maintains, because no such reduction applies to sugar imports from other countries. In other words, as emphasized by counsel during oral argument, the Government's position is that since section 3501 specifically provides that no preference may be granted with respect to the tax levied under section 3500 on sugar, no preference can be granted, this certainly being a preference. Urging a contrary view, the appellant states that it does not argue for a preference; that the exception in section 3501 relating to preferences is not applicable because Article II of the treaty refers only to 'reduction' and not 'preference' and furthermore because the reduction in duty was granted on a valuable consideration and is consequently a contractual obligation giving a reduction and not a preference; that Article II of the Cuban Treaty of 1902, *supra*, embraces the type of tax levied by section 3500, *supra*; that the assessment under section 3500 and 3501 provides specifically that it be 'levied, assessed, collected, and paid in the same manner as a duty imposed by the Tariff Act of 1930 . . . and shall be treated for the purposes of all provisions of law relating to the customs revenue as a duty imposed by such Act . . .' ; that the exceptions set forth in section 3501 must be read together as a limitation upon the President's powers under the flexible-tariff and trade-agreement provisions with respect to granting a preference, and therefore such exceptions are without significance relative to the Cuban Treaty of 1902; and that nothing in Article IX of said treaty authorizes the assessment of the full rate because it is not a 'tax or charge' attaching to the imported goods 'subsequent to importation and prior to their entering into consumption,' but instead is to be levied, assessed, collected, and paid in the same manner as a duty imposed under the Tariff Act of 1930.

" Proceeding now to a consideration of the *Faber, Coe & Gregg* case, *supra*, the merchandise there involved consisted of cigars imported from Cuba in 1927. Duty was assessed thereon under the applicable paragraph of the Tariff Act of 1922 less 20 per cent on such goods as provided in the Cuban Treaty of 1902. The importer was additionally required to purchase revenue stamps in accordance with the Revenue Act of 1926 which provided, in part, that 'All cigars imported from foreign countries shall have the same stamps affixed in payment of the internal-revenue tax as are prescribed for cigars manufactured in the United States.' The stamp tax was to be collected while the merchandise was in customs custody and the importer contended, therefore, that the involved taxes were customs duties and as such it was entitled to a 20 per cent reduction as provided in Article II of the Cuban Treaty of 1902. In disposing of the importer's claim, this court said:

> 'Regardless of how taxes may be designated by the Congress, if they are imposed on imports while in customs custody, they are essentially customs duties and are determinable and collectible as prescribed by law. [Citing cases.]
>
> . . . .
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> 'In view of the fact that, generally, customs duties become a lien on imported merchandise at the moment of its arrival within the limits of a port of entry, and, as taxes imposed on imported merchandise, while it retains its "distinctive character" as an import, are customs duties, regardless of whether they are imposed at the time of importation or

subsequent thereto, it is obvious that the contracting parties intended to distinguish between the regular tariff duties (made preferential in respect to all like imports from other countries, Articles II and VIII) and other additional taxes, including additional customs duties, imposed on *imported merchandise subsequent to its importation and prior to its entering into consumption* (required by Article IX to be "imposed and collected without discrimination upon like articles whencesoever imported"), and to provide that, as to the regular tariff duties, the rates therein provided should continue preferential in respect to all like imports from other countries, whereas the additional taxes, including additional customs duties, should be imposed and collected *without discrimination* upon like articles whencesoever imported. [Italics quoted.]'

"The importer seeks to distinguish the factual situation existing in the *Faber, Coe & Gregg* case, *supra*, from the facts of the present controversy by stating that unlike the Revenue Act of 1926, section 3501 of the Internal Revenue Code contains a specific provision to the effect that the tax be levied, assessed, collected, and paid in the same manner as a duty imposed by the Tariff Act of 1930 and be treated as a duty imposed by that Act. We do not think that the distinction thus drawn warrants a different conclusion herein.

"In the cited case, this court determined that the revenue tax on cigars was an additional duty, different in status than the regular duties covered by the Cuban Treaty of 1902, and as such was not entitled to a reduction under Article II of that treaty for the stated reasons. Similarly, section 3501, *supra*, treats the sugar tax as a duty under the tariff. With equal force and effect, however, section 3501 specifically provides, by way of exception, that no preference with respect thereto shall be granted. That statute, clear and direct in its terms, was enacted in 1937 and, insofar as it has relation to the provisions of the Cuban Treaty of 1902, is a later expression of the will of the Congress. If there be any irreconcilable inconsistency between a constitutional treaty and a federal statute, both being equal in rank, the later pronouncement will prevail. *Whitney* v. *Robertson*, 124 U. S. 190; *Rainey* v. *United States*, 232 U. S. 310; *American Express Co. et al.* v. *United States*, 4 Ct. Cust. Appls. 146, T. D. 33434; *Minerva Automobiles, Inc.* v. *United States*, 25 C. C. P. A. (Customs) 324, T. D. 49424.[1]

"We are of the opinion that the appellant herein is seeking a preference within the meaning of that term as found in section 3501, *supra*. As that statute specifically prohibits preferences, the importer's claim therefore must be denied. As defined in Webster's *New International Dictionary*, Second Edition, 1949, a preference is 'the setting of one thing before or above another.' Further definition therein is 'one who or that which is preferred; the object . . . of choice or superior favor.' To the same effect is the definition given in Funk and Wagnall's *New Standard Dictionary*, 1942. This additional comment in that publication, using the term in question in a commercial sense, is pertinent. A preference is ' some advantage or privilege accorded to locality, class of goods, or competitor.' In the *American College Dictionary* (Random House, New York), the term in question is defined as follows: ' act of preferring; estimation of one thing above another. State of being preferred. That which is preferred, the object of prior favor or choice. The favoring of one country or group of countries by granting special advantages over others in international trade.' While resort to dictionaries, however, is hardly necessary, the meaning of the word being so clear that it virtually speaks for itself, such reference emphasizes our ability to arrive at this conclusion. Furthermore, Article VIII of the Cuban Treaty of 1902 sets forth an agreement whereby the reduced rates should continue ' *preferential* in respect to all like imports from other countries . . . .'

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[1] *Annual Digest*, 1938–1940, Case No. 196.]

" We have considered the points raised by the appellant in its argument but find no reason therein to disturb the conclusion reached below. Alluding briefly, however, to certain of the appellant's contentions, the claim is made that the 20 percent reduction of duties accorded by Article II of the Treaty of 1902 is based on a valuable consideration and therefore is not a preference prohibited by section 3501. In pursuance of this theory, the appellant cites the cases of *Bartram* v. *Robertson*, 122 U. S. 116; *Whitney* v. *Robertson*, *supra*, and *Shaw* v. *United States*, 1 Ct. Cust. Appls. 426, T. D. 31500. We have read those cases but do not feel that they support the position taken by the appellant. It is, of course, clear that the Cuban Treaty of 1902 is based on valuable considerations but that does not disturb in the slightest the ability of Congress to subsequently pass legislation which it may deem advisable affecting the provisions of that treaty. It is further argued by the appellants that the exception provisions of section 3501, *supra*, were not intended to abrogate or repeal the pertinent provisions of the Cuban Treaty of 1902. In discussing this point, considerable reference has been made to the Congressional debates and reports of appropriate Congressional committees. Our study of the debates in Congress and the committee reports, as presented, along with the specific language employed in section 3501, has convinced us that Congress meant exactly what it said, i.e., ' that *no* preference,' and we emphasize that language, ' shall be accorded *any* articles,' and we emphasize that language, ' imported or brought into the United States.'

" The appellant draws attention to the provisions of the Trade Agreements Act, *supra*, approved June 12, 1934, whereby the President is given the authority to ' enter into foreign trade agreements with foreign governments ' and is authorized to ' proclaim such modifications of existing duties and other import restrictions . . . as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.' It is the appellant's contention that the tax in question is a customs duty, as provided in section 3501, with the exception provisions therein contained relating solely to, and being a limitation upon, the powers of the President under the Trade Agreements Act. In other words, the appellant seeks to treat the exceptions in section 3501, *supra*, as one. The Customs Court considered this argument in some detail but concluded that 'The exception, as enacted, is devoid of language that would warrant such a construction.' We are in entire agreement with that holding as there is no factual basis whatsoever upon which we could otherwise conclude.

" Other subsidiary issues have been raised by the appellant which we consider totally irrelevant to the one isolated and controlling question principally discussed herein. It is well, however, to note that in accordance with the Trade Agreements Act, *supra*, the President negotiated various Cuban Trade Agreements, the first of which was effective September 3, 1934. That agreement, as well as subsequent agreements between the two nations, modified and rendered inoperative the general 20 per cent preferential granted in Article II of the Cuban Treaty of 1902 under conditions stated in such agreements. The appellant has persistently urged that the President thereby exceeded the authority delegated to him by the Trade Agreements Act and that such agreements are henceforth invalid. We do not regard a discussion of such point as necessary."

[Report: 41 C.C.P.A. (Customs) 236.]

Treaties—Operation of—Reservations—Whether Creating Rights in Individuals—Subsequent Inconsistent Legislation—Effect of—International Convention for the Safety of Life at Sea, 1929.

SAVELIS *ET AL.* *v.* VLACHOS *ET AL.*

United States, District Court, Eastern District, Virginia.

November 25, 1955.

THE FACTS.—This was a petition for habeas corpus and for a declaratory judgment by three Greek seamen, who had arrived in the United States as members of the crew of a Greek vessel. When, notwithstanding the fact that they had been issued with landing permits indicating that they would have to depart on the vessel on which they arrived, they indicated their intention not to leave the United States on that vessel, they were taken into custody by the Immigration and Naturalization Service, pursuant to subsection 252(b) of the Immigration and Nationality Act, 66 Stat. 220, 8 U.S.C. § 1282(b), which provides:

> " Pursuant to regulations prescribed by the Attorney General, any immigration officer may, in his discretion, if he determines that an alien is not a bona fide crewman, or does not intend to depart on

> the vessel or aircraft which brought him, revoke the conditional permit to land which was granted such crewman under the provisions of subsection (a) (1) of this section, take such crewman into custody, and require the master or commanding officer of the vessel or aircraft on which the crewman arrived to receive and detain him on board such vessel or aircraft, if practicable, and such crewman shall be deported from the United States at the expense of the transportation line which brought him to the United States."

The seamen contended that they were entitled to a landing permit good for twenty-nine days, which could, under subsection 1282(a) of the Act, be granted "if the immigration officer is satisfied that the crewman intends to depart, within the period for which he is permitted to land, on a vessel or aircraft other than the one on which he arrived." Their main contention was that they had a right to land in the United States free of restraint and to reship on any vessel under para. 1 of the reservation made by the United States to the International Convention for the Safety of Life at Sea, signed at London, May 31, 1929, 50 Stat. 1306, T.S. No. 910, 136 L.N.T.S. 81, which provides:

> "[N]othing in this convention shall be so construed as to authorize any person to hold any seaman, whether a citizen of the United States of America or an alien, on board any merchant vessel, domestic or foreign, against his will in a safe harbor within the jurisdiction of the United States of America, when such seaman has been officially admitted thereto as a member of the crew of such vessel or to compel such seaman to proceed to sea on such vessel against his will; . . ."

Held: that the writ of habeas corpus must be discharged and the relief prayed for in the petition for a declaratory judgment must be denied. The petitioners derived no rights under the reservation to the International Convention for the Safety of Life at Sea, since a reservation only places limitations upon the provisions of a treaty and creates no substantive rights. The Immigration and Nationality Act would in any event prevail over a prior inconsistent treaty.

The Court said: "The main contention asserted by counsel for petitioners is that paragraph 1 of the 'Reservations of the United States' to the 1929 'International Convention for the Safety of Life at Sea', 50 Stat. pt. 2, 1306 (1937), confers on alien crewmen a substantive right to land in the United States free of restraint and permits such crewmen to reship on any vessel. This contention is without merit. The reservation to a treaty or convention confers no substantive rights; it merely serves as a limitation to the provisions agreed upon in the treaty or convention. It is only necessary to examine the provisions of the convention to ascertain that no such substantive rights were conferred. Even if inconsistent with an Act of Congress, the latest in date controls. *Lakos* v. *Saliaris*, 4 Cir., 116 F.2d 440, 444;[1] *Horner* v. *United States*, 143 U.S. 570,

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[1] *Annual Digest*, 1941–1942, Case No. 38.]

578, 12 S.Ct. 522, 36 L.Ed. 266; *Rainey* v. *United States*, 232 U.S. 310, 316, 34 S.Ct. 429, 58 L.Ed. 617; *State of Arizona ex rel. Arizona State Board of Public Welfare* v. *Hobby*, 94 U.S.App.D.C. 170, 221 F.2d 498, 500. If Congress enacts legislation in contravention of the express provisions of an earlier treaty, it is the duty of the Court to uphold such legislation if it is sufficiently clear and explicit and within the exercise of its constitutional power. *Hijo* v. *United States*, 194 U.S. 315, 24 S.Ct. 727, 48 L.Ed. 994. As the Immigration and Nationality Act was enacted by Congress in 1952 and regulations were issued pursuant thereto, it follows that the 1929 Convention would not control the present action but, as previously indicated, there does not appear to be any conflict or any provision of that Convention that would afford petitioners any substantive right. . . ."

(The Court then proceeded to an examination of a number of questions connected with the municipal law of the United States.)

[Report: 137 F.Supp. 389; affirmed *per curiam*, 248 F.2d 729 (4th Cir. 1957).]

Treaties—Operation of—Necessity for Municipal Legislation—The Law of Canada—Effect of War on Operation of Treaty.

Francis *v.* The Queen.

Canada, Exchequer Court. August 4, 1954.

(Cameron J.)

The Facts.—The suppliant was an Indian, resident at all relevant times on the St. Regis Indian Reserve in St. Regis Village, Quebec. Between 1948 and 1951 the suppliant imported from the United States into Canada one washing machine, one oil heater, and one electric refrigerator, being his own property acquired by him in the United States. No duty was paid by him on the importation of the said articles. The three articles were subsequently seized while on the premises and in the possession of the suppliant and detained by the Crown under the provisions of the Customs Act for failure to pay duty and taxes under the Customs Tariff Act and the Excise Tax Act on the importation of the articles. Following the seizure, the suppliant claimed exemption from duty and taxes with respect to the articles by reason of the provision of Article III of the Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America, signed on November 19, 1794,[1] and which is commonly known, and will be hereinafter referred to, as the Jay Treaty. The claim for exemption was not recognized by the Crown, and, on payment under protest by the suppliant of the required amount, the articles were released to him.

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[1] *British and Foreign State Papers* (1812–1814), Vol. I, part 1, p. 784.

The suppliant then filed a petition of right for a declaration of a right to exemption from customs duty under the Jay Treaty of 1794.

The suppliant relied principally on certain provisions contained in Article III of the Jay Treaty, the relevant part being as follows:

> " No duty of entry shall ever be levied by either party on peltries brought by land or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any import or duty whatever, but goods in bales, or other large package, unusual among Indians, shall not be considered as goods belonging bona fide to Indians."

For the respondent, the following contentions were advanced in denial of the suppliant's claim to exemption: (i) the relevant provisions of Article III of the Jay Treaty were terminated by the War of 1812 between the United States and Great Britain; (ii) even if not so terminated, the Jay Treaty was not enforceable by the Canadian Courts unless the Treaty had been implemented by legislation rendering it binding upon the subject, and at the time when the goods in question were imported no such legislation was in effect in Canada; (iii) even if the Treaty was in full force and effect at all relevant times, the nature of the goods imported was not such as to be within the purview of Article III; (iv) certain Canadian statutes were contrary to the suppliant's claim.

Held: that the suppliant was not entitled to the relief claimed in the petition of right. The terms of Article III of the Jay Treaty not being, at the relevant times, implemented or sanctioned by Canadian legislation, gave rise to no right in Canada to exemption from the import duties and taxes. Further, Article III of the Jay Treaty was annulled by the War of 1812.

The Court said: " The first question for consideration is this. Is the suppliant entitled to an exemption from the duties claimed by reason of that part of Article III of the Jay Treaty which I have cited above? Here I should emphasise the fact that in this opinion, my comments and conclusions—unless otherwise stated—are referable only to that part of Article III and to no other part of the Treaty.

" I have given this matter the most careful consideration and after referring to the authorities cited to me, I have reached the conclusion that this question must be answered in the negative. Briefly, the reason for so finding is that at the time the goods were imported into Canada by the suppliant there was in force in Canada no legislation sanctioning or implementing that term of the Treaty.

" The first authority to which I would like to refer on this point is the case of *Re Arrow River and Tributaries Slide and Boom Co.*, [1932], 2 D.L.R. 250, S.C.R. 495, 39 C.R.C. 161.[1] The facts in that case were as follows: The appellant, which had constructed certain

[1 *Annual Digest*, 1931–1932, Case No. 2.]

works upon that part of the Pigeon River which was in Ontario (the remaining part being in the United States) was desirous of charging tolls upon timber passing through such works, under the authority of the Lakes and Rivers Improvement Act, R.S.O. 1927, c. 43. The respondent applied for an injunction restraining the District Judge from acting on the appellant's application to fix the tolls on the ground that the Pigeon River being an international stream, its use under the Ashburton Treaty is free and open to the use of the citizens of both the United States and Canada and that Part V of the Lakes and Rivers Improvement Act, in so far as it purports to authorise the appellant company to charge tolls for the use of improvements on that river, is *ultra vires* of the Ontario Legislature. Application for an injunction was refused by Wright J. [[1931] 1 D.L.R. 260, 38 C.R.C., at p. 66, 65 O.L.R. 575] on the ground that in British countries treaties to which Great Britain is a party are not as such binding on the individual subject in the absence of legislation. The Appellant Division of Ontario [[1931] 2 D.L.R. 216, 38 C.R.C. 65, 66 O.L.R. 577] agreed with that principle and apparently would have upheld the decision of Wright J. had there been, in their view, legislation in Ontario that authorised the construction of the works in question. In the Supreme Court of Canada, the appeal was allowed and the judgment of Wright J. restored. At pp. 260–1 D.L.R., pp. 510–11 S.C.R., Lamont J., speaking also for Cannon J., said:

'The Act must, therefore, be held to be valid unless the existence of the treaty of itself imposes a limitation upon the provincial legislative power. In my opinion the treaty alone cannot be considered as having that effect. The treaty in itself is not equivalent to an Imperial Act and, without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign power. For a breach of a treaty a nation is responsible only to the other contracting nation and its own sense of right and justice. Where, as here, a treaty provides that certain rights or privileges are to be enjoyed by the subjects of both contracting parties, these rights and privileges are, under our law, enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subject. Upon this point I agree with the view expressed by both Courts below, "that in British countries treaties to which Great Britain is a party are not as such binding upon the individual subject, but are only contracts binding in honour upon the contracting state."

'In this respect our law would seem to differ from that prevailing in the United States where by an express provision of the constitution, treaties duly made are "the supreme law of the land" equally with Acts of Congress duly passed. They are thus cognizable in both the Federal and State Courts. In the case before us it is not suggested that any legislation, Imperial or Canadian, was ever passed implementing or sanctioning the provision of the treaty that the water communications above referred to should be free and open to the subjects of both countries. That provision, therefore, has only the force of a contract between Great Britain and the

United States which is ineffectual to impose any limitation upon the legislative power exclusively bestowed by the Imperial Parliament upon the Legislature of a Province. In the absence of affirming legislation this provision of the treaty cannot be enforced by any of our Courts whose authority is derived from municipal law. *Walker* v. *Baird*, [1892] A.C.491; *Re Carter Medicine Co.'s Trade Mark*, [1892] 3 Ch. 472; *U.S.* v. *Schooner "Peggy"* (1801) 1 Cranch p. 103; *The Chinese Exclusion Case* (1888), 130 U.S.R. 581; *Oppenheim's International Law*, 4th ed., pp. 733–4.

'I am, therefore, of opinion that s. 52, in question in this appeal, must be considered to be a valid enactment until the treaty is implemented by Imperial or Dominion legislation.'

"Reference may also be made to *Albany Packing Co.* v. *Registrar of Trade Marks*, [1940], 3 D.L.R. 727 at p. 736, Ex. C.R. 256 at pp. 265–6, 1 C.P.R., 108 at pp. 117–8, in which the late President of the Court said:

'Before proceeding to do so, however, I should perhaps here add that, I think, it is correct to say that the terms of the Convention of The Hague may be referred to by the Court as a matter of history, in order to understand the scope and intent of the terms of that Convention, and under what circumstances any of the provisions of the *Unfair Competition Act* were enacted, in order to give legislative effect to the same. But the terms of the Convention cannot, I think, be employed, as a guide in construing any of such provisions so enacted, for the reason that in Canada a treaty or convention with a foreign state binds the subject of the Crown only in so far as it has been embodied in legislation passed into law in the ordinary way.'

"And in the case of *Reference re Weekly Rest in Industrial Undertakings Act*, etc., [1937], 1 D.L.R. 673 at pp. 678–9, A.C. 326 at pp. 347–8, Lord Atkin said:

'It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more Sovereign states. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament or any subsequent Parliament from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the state as against the other contracting parties, Parliament may refuse to perform them and so leave the state in default. In a unitary state whose legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the state by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But in a state where the Legislature does not possess absolute authority; in a federal state where legislative authority is limited by a constitutional document; or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible; but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed, and that depends upon the authority of the competent Legislature or Legislatures.'

" Following the signing of the Jay Treaty, the relevant part of Article III was in fact implemented in Canada. In 1796, the Legislature of Lower Canada by c. VII of its Statutes passed 'An Act for making a Temporary Provision for the Regulation of Trade between this Province and the United States of America, by Land or by Inland Navigation '.

" Thereby power was conferred on the Government with the advice and consent of the Executive Council to give directions and make orders with respect to importation and duties, for carrying on trade between the Province and the United States. Section II of the Act was as follows:

> ' And be it further enacted by the authority aforesaid, that this Act shall be in force and have effect from and after the passing thereof, until the first day of January, one thousand, seven hundred and ninety-seven, and from thence to the end of the then next session of the Provincial Parliament, and no longer.'

" Pursuant to that authority and in conformity with the terms of the Jay Treaty, a Regulation was passed and duly gazetted on July 7, 1796 (ex. 4), such Regulation putting into effect the same exemption in respect to the goods of Indians passing between the two countries as is found in the Jay Treaty, the language used being practically identical with that in the Jay Treaty itself.

" As I have said, the Act of 1796 was of a temporary nature; the Regulation appears to have been renewed from time to time, the last renewal being found in the Statutes of 1812, c. 5, by virtue of which it expired on June 1, 1813.

" That part of the Jay Treaty was first implemented in Upper

Canada in 1801 by s. VI of C. V of the Statutes of that year (ex. 6), the relevant part thereof being as follows:

> ' VI. And be it enacted by the authority aforesaid. That no duty of entry shall be payable, or levied, or demanded by any Collector or deputy on any Peltries brought by land or inland navigation into this Province, and that Indians passing or repassing with their proper goods and effects, of whatever nature, shall not be liable to pay for such goods and effects any impost or duty whatever, unless the same shall be goods in bales or other packages unusual among Indians for their necessary use, which shall not be considered as goods belonging *bona fide* to Indians, or as goods entitled to the foregoing exemption from duties and imposts.'

" It will be noted that the wording is similar to but not precisely the same as that found in Article III. That Act remained in force until 1824, when it was repealed by C. XI, 4 Geo. IV–4th Session. The Jay Treaty was also implemented in part by the Imperial Act of 1797, c. 97. It would seem that thereby no attempt was made to implement those parts of the Treaty which concerned only the Province of Canada, and in particular that the Act did not implement that part of Article III relating to Indians which is here in question.

" In so far as I am aware, there has been no legislative enactment in Canada implementing in any way this particular provision in favour of Indians other than those in Upper and Lower Canada to which I have referred, and those statutes either lapsed or were repealed more than 125 years ago. Moreover, there is nothing to indicate that by usage, practice or custom, any Indian in Canada for that length of time has claimed or been allowed the exemption conferred by the Jay Treaty. The suppliant did give evidence that for a few years after taking up residence on the Reserve in 1946, he did bring certain small articles such as food and clothing into Canada from the United States without paying any duty. The fact, however, is that on those occasions he neglected to report the matters to any Customs Officer, and it is not shown that he was at any time authorized to import anything without declaring the goods and paying proper duties in respect thereto.

" I am of the opinion, also, that notwithstanding the fact that the Legislatures of Upper and Lower Canada did for a time implement that part of Article III now under consideration, those Legisatures had full authority to alter or amend or annul such legislation at any later time, as was in fact done. Reference may be made to the case of *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board* [1941] A.C. 308,[1] in which the following statement appears at p. 327:

> ' If then, as appears clear, the Imperial Parliament has conferred on the New Zealand legislature power to legislate with regard to the native lands, it necessarily follows that the New Zealand legislature has the same

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[[1] *Annual Digest*, 1938–1940, Case No. 184.]

power as the Imperial Parliament had to alter and amend its legislation at any time. In fact, as pointed out by the learned Chief Justice, s. 73 of the Act of 1852 was repealed by the New Zealand legislature by the Native Land Act, 1873. As regards the appellant's argument that the New Zealand legislature has recognized and adopted the Treaty of Waitangi as part of the municipal law of New Zealand, it is true that there have been references to the treaty in the statutes, but these appear to have invariably had reference to further legislation in relation to the native lands, and, in any event, even the statutory incorporation of the second article of the treaty in the municipal law would not deprive the legislature of its power to alter or amend such a statute by later enactments.'

" My conclusion on this point, therefore, is that, as there was no legislation in effect at the time of the importation of the goods into Canada which sanctioned or implemented the particular terms of the Jay Treaty which are here under consideration, the suppliant is not entitled to exemption from the duties claimed by reason of the terms of that Treaty.

" Counsel for the respondent submitted also that in any event the relevant provision of the Jay Treaty was terminated by the War of 1812, and for the following reasons I am of the opinion that that contention must be upheld.

" It is not altogether settled what treaties are annulled or suspended by war and what treaties remain in force during its continuance or revive at its conclusion. The diversity of opinion in regard thereto is very substantial as will be seen by reference to such texts as *Pitt Cobbett's Leading Cases on International Law* (Walker), vol. II, 5th Ed., p. 50 ff., and *Hall's International Law* 8th ed. p. 453 ff. In 5 *Moore's Digest of International Law*, s. 779, p. 383, it is stated that the view now commonly accepted is that ' Whether the stipulations of a treaty are annulled by war depends upon their intrinsic character '.

" Counsel for the suppliant stresses the provision of Article XXVIII of the Treaty as indicating that the terms of Article III were to be ' permanent ' and that therefore they remained unaffected by the outbreak of war in 1812. The relevant part of that Article is as follows:

> ' It is agreed that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years, to be computed from the day on which the ratification of this treaty shall be exchanged.'

" Reference was made to *Sutton* v. *Sutton*, 1 Russ. & M. 663, 39 E.R. 255. That was a decision of the Master of the Rolls in 1830 in which it was declared that under the Jay Treaty and the Act of 37 Geo. III., c. 97, American citizens who held lands in Great Britain on October 28, 1795, and their heirs and assigns, are at all times to be considered, so far as regards these lands, not as aliens but as native subjects of Great Britain.

"The Act referred to provided for carrying into effect certain of the terms of the Jay Treaty, as s. 24 thereof incorporated the provisions of Article IX of the Treaty relating to the rights of American citizens who then held lands in the British Dominions, and of British subjects holding lands in the United States to continue to hold and dispose of them as if they were natives and not aliens. By s. 27 it was provided that the Act would remain in force so long only as the Jay Treaty remained in effect. The Act was continued by 45 Geo. III., c. 35, in which it is interesting to note that both in the recital and in the enactment, it is stated that 'The said Treaty has ceased and determined'. The Act was further continued, and finally by 48 Geo. III., c. 6, it was extended to the end of that Session of Parliament and it would appear that thereafter no Act was passed to revive or prolong the operation of the Treaty. The judgment of the Master of the Rolls in that case was as follows (pp. 675–6):

'The relations, which had subsisted between Great Britain and America when they formed one empire, led to the introduction of the ninth section of the Treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the Treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.

'The act of the 37 G. 3 gives full effect to this article of the Treaty in the strongest and clearest terms; and if it be, as I consider it, the true construction of this article, that it was to be permanent, and independent of a state of peace or war, then the Act of Parliament must be held, in the twenty-fourth section, to declare this permanency; and when a subsequent section provides that the act is to continue in force, so long only as a state of peace shall subsist, it cannot be construed to be directly repugnant and opposed to the twenty-fourth section, but is to be understood as referring to such provisions of the Act only as would in their nature depend upon a state of peace.'

"Similarly, in the case of *Society for Propagation of the Gospel in Foreign Parts* v. *New Haven* (1823), 8 Wheat. 464, the Supreme Court of the United States upheld the right of a British corporation to continue to hold lands in Vermont. It was held that the title to the property of the Society was protected by the 6th Article of the Treaty of 1783; was confirmed by Article IX of the Jay Treaty and was not affected by the War of 1812. The applicable rule was stated at pp. 494–5 in the following words:

'But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

'We think, therefore, that treaties stipulating for permanent rights, are general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.'

"Both these cases were considered by the Supreme Court of the United States in *Karnuth* v. *United States* (1928), 279 U.S. 231.[1] That case arose under s. 3 of the Immigration Act of 1924, c. 190. Two persons resident in Canada sought to enter the United States either to continue or to secure work, and both were denied admission by the immigration authorities. In habeas corpus proceedings, the Federal District Court sustained the action of the immigration officials and dismissed the writ, but that judgment was reversed by the Circuit Court of Appeals. In reaching its conclusion, that Court seemed to be of the opinion that if the Immigration Act were so construed as to exclude the aliens, it would be in conflict with the opening words of Article III of the Jay Treaty, which result it thought should be avoided if it could reasonably be done. By *certiorari* the matter was brought to the Supreme Court. There the Court considered the pertinent provisions of Article III of the Jay Treaty, which is as follows:

> 'It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other.'

[The main point for consideration by the Court was the contention made by the Government that the Treaty provision relied on was abrogated by the War of 1812. The Court reached the conclusion that the view now commonly accepted was that "whether

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[1 *Annual Digest*, 1927–1928, Case No. 364.]

the stipulations of a Treaty are annulled by war depends upon their intrinsic character". After referring to the cases of *Sutton* v. *Sutton* (*supra*) and *Society, etc.* v. *New-Haven* (*supra*), the Court continued (at pp. 239–40):] "These cases are cited by respondents and relied upon as determinative of the effect of the War of 1812 upon Article III of the treaty. This view we are unable to accept. Article IX and Article III relate to fundamentally different things. Article IX aims at perpetuity and deals with existing rights, vested and permanent in character, in respect of which, by express provision, neither the owners nor their heirs or assigns are to be regarded as aliens. These are rights which, by their very nature are fixed and continuing, regardless of war or peace. But the privilege accorded by Article III is one created by the treaty, having no obligatory existence apart from that instrument, dictated by considerations of mutual trust and confidence, and resting upon the presumption that the privilege will not be exercised to unneighborly ends. It is, in no sense, a vested right. It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility. See 7 *Moore's Digest of International Law*, s. 1135; 2 Hyde, *International Law*, s. 606. The reasons for the conclusion are obvious—among them, that otherwise the door would be open for treasonable intercourse. And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of the war. Disturbance of peaceful relations between countries occasioned by war, is often so profound that the accompanying bitterness, distrust and hate indefinitely survive the coming of peace. The causes, conduct or result of the war may be such as to render a revival of the privilege inconsistent with a new or altered state of affairs. The grant of the privilege connotes the existence of normal peaceful relations. When these are broken by war, it is wholly problematic whether the ensuing peace will be of such character as to justify the neighborly freedom of intercourse which prevailed before the rupture. It follows that the provision belongs to the class of treaties which does not survive war between the high contracing parties, in respect of which, we quote, as apposite, the words of a careful writer on the subject. . . .

[Reference was then made to Hall, *International Law* (5th ed.), pp. 389–390; Westlake, *International Law*, Part II, pp. 29–32, and Fauchille, *Traité de Droit International Public* (1921), vol. II, p. 55, and the Court continued (at p. 241):] "These expressions and others of similar import which might be added, confirm our conclusion that the provision of the Jay Treaty now under consideration was brought to an end by the War of 1812, leaving the contracting powers discharged from all obligation in respect thereto, and, in the absence of a renewal, free to deal with the matter as their views of national policy, respectively, might from time to time dictate.

"We are not unmindful of the agreement in Article XXVIII of the Treaty 'that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years.' It is quite apparent that the word 'permanent' as applied to the first ten articles was used to differentiate them from the subsequent articles—that is to say, it was not employed as a synonym for 'perpetual' or 'everlasting', but in the sense that those articles were not limited to a specific period of time, as was the case in respect of the remaining articles. Having regard to the context, such an interpretation of the word 'permanent' is neither strained nor unusual. See *Texas, etc. Railway Co.* v. *Marshall*, 136 U.S. 393, 403; *Bassett* v. *Johnson* 2 N.J., Eq. 154, 162."

"The finding in that case, it is true, was limited to 'the provision of the Jay Treaty now under consideration', which, as noted, was the opening part of Article III relating to the rights of the subjects of both contracting parties and of Indians dwelling on either side of the boundary line freely to pass and repass into the territories of the two contracting parties. It seems to me, however, that the *ratio decidendi* in that case is of equal application to the other part of Article III now under consideration. It involves the right of free entry of peltries *brought* by land or inland navigation and the particular rights of Indians when *passing* or *repassing* from one country to the other with their proper goods and effects. If such rights were not abrogated by war and the rights of passing and repassing were to continue during the war, the door would likewise be open for treasonable intercourse.

"However, the precise part of Part III with which we are here concerned has also been considered in the American Courts. In *United States* v. *Garrow* (1937), 88 Fed. (2d) 318, the second headnote is as follows: 'Provisions of Article 3 of Jay Treaty of 1794 permitting Indians to import their own proper goods and effects free of duty *held* terminated by War of 1812 as regards rights of Indians residing in Canada, and hence Canadian Indians' right subsequently to import goods free of duty depended on statutes rather than treaty.'

"In that case, which was decided in 1937, an Indian woman, also of the Canadian St. Regis Tribe and residing in Canada near the international border, entered the United States carrying 24 baskets which she had manufactured in Canada and intended to sell in the United States. The Collector at the port of entry imposed a duty under the existing Tariff Act. She filed a Protest, claiming the baskets to be free under Article III of the Jay Treaty. She alleged also that those provisions were in substance carried into the various Tariff Acts from 1799 to August 28, 1894, and that, while that provision was repealed by the Tariff Act of 1897, such repeal in effect abrogated that part of the Jay Treaty and was therefore invalid. The United States Customs Court sustained her protest, holding that the case was controlled by *McCandless* v. *United States*, (1928), 25 Fed. (2d) 71,[1] a decision of the Circuit Court of Appeals for the Third Circuit. The Government then appealed to the Court of Customs and Patent Appeals on the following grounds (at p. 319):

" ' 1. Article 3 of the Jay Treaty of 1794 was annulled by the War of 1812.

" ' 2. Alternatively, if Article 3 of the Jay Treaty was not abrogated by the War of 1812, it is, nevertheless, in conflict with a subsequent statute. It is well settled that when a Treaty and a Statute are in conflict, that which is later in date prevails.

" ' 3. Assuming, for the sake of argument, that article 3 was not abrogated but is still in force and effect, the importation is not within the purview of the language of said article 3.'

" The Court, after pointing out that these terms of the Treaty were at that time self-executing, referred to the fact that they were also incorporated in an Act of Congress in 1799, and in substance were continued by various later amendments and revisions; that, however, in the Session of 1897, that provision was omitted and has not been carried into any later revision; that both by that Act and any succeeding Acts duties have been imposed upon similar goods. The Court then considered the *McCandless Case* (*supra*) in which the United States District Court in 1928 held that the declaration of the War of 1812 did not end the Treaty rights secured to the Indians through the Jay Treaty so long as they remained neutral; that their rights were permanent, and were at most only suspended during the instance of the war; and that, therefore, the petitioner, a fullblooded Indian, might pass and repass freely under and by virtue of Article III. The Court of Customs and Patent Appeals pointed out, however, that that case had not been appealed to the Supreme Court of the United States, possibly because of an Act of Congress in 1928 which provided that the Immigration Act of 1924 should not apply to Indians crossing the international border.

" The Court then considered and followed the *Karnuth Case* (*supra*), concluding its opinion on this point as follows (at p. 323): ' The view of the Supreme Court on this interesting question, expressed in the case last cited, was confirmatory of views held by that court from the initiation of our government. See *Society for Propagation of Gospel in Foreign Parts* v. *Town of New Haven and William Wheeler*, 8 Wheat. 464, 494, 5 L. Ed. 662.'

" It was also obviously in conformity with the current of authority both in the United States and England. Moore's *International Law Digest*, vol. 5, par. 779.

" [The Court then proceeded to consider the submission that the

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[1] *Annual Digest*, 1927–1928, Case No. 363.]

Karnuth case was not applicable to Indians, and stated its conclusion in these words (at p. 323): ‘ It is contended by the appellee that some distinction should be made between the members of an Indian tribe and the immigrants in the *Karnuth Case, supra.* We know of no authority which states or indicates that any such distinction exists, especially as to Indians domiciled in a foreign country. There is no such line of demarcation indicated in the opinion of Mr. Justice Sutherland, hereinbefore quoted. If Article 3 of the Jay Treaty was nullified by the War of 1812, as to Canadian citizens or subjects, it certainly was nullified, so far as Indians residing in Canada were concerned, for, although wards of the Canadian government, they were certainly within the category of citizens or subjects.’

“ We think, therefore, it must be said that so far as the provision under which the appellee here claims is concerned, the War of 1812 ended the right which the appellee now claims of bringing her goods across the border and into the United States without the payment of duty.”

“ Finally, the Court came to the conclusion that at least since 1812 the rights of the Indians of Canada to bring their peltries and goods into the United States free of duty were granted by statute and not by Treaty; and that as the right of exemption was dropped from the Revising Act of 1897 and duties imposed thereafter, the appeal should be allowed, there being at the time of importation no treaty or statutory exemption in regard thereto.

“ Counsel for the suppliant herein laid considerable stress on the fact that the goods imported in the *Garrow case* were goods intended to be sold, whereas the goods imported by the suppliant herein were for his own personal use. In the *Garrow case*, however, the protestant relied entirely on the particular part of Article III which is here in question—the general right conferred on Indians to pass or repass with their own proper goods and effects; and the Court clearly held that that part of the Article in the Treaty was terminated by the War of 1812. As I read the judgment, it is not based on the fact that the goods there imported were or were not for sale, but on a general consideration of the words of the provision itself.

“ The Supreme Court of the United States in the *Karnuth Case* has held that the outbreak of the War of 1812 annulled the provisions of the opening part of Article III of the Treaty, which conferred the right upon citizens (including Indians) on either side of the boundary to pass and repass freely across the border. The reasons in that case would seem to be relevant also to that part of Article III now under consideration, which conferred an exemption upon Indians from payment of duties while passing and repassing the border with their own proper goods and effects. The Court of Customs and Patent Appeals in the *Garrow Case* reached a similar conclusion. While it is true that these cases are not binding upon me, the reasons given in each case commend themselves to me and with respect I shall adopt them in this case. My conclusion, therefore, is that the particular provision of the Jay Treaty on which the suppliant relies was annulled by the War of 1812. In view of that finding, it becomes unnecessary to consider the further submission made on behalf of the respondent that in any event the nature of the goods imported by the suppliant is not such as to be within the purview of the goods mentioned in Article III."

The Court went on to consider the provisions of s. 49 of the Act to Amend the Income Tax Act and the Income War Tax Act, 1949 (Can. 2nd Sess.), C. 25, and s. 86 of the Indian Act, 1951 (Can.), C. 29, and concluded that neither of these Statutes afforded any support to the suppliant's claim.

[Report: [1955] 4 D.L.R. 760.]

Treaties—Operation of—Treaty Modifying Municipal Law—Requirement of Approval of Parliament—Whether Treaty Applicable in Absence of Parliamentary Approval if Operation of Treaty Invoked by virtue of Most-Favoured-Nation Clause—The Law of France.

SANZOGNI *v.* CAISSO.

France, Court of Cassation. January 6, 1955.

THE FACTS.—Article 27 of the French Constitution provides, as far as here material, that treaties modifying French municipal law require ratification by a French (municipal) law. The appellant was an Italian citizen whose claim to the benefits of a French Law relating to the tenure of agricultural land (*statut du fermage*) was rejected on the ground that this Law was applicable only to French citizens, and that this legal position was not affected by the Franco-Italian Emigration Agreement of May 17, 1946, because the latter had not received the approval of Parliament as required by Article 27 of the Constitution. On behalf of the appellant, it was contended that he was entitled to the benefits of this Law by virtue of the Franco-Italian Agreement which contained a most-favoured-nation clause and thus brought into play the application of the *statut du fermage* for the benefit of Italian citizens, and that as this result followed automatically from the operation of the most-favoured-nation clause the Agreement was not a treaty " modifying " French law which would require the enactment of a French law, as required by Article 27 of the Constitution. On behalf of the respondent (the appellant's landlord), it was contended that the Franco-Italian Agreement was not concerned with the law relied upon by the appellant, nor with the law of landlord and tenant generally, and that it could not therefore operate so as to exclude the operation of Article 61 of the *statut du fermage* which provided that foreign nationals were not entitled to its benefits.

Held: that the appeal must be dismissed. The Franco-Italian Agreement did not operate so as to exclude the operation of Article 61 of the *statut du fermage*, and moreover, although the Agreement had been ratified by the President of the French Republic, the Exchange of Letters between the two Governments containing an interpretation of the Agreement had not been published and could not therefore be applied by the Court.

The Court said: " The appeal alleges that the lower Court, by failing to apply the same, violated the Franco-Italian Agreement on Emigration of May 17, 1946, which was ratified by the President of the Republic and published in the Official Gazette (*Journal Officiel*) of August 27, 1947, as interpreted by an Exchange of Letters dated October 28 and November 2, 1948. The appeal also alleges an erroneous application of Article 27 of the Constitution of October 27, 1946, and a violation of Article 61 of the *statut du fermage* and of Article 7 of the Law of April 20, 1810. It is contended that the judgment under appeal refused to apply to the appellant the *statut du fermage* on the ground that the Agreement of May 17, 1946, did not receive the approval of Parliament when such approval, in accordance with Article 27 of the Constitution, was required only in the case of treaties which, because they 'modify' municipal law, require ratification by means of a (municipal) law. It is said that the application of the *statut du fermage* to Italian citizens, because such application results from the operation of the most-favoured-nation clause, does not 'modify' the rule contained in Article 61 of the *statut*, which, notwithstanding that it provides for the exclusion of farmers of foreign nationality, expressly reserves the case of a foreign national who can rely on an international agreement. It is further said that, as such reservation follows from the wording of the Law itself, there is no room for a modification in the present case, but there is merely an extensive application of the exceptions which the text implies. It is also contended that the judgment under appeal does not deal with the significance of agreements in simplified form, thus omitting to deal with a matter which is essential for the determination of the dispute and which was expressly relied upon by the appellant.

" The Exchange of Letters of May 17, 1946, ratified by Decree dated August 25, 1941, and published on August 27, 1947, on the Settlement of Italian Citizens, though subsequent to the Law (*statut du fermage*) of April 13, 1946, does not contain any reference to that Law or to the general Law of Landlord and Tenant. It cannot, therefore, be interpreted as excluding the application of Article 61 of that Law which excludes foreign nationals from its benefits. Furthermore, the Exchange of Letters of October 28 and November 2, 1948, which interprets the Agreement of May 17, 1946, was not published and is therefore not binding on the courts . . ."

[Report: *Bulletin de la Cour de Cassation*, 1955, IV, p. 1.]

Treaties—Operation of—Agencies of Interpretation—Statement of Executive Department—The Law of France.

In re HURTADO.

France, Court of Cassation. March 10, 1955.

THE FACTS.—The Court of Appeal of Paris acquitted the respondent, a Spanish national, of a charge under a French Decree of November 12, 1938, which provided that no alien shall carry on trade in France without being in possession of a special trader's permit. In acquitting the respondent the Court accepted his contention that Spanish nationals were entitled, by virtue of the Franco-Spanish Treaty of January 7, 1862, to carry on trade in France on the same conditions as French nationals who, by the same Treaty, were accorded similar rights in Spain. The Public Prosecutor appealed against the respondent's acquittal and contended that the Court of Appeal should not have determined the case on the merits without first ascertaining the views of the French Government on the interpretation and application of the Treaty and on the question whether French nationals in Spain were entitled to engage in trade on the same conditions as Spanish nationals. He further contended that the views of the French Government on these two questions would be binding on the Court.

Held: that the contentions of the Public Prosecutor must be upheld. Only the French Government, and not the courts, was entitled to determine the questions relating to reciprocity and the interpretation of the Franco-Spanish Treaty. The case was accordingly sent to the Court of Appeal of Orléans for re-trial on that basis.

The Court said: " The courts are bound to stay the proceedings where the decision is subject to the determination of an interlocutory question. Victor Hurtado, a Spanish national, was charged with carrying on trade in France without being in possession of a special permit describing him as a trader. This is an offence under the Decree of November 12, 1938. The accused was discharged, notwithstanding that the facts alleged against him were not disputed. The Court of Appeal, in support of its decision, relied on the Franco-Spanish Treaty of January 7, 1862, according to which the nationals of the Contracting Parties are entitled to engage in trade in the respective territories, subject only to the requirement that they shall observe the conditions applicable to nationals by virtue of the laws in force at the time when the acts are alleged to have been committed. The following matters should have been investigated: (1) whether the said Treaty is such as to permit Spanish nationals to trade in France without the special permit which is required in the case of every trader of foreign nationality; and (2) whether French nationals living in Spain are entitled, in that country, on the basis of reciprocity, to engage in trade without permission. Although the

Court of Appeal was right in disregarding—as being of no binding force—the view expressed by the Director of Administrative and Social Affairs of the Ministry of Foreign Affairs, which had not been published in the Official Journal and had only been notified by a circular of the Chancellery, it was nevertheless bound to stay the proceedings on the merits until such time as the French Government had officially interpreted these two aspects of the Treaty of January 7, 1862. It follows that the Court, in ordering the release of the accused at that stage, exceeded its powers. The judgment of the Court of Appeal of Paris of April 1, 1954, must therefore be quashed and the case sent to the Court of Appeal of Orléans in order there to be determined afresh in accordance with the law."

[Report: *Revue critique de droit international privé*, 45 (1956), p. 48.]

Treaties—Operation of—Whether Executive or Judiciary Competent to Interpret and Determine Continuing Operation or Cessation of Treaties—The Law of France.

PROCUREUR GÉNÉRAL *v.* FOURNIER AND OTHERS.

France, Court of Cassation. June 4, 1955.

THE FACTS.—In an action by bondholders for the distribution of certain funds held by the "Committee of Bondholders of the Railway Company of the Danube, Save and Adriatic", the Committee contended that a Treaty concluded at Rome on March 29, 1923, which provided for the payment of compensation to bondholders of the Company and for the distribution of funds arising from such payment, had terminated on the outbreak of the Second World War and that the Committee was accordingly entitled to retain such funds as had been received after September 2, 1939. The Court of first instance upheld this contention, notwithstanding that the Treaty of March 29, 1923, was a multilateral Convention kept in force by the terms of the Treaty of Peace with Italy of 1947.

Held: that the terms of the Peace Treaty with Italy constituted an authoritative interpretation by the French Government of the status of the Treaty of March 29, 1923, and that the Court of first instance, in holding that that Treaty had terminated as a result of the outbreak of war, had exercised powers which properly belonged to the Government; accordingly, the judgment of the Court of first instance must be set aside.

The Court said: "The courts cannot, without infringing the prerogative of the Government's diplomatic activity, disregard the provisions of a treaty dealing with questions of international *ordre public* or the official interpretation of a treaty by the competent authority. In an action for the distribution of funds held by the Committee of Bondholders of the Railway Company of the Danube, Save and Adriatic, a judgment of the Tribunal de la Seine of December 12, 1951, held that treaties concluded to govern relations in time of peace lapsed as a result of the outbreak of war and that the Committee was entitled to retain funds received after September 2, 1939. The Tribunal de la Seine exceeded its powers in holding that the Rome Agreement of March 29, 1923, lapsed by reason of the state of war which began on September 3, 1939. The Rome Agreement was a multilateral Convention kept in force by the provisions of Annex XIV to the Treaty of Peace with Italy, and in holding as it did the Court of first instance disregarded the interpretation of the Peace Treaty officially sanctioned by the Government. It follows that the judgment must be set aside."

[Report: *Gazette du Palais*, August 6–9, 1955.]

Treaties—Operation of—Relation to Municipal Law—Municipal Law Providing that General Rules of International Law shall Form Part of Municipal Law—Whether General Rules of International Law Include Treaties—European Convention for Protection of Human Rights, 1950—Whether Part of German Law.

EUROPEAN HUMAN RIGHTS CONVENTION CASE.

German Federal Republic, Administrative Court of Appeal of Münster.
November 26, 1955.

THE FACTS.—Article 6 (1) of the European Convention of November 4, 1950, for the Protection of Human Rights and Fundamental Freedoms provides—as far as here material—as follows:

> " In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing. . . . Judgment shall be pronounced publicly. . . . "

Article 25 of the Constitution of the Federal Republic of Germany provides that " the general rules of international law form part of federal law ". Complaint was made that the judgment of an administrative tribunal given in pursuance of an Ordinance enacted by the Occupying Power was invalid on the ground that it had not been " pronounced publicly ", as provided in Article 6 (1) of the Convention. Against this it was contended that, notwithstanding that the Federal Republic of Germany had ratified the Convention, the provisions of the latter—being the provisions of a treaty, as distinct from general rules of international law—had not thereby automatically become part of the German law of procedure, and that in any event Article 6 (1) of the Convention did not apply to the judgments of administrative tribunals.

Held: (i) that the Convention, though ratified by the Federal Republic of Germany, did not take precedence over German municipal law, because Article 25 of the Constitution was concerned only with the general rules of international law and not with treaties;

(ii) that, quite apart from the foregoing, Article 6 (1) of the Convention was concerned only with the jurisdiction of civil and criminal courts, and not with the jurisdiction of administrative courts; and (iii) that, accordingly, the complaint was not justified.

The Court said: " The failure of the lower Court publicly to pronounce judgment at the conclusion of the oral proceedings is not contrary to the existing law of procedure, because according to section 78 (1) of Military Government Ordinance No. 165 the public pronouncement of judgments within the field of operation of this Ordinance is not required. This position has not undergone any change by reason of the fact that the Federal Republic has signed the Convention of November 4, 1950, for the Protection of Human Rights and Fundamental Freedoms together with Belgium, Denmark, France, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, the Saar Territory, Turkey and the United Kingdom of Great Britain and Northern Ireland, and that Parliament has approved the conclusion of the Convention and has published it as having the 'force of law'. The Convention came into force on September 3, 1953. As this Senate pointed out in its order of June 24, 1955, Article 6 (1) of the Convention did not apply within the field of operation of Military Government Ordinance No. 165, at any rate not prior to May 5, 1955, which was the date of the coming into force of the Protocol of October 23, 1954, providing for the ending of the occupation régime in the Federal Republic, because prior to that date the legislative organs of the Federal Republic were not in a position to amend occupation law, including Military Government Ordinance No. 165. Similarly, the public pronouncement of judgments within the field of operation of the Ordinance was not required after May 5, 1955. In determining the question whether Article 6 of the Convention is applicable to proceedings under the Ordinance, we have to decide the question whether the substantive provisions of the Convention constitute law which is directly binding on German courts, or whether they merely constitute a legal duty for the Federal Republic of Germany to make provision that its municipal law shall conform to the provisions of the Convention. To date, the courts have not been concerned with this question. The opinions of writers differ.

" [The Court then reviewed the opinions expressed by various writers and by speakers in the debates preceding the enactment of the " enabling Law " of August 17, 1952, which resulted in the ratification of the Convention, and continued:] This Senate regards the enabling law not only as a formal Law within the meaning of Article 59 (2) of the Constitution,[1] but also as a substantive Law.

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[1] Article 59 (2) of the Constitution of the Federal Republic provides as follows: " Treaties governing the political relations of the Federation, or having reference to matters within the legislative competence of the Federation, require the approval or co-operation, in the form of a federal Law, of the organs of the Federation which are competent in the field of federal legislation."

With the enactment of the enabling Law, the Convention has thus become municipal law, *viz.*, law which is directly binding. This is in accordance with the jurisprudence of the Constitutional Court inasmuch as the latter, in its judgment of July 30, 1952 (NJW, 1952, p. 1209), regarded the wording of an enabling Law as being sufficient for the purpose of transforming international law into municipal law. It does not follow, however, that thereby every provision of the Convention takes precedence over other municipal laws. Krüger takes the view that this can be inferred from Article 25 of the Constitution, but in drawing this inference she overlooks the fact that Article 25 is concerned only with ' general rules of international law '. Whilst it is true that these rules can include treaty law, the fact remains that they include only such treaty law as contains a written codification of general rules of international law. General rules of international law are such rules only as apply to and are binding on all the members of the international community. Not only Switzerland, Austria, Spain, Portugal, Yugoslavia, Finland and the countries beyond the ' Iron Curtain ', but also all the non-European countries, have failed to become Parties to the Convention. Even though some of these States have enacted municipal law which is in accordance with the provisions of the Convention, as has Switzerland, they have not thereby evinced any intention that they wish to be bound by it in international law, or that they wish to submit to a supra-national tribunal. Nor can the Convention be regarded as codifying general international law because in most parts of the world such fundamental freedoms are not recognized, which follows from the failure of the efforts of the United Nations to achieve the conclusion of a similar convention which would be applicable to the Member States of the United Nations.

" The fact that the Convention has become municipal law does not mean that the requirement contained in Article 6 thereof—that judgments are to be pronounced publicly—applies equally to administrative courts. Article 6 refers to ' tribunals which have to determine civil rights and obligations or criminal charges '. According to established German legal terminology, these are the so-called ' ordinary ' courts, *viz.*, the civil and criminal courts, and not the administrative courts, which exercise jurisdiction over disputes of public law. Neither the French nor the English wording shows that the Contracting Parties intended to extend the duty of public pronouncement to the judgments of all courts. The history of this provision is not known in detail. Some of the Contracting States have, for many years, known the institution of administrative jurisdiction. In view of this it would have been feasible to include in Article 6 the judgments of administrative courts. We may infer from the fact that this has not been done that there was no intention to include administrative courts in Article 6. There is accordingly, having regard to the clear wording of Article 6, no room for an extensive interpretation. Article 13 of the Convention confirms this view. It provides as follows:

> ' Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity.'

According to this provision, there has to be a national authority to determine complaints of a violation of the ' fundamental freedoms ' guaranteed by the Convention. It follows that it is not necessary that competence shall be vested in an independent court subject to the law, but that it is sufficient to appoint an administrative authority or even a parliamentary commission for the municipal determination of complaints against a violation of the fundamental freedoms guaranteed by the Convention. German municipal law, in fact, goes a great deal further. Everyone is entitled to appeal against a violation of the fundamental freedoms guaranteed by the Constitution. Should an administrative authority violate a fundamental right which, though not a fundamental right as provided in the Constitution, is a fundamental freedom as provided in the Convention, any aggrieved person would—seeing that the Convention bears the character of municipal law—be in a position to demand a decision of the competent administrative court. Thus the protection of the fundamental freedoms of international law guaranteed by the Convention is far more extensive, in the territory of the Federal Republic, than is required by the Convention. Neither the Contracting Parties nor the federal Legislature seem to have felt any need to subject the Federal Constitutional Court or the administrative courts to the more exacting procedural requirements of Article 6 of the Convention."

[Reports: NJW, 9 (1956), p. 1374; MDR, 10 (1956), p. 572.]

Treaties—Operation of—Effect on Rights of Individuals—Peace Treaty Containing Waiver of Rights of Individuals—Peace Treaty with Italy, 1947—Treaty Containing Waiver of Claims of Italian Nationals against German Nationals—Germany not Party to Treaty—London Debt Agreement with Germany, 1953—Debt Agreement Providing for Application of Relevant Clauses of Treaty of Peace with Italy—Whether Italian National Entitled to Enforce Claim against German National in German Courts.

German External Debts Agreement Case.

German Federal Republic, Federal Supreme Court. December 14, 1955.

The Facts.—According to the relevant provision of the London Agreement of February 27, 1953, on German External Debts, all claims by nationals of countries allied to Germany in the Second

World War (which includes Italian nationals) against German nationals in respect of debts incurred between September 1, 1939, and May 8, 1945, are to be treated in accordance with the provisions contained in the " relevant treaties ". One such " relevant treaty " is the Treaty of Peace with Italy of February 10, 1947, Article 77 (4) of which provides—as far as here material:

> " . . . Italy waives . . . on behalf of Italian nationals all claims against . . . German nationals outstanding on May 8, 1945, except those arising out of contracts . . . entered into, . . . before September 1, 1939."

Such waiver includes all claims for loss or damage arising during the war, *i.e.*, between September 1, 1939, and May 8, 1945).

The plaintiff, an Italian national, brought an action against the defendants, a German Company, for payment of a sum of money due partly under contracts concluded between the parties between September 1, 1939, and May 8, 1945, and partly in respect of loss or damage arising during the same period. It was contended on behalf of the plaintiff that any waiver by Italy on behalf of Italian nationals could not affect his right of action as the Treaty of Peace with Italy, which had been concluded between Italy and the Allied Powers, was *res inter alios acta* so far as Germany and German nationals were concerned. On behalf of the defendants, it was contended that the London Debt Agreement of February 27, 1953, to which Germany was a party, in providing that claims of this nature should be treated in accordance with the provisions contained in the " relevant treaties ", brought into operation Article 77 (4) of the Treaty of Peace with Italy, with the result that the present claim was no longer vested in the plaintiff and that the latter was accordingly not entitled to pursue his action in the German courts.

Held: that the plaintiff's action could not be maintained in the German courts as, by virtue of the waiver contained in the Peace Treaty with Italy, the claim was no longer vested in the plaintiff.

The Court said: "Article 77 (4) of the Treaty of Peace with Italy, which the latter country signed at Paris on February 10, 1947, provides as follows:

> ' Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all inter-governmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war.'

This Treaty, in so far as concerns Italian nationals, has been given the force of law by Decree No. 1430 of November 28, 1947. The

Combined Civil Chambers of the Italian Court of Cassation therefore held, in Judgment No. 285 of February 2, 1953, that the waiver contained in the Peace Treaty was fully valid and binding on individual Italian nationals. The judgment held that the Treaty contained a complete waiver by Italy and Italian nationals of all proceedings against Germany and German nationals, except for obligations dating from before September 1, 1939. It follows that if the plaintiff had to pursue his remedy in the Italian courts, his action would be bound to fail because, as the Italian Court of Cassation said, Italian nationals cannot institute proceedings against the German State or German nationals in respect of legal relations or facts arising after September 1, 1939, and before May 8, 1945, there being no longer any right of jurisdiction of the Italian courts over claims of this kind. Nor can the action succeed in the German courts. It is true that the Treaty of Peace with Italy as such was not signed by Germany and was never enacted as law in that country. On the other hand, the waiver which is contained in the Peace Treaty must be given effect by the German courts, in accordance with Article 5 (4) of the London Debt Agreement. This Article provides that claims against Germany or German nationals by States allied to the German Reich after September 1, 1939, and by nationals of such States, in respect of debts arising between September 1, 1939, and May 8, 1945, or in respect of rights acquired during that period, shall be treated in accordance with the provisions contained in the relevant treaties. The Debt Agreement was approved by Parliament and enacted as law on August 24, 1953. It thus has the force of law in the Federal Republic. The claims of the plaintiff fall within the framework of Article 77 (4) of the Peace Treaty with Italy. They are claims arising partly from contracts concluded during the war and partly from loss or damage suffered during the war. It follows from Article 77 (4) of the Treaty that the claims which are being put forward in the present case are no longer vested in the plaintiff.

" The Second Civil Senate of the Supreme Court has taken the view (*cf.* BGHZ, vol. 16, p. 207) that where treaties contain waivers, the claims concerned become extinct upon the conclusion of the relevant Peace Treaty. The First Civil Senate of the Supreme Court, on the other hand, has held (*cf.* BGHZ, vol. 18, p. 22) that Article 5 of the London Debt Agreement has the same legal effect—so far as concerns claims not falling within the Debt Agreement, and until such time as specific provision is made by international agreement—as a moratorium concluded for an indefinite period. According to this view, the date on which such claims become due is temporarily postponed, and the claims must be rejected as ' not yet being due '.

" The judgment of the Second Civil Senate was concerned with the claim of an Austrian company. It was given before the conclusion of the Treaty with Austria. The judgment of the First Civil Senate was concerned with the claim of a Swedish shipping company, which fell within Article 5 (3) of the London Debt Agreement. The question now before us as to whether the claim of an Italian national is still subsisting and can be asserted before a German court must be determined, according to Article 5 (4) of the London Debt Agreement, solely by reference to Article 77 (4) of the Peace Treaty with Italy. It is doubtful whether, having regard to the meaning and purpose of the latter provision, we ought to accept the view of the Second Senate—which, incidentally, was expressed only *obiter*—that the claims of Italian creditors have become wholly extinct by virtue of the waiver. The Allied Powers insisted on such waiver by Italy exclusively in their own interests. They wanted to prevent a diminution of Germany's capacity to pay, which would have occurred if the claims of Germany's former Allies and their nationals had been allowed to affect their own claims and those of their nationals. The waiver was not intended to benefit the debtors, nor to provide a permanent solution of the problem, because Article 77 (4) provides expressly that the waiver does not prejudice any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany . . . The Italian Court of Cassation, in the decision referred to above, merely said that the claims were not subject to the jurisdiction of the Italian courts. We need not here determine the precise legal effect of the waiver in the realm of civil law. There is no doubt that, according to the meaning and purpose of the waiver by Italy, the claim is no longer vested in the plaintiff. If it has not been wholly extinguished and if there is a liability continuing in the person of the debtor, then it is for the Federal Republic, which exercises legislative authority over the debtor, to determine the creditor in whom the claim is vested. The plaintiff, in accordance with the foregoing, is not entitled to bring an action for payment or for a declaration that the money is due."

[Report: NJW, 9 (1956), p. 343.]

Treaties—Operation and Enforcement of—Governmental Agreement on Subject Constitutionally Requiring Assent of Parliament—Lack of Municipal Effect—The Law of Belgium.

BELGIAN STATE, MINISTER OF NATIONAL DEFENCE AND MINISTER OF FINANCE *v.* LEROY.

Belgium, Court of Cassation. November 25, 1955.

THE FACTS.—The respondent was the owner of a business in Mons which on May 14, 1940, was looted by French soldiers. He sued the Belgian State for compensation for the damage suffered, to an amount of some 5½ million Belgian francs, in reliance on an "Arrangement" of October 30, 1945, by which the Belgian Government agreed, on a basis of reciprocity, to be subrogated to the French

Government in respect of civil law claims for injury or damage caused by French troops in Belgium. The Court of first instance of Mons held the claim to be well founded and ordered an expert evaluation of the amount of the damage to be made. The Court of Appeal of Brussels on June 10, 1954, affirmed the decision of the Court of first instance.

The Belgian State now asked the Court of Cassation to set aside the decision of the lower Court. It was contended on its behalf that the "Arrangement" of October 30, 1945, imposed obligations on the State; that Article 68 of the Constitution provided that treaties imposing obligations on the State shall have effect only after receiving the assent of the two Houses of Parliament; that the "Arrangement" had not received that assent; and that, in these circumstances, the "Arrangement" could not be applied by Belgian courts.

Held: that the decision of the lower Court must be set aside and the case sent back for retrial to the Court of Appeal of Liége. The Arrangement of October 30, 1945, imposed obligations on the Belgian State. It had not been approved by Parliament, and accordingly it did not have binding force in municipal law.

The Court said: "Article 68 of the Constitution provides that the King concludes treaties of peace, alliance and commerce, and informs Parliament of their conclusion as soon as the interest and safety of the State permit. It provides further that treaties of commerce and treaties which may impose obligations on the State or on individual Belgian nationals shall have effect only after obtaining the assent of the two Houses.

" The contested Arrangement was concluded between Governments, without the intervention either of the King or of Parliament, by an exchange of letters on October 30, 1945, between the Minister of Foreign Affairs of Belgium and the French Ambassador in Brussels. The Arrangement provides that the Belgian Administration shall, after obtaining the agreement of the French Administration on the validity of claims, settle and pay on behalf of the French Treasury and in accordance with Belgian laws and regulations: (a) compensation for personal injury or damage to property caused by French troops in Belgium, other than war damage; and (b) requisitions, purchases, contracts and provisions of any kind carried out or concluded for the benefit of the French Army in Belgium. The French Administration assumes reciprocal obligations on behalf of the Belgian Treasury. Finally, a clause of the Arrangement provides that the sums expended by the parties in pursuance of the Arrangement shall be subsequently compensated.

" Until that final settlement, the agreement in simplified form of October 30, 1945, lays upon the Belgian Treasury the burden of payments annually authorized by the budget. Since the Arrangement thus imposes obligations upon the State, it cannot have binding force in municipal law until it has obtained the assent of Parliament. Parliament has not approved the Arrangement. Its assent cannot be implied from the fact that the budget provided credits for the execution of the Arrangement, since the general and mandatory provisions of the Arrangement of October 30, 1945, were not thereby introduced into municipal law.

" Seeing that the Arrangement has thus not been approved in conformity with Article 68 of the Constitution, it has no effect in municipal law and is not binding. Belgian courts can accordingly not apply it."

[Report: *Pasicrisie Belge*, 1956, I, p. 285.]

Treaties—Operation of—Enforcement in Accordance with Provisions of National Constitution—The Law of Mexico.

Re CALLES NEGRETE.

Mexico, Supreme Court. July 9, 1954.

THE FACTS.—The petitioner, Adolfo Calles Negrete, sought federal protection (*amparo*) against detention of his motor-car by order of the Secretary of Foreign Relations and other federal authorities in pursuance of provisions of the Convention with the United States of America of 1936 for the recovery and return of stolen motor vehicles.[1] The Court granted *amparo* on the basis of the reasoning in the decision in the case of *Ramón C. Ramírez,* decided on September 7, 1953.[2]

Held: that *amparo* must be granted. In enforcing the provisions of a treaty, Government officials must observe the procedures established by the Constitution for the protection of individual rights.

The judgment is summarized in the report as follows: " It is true that according to Article 133 of the Constitution, treaties concluded with other States are the supreme law of the land and that, pursuant to Article 2 of the Treaty between Mexico and the United States relative to the return of vehicles stolen in the United States, the Secretary of Foreign Relations is required to take every proper means to bring about the recovery of such property. It is no less true that while treaties have the character of constitutional law, no treaty can have greater authority than the Constitution itself, which establishes certain guarantees which are the right of every person. It must be understood that among the methods to which the Secretary of Foreign Relations may resort in the enforcement of the said Article 2, opportunity must be provided for judicial intervention, so that the individual concerned in the case may enjoy the right to a hearing which is guaranteed in Article 14 of the Constitution of the Republic. Where judicial proceedings have not taken place, there is a violation of Article 14 and *amparo* may properly be granted."

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[1] *L.N.T.S.* vol. 180 (1937-38), p. 33.

[2] *Semanario Judicial de la Federación* (5a Época), vol. 117, Part 1, p. 896; *International Law Reports,* 1953, p. 410.

[Report: *Semanario Judicial de la Federación* (5a Época), vol. 121, Part 1, p. 265.]

Treaties—Operation and Enforcement of—Relation to Municipal Law—Primacy of Treaty—Commercial Treaty—Invalidation of Taxes Imposed Subsequent to Signature of Treaty—The Law of Guatemala.

TABACALERA NACIONAL, S.A. *v.* ADMINISTRATION OF CUSTOMS.

Guatemala, Supreme Court. May 31, 1955.

THE FACTS.—This was an appeal from a decision dated November 13, 1954, of the Tribunal for Administrative Disputes, reversing decisions of the Director-General of Customs and of the Treasury, respectively.

On March 11, 1954, the appellant Company lodged a complaint with the Director-General of Customs against the charging of duty under Decree No. 931 (import duties) on 95 packages of leaf tobacco imported from the United States of America. It was said that the duty ought not to have been charged because under the terms of the Treaty of Commerce between Guatemala and the United States signed on April 24, 1936, and ratified on May 9 and 16, 1936, respectively, the taxes on a number of articles mentioned in the Treaty, including leaf tobacco, had been "stabilized". Decree No. 931 therefore conflicted with the Treaty as regards leaf tobacco, on which the duty had thus been improperly charged. The Director-General of Customs, in his decision of February 20, 1954, ruled, however, that the imposition of duties under Decree No. 931 was in order seeing that the levying of a tax was an internal activity of the State, performed in the exercise of its sovereignty with respect to the national finances, which were "not subject to the provisions of a Treaty of Commerce concluded between this country and the United States of America." In any event, the purpose of a treaty of that kind was to stabilize existing taxes and not to prevent the creation of new ones.

The Company's appeal from this decision to the Treasury was dismissed, on May 5, 1954, on the ground that the tax was a personal tax on the importers and not, as alleged, a charge on merchandise produced or manufactured in the United States of America. A further appeal to the Tribunal for Administrative Disputes was, however, allowed, the Tribunal holding that "the import duties referred to were entirely without legality and were violative of the Commercial Treaty between the United States and Guatemala, since this Convention in precise and clear language fixes an effective fiscal stabilization, to the mutual interest of the States parties thereto, on articles produced or cultivated in either country, as enumerated on the respective lists; that these, for purposes of importation, are protected by the privileges granted therein, and this being so, to apply the tax created by Decree 931 of Congress is illegal, for a treaty is a law in full force; and also that the decision of the Treasury, that this duty should be treated as an internal tax, cannot be accepted; an administrative decision must not be allowed to affect the operation of a commercial treaty which is part of the law of the Republic."

The Treasury now appealed against the decision of the Tribunal, contending that " said Treaty cannot prevent the State of Guatemala from decreeing other taxes than those contemplated by said Convention ", and that " this Treaty refers to taxes in existence on the date of its conclusion, but not to taxes of an internal character subsequently imposed ".

Held: that the appeal must be dismissed. The Convention of 1936 applied not only to duties in existence when it was signed but also to duties subsequently imposed.

The Court said: " It is true, without doubt, that a commercial treaty or convention concluded between two States cannot limit or prevent one of them from imposing taxes, charges, contributions, etc., other than those contemplated in the said convention, but in the Convention between Guatemala and the United States of America it is agreed that the articles which are the object of the agreement shall be exempted, upon importation into the contracting State, from ordinary customs fees which exceed those already established and *also from any other fees, taxes, contributions, or any other charges higher* than those in force at the time of the signature of the Convention *on or with respect to the importation* or whose subsequent imposition is required by laws *in force* in the Republic *on the day of signing*. It should be understood from this that the articles protected thereby are exempt from any taxes not in existence on the day of the signature of the Treaty, such as the duties created by Decree 931 of Congress, for which reason the Tribunal did not err in applying the terms of the Convention . . . "

[Report: *Gaceta de los Tribunales*, January–June 1955, p. 140.]

Treaties—Operation of—Requirement of Municipal Legislation—The Law of Jordan.

JABAGI *v.* MINISTER OF FINANCE AND ANOTHER AND CO-OPERATIVE DEPARTMENT FOR WATER RESOURCES.

Jordan, High Court of Justice. November 27, 1955.

THE FACTS.—The applicant was a civil engineer in the Co-operative Department for Water Resources. On April 6, 1955, he was given notice of dismissal for misconduct. He now applied to the Court for a declaration that the notice was invalid on the ground, *inter alia*, that under the Agreement concluded on February 12, 1952, between the Hashemite Kingdom of Jordan and the Government of the United States of America, the applicant's employers had no power to terminate his employment. On behalf of the respondents, it was stated that the notice was given by the Minister for Economic Affairs and the manager of the Co-operative Department concerned, by virtue of an Agreement dated June 17, 1954, made between the Minister for Economic Affairs and the Director of Co-operative Departments for Jordan, of the one part, and the Government of the United States of America, of the other part. By that Agreement the authority of the Minister of Finance to appoint and dismiss employees was transferred to the Minister for Economic Affairs.

Held: that the application must succeed.

The Court said: "The Agreement of 1954 was not a properly concluded Treaty, with the result that the notice terminating the applicant's employment and purporting to be given under it was not valid. We find that the Agreement of 1954 was concluded between the Government of the Hashemite Kingdom of Jordan and the Government of the United States of America. It is therefore a Treaty as defined in Article 33 of the Constitution of Jordan. However, that Article provides that if a treaty entails an alteration in the boundaries of Jordan, or diminishes its sovereign rights, or entails financial commitments or affects the public or private rights of Jordanian nationals, then it shall be concluded by His Majesty and confirmed by Parliament. The Agreement of 1954, therefore, was not concluded by the proper authority and hence is not operative, so that the Minister of Economic Affairs has no power to dismiss the applicant. Therefore we declare the notice of dismissal to be invalid."

[Report: Unpublished.]

Treaties—Operation of—Executive Agreements Made by the United States of America—Effect on Constitutional Rights.

See p. 398 (*Seery* v. *United States*).

Treaties—Operation and Enforcement of—Treaty Establishing Reciprocal Right of Inheritance—Applicability to Persons Resident in Territory Controlled by Unrecognized Government—Effect of Civil War on Treaties—The Law of the United States of America.

See p. 90 (*In re Nepogodin's Estate*).

Treaties—Operation of—Interpretation of Treaty Consistently with Statute—Statute as Overriding Prior Inconsistent Treaty —Consistency of Treaty Exempting Aliens from Military Service with Statute Making Persons Applying for Such Exemption Ineligible for Citizenship.

See p. 460 (*Ballester* v. *United States*).

Treaties—Operation of—Treaty Inconsistent with Subsequent Statute—Effect in Municipal Law—International Convention for the Safety of Life at Sea, 1929—Consistency with Law Relating to Immigration—The Law of the United States of America.

See p. 589 (*Savelis et Al.* v. *Vlachos et Al.*).

Treaties—Operation of—Compatibility of Treaty with Requirements of Municipal Constitutional Law—The Law of Germany.

See p. 630 (*Statute of Saar Territory Case*).

Treaties—Operation of—Effect of Annexation—Treaty between France and Austria—Annexation of Austria by Germany—Subsequent War between France and Germany—Whether Treaty Affected by Annexation—Whether Treaty Affected by Outbreak of War.

See p. 100 (*Nemec* v. *Établissements L.A.B. and Others*).

Treaties—Operation of—Whether Affected by Incorporation of Territory of One Contracting Party into Territory of Third State—Treaties Concluded by Austria Prior to Incorporation of Austria into German Reich—Whether Operative after Severance of Austria from Reich.

See p. 58 (*Security for Costs* (*Austria*) *Case*).

Treaties—Operation of—Retroactive Effect of Provisions.

See p. 340 (*Carnelli Claim*).

Treaties—Operation and Enforcement of—Necessity for Municipal Legislation—The Law of Italy.

See p. 544 (*Società Arethusa Film* v. *Reist*).

Treaties—Municipal Law and—Necessity for Municipal Legislation —The Law of Italy.

See p. 882 (*Combes de Lestrade* v. *Ministry of Finance*).

Treaties—Operation of—Treaty Allegedly Inconsistent with Public Policy—The Law of Switzerland.

See p. 424 (*Stransky* v. *Zivnostenska Banka*).

C—TERMINATION OF TREATIES

I.—By Operation of Law

ii.—Extinction or Dismemberment of Contracting Party

Treaties—Termination of—As Result of Incorporation of One Party into Another State—Incorporation of Austria into German Reich—Fate of Treaties Concluded by Austria Prior to Incorporation—Double Taxation Agreement between Austria and the Netherlands.

See p. 530 (*Re Nijdam, deceased*).

iii.—Outbreak of War

[*See also* PART XI, WAR AND NEUTRALITY.]

Treaties—Effect of Outbreak of War on—Treaty of Amity, Commerce and Navigation—The Law of Canada.

See p. 591 (*Francis* v. *The Queen*).

iv.—The *clausula rebus sic stantibas*

Treaties—Termination of—*Clausula rebus sic stantibus*—Whether *Clausula* can be relied upon by Private Party.

See p. 424 (*Stransky* v. *Zivnostenska Banka*).

II.—By Act of Party

i.—In General

Treaties—Termination of—Supersession of Treaty by Subsequent Treaty.

See p. 705 (*In the matter of International Bank for Reconstruction and Development and International Monetary Fund* v. *All America Cables & Radio, Inc., and Other Cable Companies*).

iii.—Unilateral Denunciation. Result of Non-performance by the Other Party

Treaties—Termination of—Denunciation by Unrecognized Government.

See p. 90 (*In re Nepogodin's Estate*).

Treaties—Termination of—Withdrawal from Treaty—General Agreement on Tariffs and Trade.

See p. 565 (*Bardwil & Sons* v. *United States*).

D—INTERPRETATION OF TREATIES

I.—Agencies of Interpretation

Treaties—Interpretation of—Agencies of Interpretation—Treaty Affecting Individuals—Contents of Treaty Relating to Matter of Public Policy—Whether Judiciary or Executive Competent to Interpret Treaty—The Law of France.

ENRÉGISTREMENT *v.* TETLOW.

France, Court of Cassation. May 9, 1955.

THE FACTS.—Article 11 of the Franco-British Treaty of February 28, 1882, provides that the subjects of each of the Contracting Parties, in the territory of the other, shall be exempt from " extraordinary contributions levied as a result of exceptional circumstances ". French Ordinances of April 15 and August 15, 1945, provided for the levying of a so-called " national solidarity tax " from persons domiciled in France. Tetlow, a British subject domiciled in France, refused to make the requisite return to enable the French revenue authorities to levy the appropriate amount of this tax, on the ground that the " national solidarity tax " was an " extraordinary contribution ", from the payment of which he, as a British subject, was exempt by virtue of the Franco-British Treaty of 1882. The Court of first instance upheld his refusal. Before the Court of Cassation the French revenue authorities contended that after an Exchange of Notes between the French and British Governments it had been agreed between the two Governments that British subjects should be liable to pay this tax, and that thereupon the French Government, as it was entitled to do in a matter concerning public policy—fiscal policy being a matter of public policy—had provided the courts with an authoritative interpretation of the Franco-British Treaty of 1882 to the effect that British subjects were liable to the tax.

Held: that the statement of the French Government to the effect that British subjects were liable to pay the " national solidarity tax " was binding on the courts, and that the judgment of the Court of first instance exonerating T. from liability must accordingly be set aside.

The Court said: " In evaluating the meaning and scope of treaties relating to matters of public policy (*ordre public*), and in particular relating to exemptions from tax liability of the subjects of Contracting States, the interpretation thereof must be left entirely to the Government and must be binding on the courts, who have to apply them when they have obtained the force of law in France. Douglas Tetlow, a British subject domiciled in France, has failed to include in his tax return the moveable property owned by him in France, and he has objected to the assessment made against him by the revenue authorities. He contended that he was exempt from the said tax by virtue of the fiscal immunity provided for in Article 11 of the Franco-British Treaty of February 28, 1882. The lower Court discharged the assessment on the ground that the exemption clause to which reference has been made has the effect of exempting British subjects from the tax imposed by the Ordinance of August 15, 1945. It held that this tax constituted an ' extraordinary contribution levied as a result of exceptional circumstances ' from which British subjects were exempt in accordance with Article 11 of the Treaty, and that the terms of the Treaty were so clear as not to require interpretation, notwithstanding the meaning attributed to the clause by the French Government, with the approval of the British Government. In fact, the lower Court when concerned with a question of tax, *viz.*, a matter of public policy, the determination of which depended upon the interpretation of the Treaty of February 28, 1882, was under a duty to apply the official interpretation of the French Government, according to which Article 11, in so far as it granted exemption to the nationals of the Contracting Parties from extraordinary contributions levied as a result of exceptional circumstances, ' did not apply so as to exempt British subjects from the national solidarity tax ', as appears from a Note of September 19, 1946, from the French Minister for Foreign Affairs to the British Ambassador in Paris, to which the latter replied on October 18, 1946, that the British Government did not wish to contest the view expressed by the French Government. Having regard to the fact that Douglas Tetlow, who was not entitled to any exemption according to the general terms of the Ordinance of August 15, 1945, relied solely on Article 11 of the Treaty, the lower Court was not entitled to disregard the interpretation of the Government as having no bearing on the determination of the dispute, it being far from certain that the ' national solidarity tax constituted an extraordinary contribution levied as a result of exceptional circumstances ' within the meaning of the Franco-British Treaty of February 28, 1882. It follows that the judgment under appeal violated the rule referred to above and must be set aside."

[Report: *Jurisclasseur périodique*, 1956, II, 9177.]

Treaties—Interpretation of—Agencies of Interpretation—Question of " International Public Policy " Contained in Treaty—Interpretation by Executive—Whether such Interpretation Retroactive—The Law of France.

C. *v.* INTENDANT MILITAIRE DE LA 3e RÉGION.

France, Tribunal Civil de la Roche-Sur-Yon. June 21, 1955.

THE FACTS.—In 1939 the plaintiff, a Spanish national resident in France, was the owner of a lorry. The lorry was requisitioned by the

French military authorities in September of that year, and in 1954 the plaintiff was offered such sum of money as was normally payable in cases of requisition. He refused to accept the sum offered and contended that as a Spanish national he was exempt from requisitions by virtue of Article 4 of the Franco-Spanish Treaty of January 7, 1862, and that accordingly his lorry had been unlawfully requisitioned and he was entitled to a full indemnity on that basis. He contended, further, that at the time when his lorry was requisitioned a circular of the French Ministry for Foreign Affairs to the Spanish Embassy in Paris (dated September 29, 1939) stated that requisitions of property belonging to Spanish nationals had been made in error, and that the Minister of War had given instructions for such errors to be avoided in the future. The French military authorities, defendants herein, contended that a statement issued by the French Ministry for Foreign Affairs on August 22, 1945, and submitted to the Court of Cassation in connection with a case concerning the requisition of property owned by a Spanish national, expressed the view " that there is no treaty which exempts foreign nationals from requisitions of property. . . ." It was conceded by both parties that an authoritative statement issued by the competent French Ministry on a matter contained in a treaty and pertaining to " international public policy " (*ordre public international*) was binding on the courts, but the plaintiff, in reply to the defendants' contention, argued that the statement issued in 1945 was not retroactive and could therefore not affect a requisition made in 1939.

Held: that the plaintiff's contention must be upheld, and that the circular of the French Ministry for Foreign Affairs issued in September 1939 applied to the present case, with the result that the requisition made at that time was unlawful. Accordingly, the plaintiff was admitted to proof to justify his claim to a full indemnity on the basis of an unlawful requisition.

The Court said: " In so far as concerns the contention based on the judgment of the Court of Cassation[1] and the statement made by the Ministry for Foreign Affairs on August 22, 1945, C. rightly says that the judgment was concerned with a lorry requisitioned from a Spanish national in September 1944, so that the view expressed by the Minister for Foreign Affairs and required for the purpose of an identical case by the *Conseil d'État* was applicable, whereas in the present case the lorry was requisitioned on September 23, 1939, *viz.*, at a time when the interpretation given by the same Ministry of the Franco-Spanish Treaty of January 7, 1862, was altogether different. The plaintiff relies on a circular of the Ministry for Foreign Affairs dated September 29, 1939, which was sent to the Spanish Embassy and which was in the following terms:

[[1] In *Estades* v. *French Government*, decided on January 19, 1954 : see *International Law Reports*, 1954, p. 277.]

'On September 2 the Spanish Embassy informed the Ministry for Foreign Affairs that motor-cars, lorries and live-stock belonging to Spanish citizens resident in France had been requisitioned by the French military authorities. The Embassy has pointed out that in accordance with the Franco-Spanish Treaty of January 7, 1862, the property of Spanish citizens resident in France is exempt from requisition. The Embassy has accordingly requested that instructions be given to the military authorities to ensure full observance of the provisions of the Treaty. The Minister for Foreign Affairs has the honour to inform the Embassy that the Minister of War, who has been informed of the position, states that the requisitions mentioned by the Embassy must have been made in error by members of the staff lacking the requisite knowledge. The Minister of War has given instructions to prevent any repetition of such occurrences. He has also instructed the competent authorities to return to their Spanish owners immediately all property which is near the place of requisition, and to pay an indemnity. In cases where it is no longer possible to make restitution in kind the military authorities have been instructed to compensate the owners so as to safeguard their rights.'

The plaintiff also relies on a letter of April 10, 1940, from the same Ministry to the President of the Franco-Spanish Chamber of Commerce which states as follows:

'The provisions contained in the Franco-Spanish Treaty of January 7, 1862, must be interpreted in a general way as implying the exemption of Spanish subjects in France (and French subjects in Spain) from military requisitions. Property belonging to Spanish subjects which has been requisitioned shall be returned in all cases except those in which such return is impossible in practice. In the latter cases, and where compensation becomes payable, a distinction is to be made between persons affected who have, and persons who have not, at the time of requisition, produced their registration certificate provided for in Article 4 of the Treaty of January 7, 1862.'

In the absence of voluntary agreement accompanied by payment of compensation prior to the removal of property, as provided by Articles 4 and 7 of the Treaty, requisitions of property belonging to Spanish nationals are prohibited also by the Decree of November 13, 1907, which amended Article 75 of the Decree of August 2, 1877, and provides that Spain is included among the countries whose nationals are exempt from all military requisitions. This is also recognised to be the position by the Ministry of War in instructions dated March 4, 1901, and by the Conseil d'État in *Re Ramis*, a judgment dated March 4, 1949. It is therefore proper to adopt this interpretation of the Treaty of 1862. . . . In any event the decision of the Ministry for Foreign Affairs of August 22, 1945, is not applicable in the present case, by virtue of the non-retroactivity of the law. It follows that C. must be admitted to proof that he or his agents objected to the delivery of the lorry when the authorities requisitioned it and demanded that it be handed over. . . ."

[Report: *Gazette du Palais*, September 17–20, 1955.]

Treaties — Interpretation of — Agencies of — Interpretation by Executive Department—Authoritative Interpretation.

See p. 705 (*In the matter of International Bank for Reconstruction and Development and International Monetary Fund* v. *All America Cables & Radio, Inc. and Other Cable Companies*).

II.—Principles and Rules of Interpretation

Treaties—Interpretation of—Principles and Rules of—Interpretation by Reference to Previous Decision of Same Tribunal—Interpretation by Reference to Decision of Another Tribunal—Comparison of Languages of Text of Treaty—Peace Treaty with Italy, 1947—Meaning of "*fait de guerre*"—State Responsibility—For Acts and Omissions of State Organs and Officials—Treatment of Goods in Transit at Outbreak of War—Whether a Discriminatory Measure—Causal Relationship between Damage and War.

Agache Claim.

Franco-Italian Conciliation Commission. September 15, 1955.

(Perier de Feral, Sorrentino, Bolla.)

The Facts.—On October 31, 1939, Agache Fils, a French company carrying on business in Lille, bought from the Naples branch of the Hempen Products Association 700 quintals (70,000 Kilograms, about 70 tons) of hemp. In June 1940, the Association sent Agache Fils, by rail, at consignees' risk, 10,000 Kg. of hemp in 31 bales, in each of two railway trucks bound for Modane (Italy). The invoices for the two consignments, sent on the same day, were for about 69,000 lire each. They were paid by Agache Fils against documents. On June 9, 1940, war was declared by Italy against France, and the trucks could therefore not proceed beyond Modane, where the hemp remained "in suspense". It was not until the spring of 1941 that it was sent back to the Association, who put it in their factory and, on April 4, 1941, notified the Prefect of Naples of what they had done. On September 25, 1941, the 62 bales of hemp were by prefectorial decree placed under sequestration as enemy property. The administrator-sequestrator drew up an inventory and left the hemp where it was. At this time the 62 bales weighed only 191·10 quintals, having lost over 10 quintals of their original weight. On April 12, 1942, the Naples Public Technical Office assessed the value of the sequestrated hemp at 300 lire per quintal, that is, 57,330 lire for the 191·10 quintals, it being of the 1939 harvest and having been seriously damaged "by reason of exposure to the elements during a year of travel". On March 29, 1944, the Controller of Property of the Allied Command ordered the requisitioning of the hemp. This was done by the administrator-sequestrator against payment of the sum of 154,294 lire. The money was then seized by the Hempen Products Association to meet the expenses incurred by them in the preservation of the hemp. On September 10, 1947, the Superintendent of Finance of Naples put at the disposition of Agache Fils, through the intermediary of the French Consul at Naples, the sum of 163,600 lire representing the price of the hemp together with accrued interest.

On June 26, 1948, Agache Fils claimed against the Italian Treasury the sum of 6,151,838 lire (being two-thirds of the value of the flax) subject to any increase in the current price of flax ruling at the time of payment, as compensation for the loss of the hemp. The Italian Treasury referred the claimants to the Bank of Naples, where the requisition moneys had been paid. amounting with accrued interest to about 176,000 lire. On June 20, 1953, the French Office for Private Property and Interest lodged with the Italian Treasury a new claim for compensation for the deterioration suffered by the flax during the period of sequestration. The claim was based on the valuation in 1942 by the Naples Public Technical Office of 57,330 lire. The value in 1940 of the flax having been 160,000 lire (at 800 lire per quintal), it was clear that by the time it was requisitioned by the Allies more than a third of it had been lost. The Office therefore claimed, on behalf of Agache Fils, two-thirds of the current value of the flax in Italy, as fixed by the National Hemp Organization at 2,333,333 lires, being two-thirds of 3,500,000 lire, the price of 7 tons of flax at 500,000 lire per ton. This claim not having been met, the French Government preferred the claim before the Commission, *viz.*, 2,333,333 lire, plus 200,000 lire for expenses, and without prejudice to the payment to Agache Fils of compensation for the requisitioning of the flax.

In reply to the claim, it was contended on behalf of the Italian Government that the Naples Public Technical Office in 1942 had not mentioned, in connection with the figure of 57,330 lire, any deterioration of the flax, but had given that figure as the value at that time. The loss of weight of the flax had been only 10.59 quintals, and it took place before the sequestration. In any event, it was contended, flax is by its nature liable to lose a certain proportion of its original weight.

Held: that the claim must fail. The loss suffered by the claimants did not result either from a discriminatory measure or from a *fait de guerre*.

The Commission said: "[The present claim, made under] Article 78, paras. 4 (*a*) and (*d*),[1] of the Treaty of Peace, is for the

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[1] Article 78 provides in part:

"4.—(*a*) The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury compensation of Agache Fils to the extent of two-thirds of the loss in weight and in value of their flax from the time it was held up on June 10, 1940, in Modane. The amount of this loss cannot in any event be placed at 57,330 lire, the value as at April 12, 1942, as is contended on behalf of the French Government on the basis of the report of the Naples Public Technical Office. It appears, in fact, from that report that the sum of 57,330 lire corresponds not to the damage done to the flax as the result of a diminution in quantity and in quality, but to the value of the flax so damaged: 191·10 quintals at 300 lires per quintal=57,330 lire. In any event, that damage cannot be regarded as a special measure applied by the Italian Government to property of a United Nations national (see Article 78, para. 4 (*d*), of the Peace Treaty). If the two trucks did not continue beyond the railway station at Modane, that was not because the Italian Government took some discriminatory measure with regard to them, or to all merchandise of French or enemy ownership lying at Modane, but simply because, war having broken out between Italy and France, rail traffic was interrupted at the frontier between the two States. The declaration of war itself cannot be regarded as a discriminatory measure within the meaning of sub-para. (*d*); it was neither a measure taken against property nor a measure taken ' during the war '. It was rather the war, regarded as a historical fact, which caused the two wagons to be stopped at Modane. The Italian State Railways (assuming that they can be regarded as being part of the Italian administration—a question which may be left open) had neither the right nor the duty to send [the flax] on to Lille via Switzerland, irrespective of the nationality of the owner. All that the State Railways were bound to do was to send back to the consignor in Italy the flax which was held up at Modane, and that is what they did. The delay in so doing does not in itself constitute a discriminatory measure: it is neither alleged nor proved that other merchandise which was held at Modane as the result of the interruption of railway traffic was returned to the consignors in Italy by the State Railways with greater expedition because there was no question of enemy ownership. In fact, the only discriminatory measure taken by the Italian Government in connection with the flax belonging to the firm of Agache was the sequestration ordered with regard to it on September 25, 1941, when the prefect of Naples received the notification dated

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or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Italian nationals.

" (*d*) The Italian Government shall grant United Nations nationals an indemnity in lire at the same rate as provided in sub-paragraph (*a*) above to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Italian property. This sub-paragraph does not apply to a loss of profit."

September 4, 1941, of the consignor. But it has not been proved that the damage to the flax was caused during the sequestration; it would appear from the report of the Public Technical Office of April 12, 1942, that the loss in weight and in value sustained by the flax was due rather to the intemperate weather met with during a year on rail and to the time which had elapsed up to the date of the report.

" The loss suffered by the claimants is undoubtedly a consequence of the war, but not of a *fait de guerre* [act of war] in the interpretation which this Commission gave to Article 78 (4) (*a*) of the Treaty of Peace in their decision of March 8, 1951.[1] The attention of the Commission was drawn by the Agent of the French Government to the decision of the Italo-American Conciliation Commission given in December 1954 in the *Giuditta Grottanelli Shafer Case*.[2] In that case, Article 78 (4) (*a*) of the Treaty of Peace was so interpreted as not to require a nexus of cause and effect between damage and a *fait de guerre*, but only a causal relationship between the damage and the war, provided that the relationship be direct and close. That case concerned an iron fence and copper utensils which had been requisitioned during the war by the Italian Government for the purpose of the manufacture of munitions (*matériel de guerre*). It is true that in the *Pertusola* case the Franco-Italian Conciliation Commission, in interpreting Article 78 (4) (*a*) of the Treaty of Peace in the light of preparatory work, relied in the grounds for its decision on, *inter alia*, a proposition put forward by the Representative of the United States on the Committee of Economic Experts, which was assisting the Council of Foreign Ministers; and it relied on that proposition as it appeared in a French translation, which although official and contemporaneous was in fact inaccurate. On the basis of the original in the English language, which was not at the time available to the Commission, it appears that, from the outset, the Representative of the United States spoke of the responsibility of Italy for losses ' as a result of the war ' and not, as the official French translation had it, for losses '*par suite de faits de guerre*'. But the decision in the *Pertusola* case depended only to a subsidiary extent on preparatory work; its principal arguments were drawn from the text of Article 78 (4) (*a*) of the Treaty (' by reason of injury or damage to property in Italy '); from comparison with other parts of the Treaty, notably Article 78 (4) (*d*); from the spirit which inspired sub-paragraph (*a*) in the general economy of the Treaty; and from an analysis of the consequences which would have flowed from the acceptance of a different interpretation. It does not appear that sub-paragraph (*d*) has a *raison d'être* independent of that of sub-paragraph

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[[1] *Pertusola Claim*: *Recueil des Décisions*, Part III, p. 67; *International Law Reports*, 1951, Case No. 129, where there is a footnote (at p. 414) on the meaning of the expression " *fait de guerre* '.]

[[2] See *infra*, p. 959 (*sub nom. Shafer Claim*).]

(*a*); sub-paragraph (*d*) also speaks of loss and damage by reference expressly to property in Italy to the exclusion of any loss of profits. In the decision of the Italo-American Conciliation Commission cited above it is, moreover, also considered that it is not sufficient for there to be a causal relationship between damage and the war; it is necessary that that relationship should be direct and close, without defining those two qualifications more precisely. In that regard, the Commission commits itself, in sum, to an interpretation of each individual case. But even if the Franco-Italian Conciliation Commission wished to follow the precedent set by the case of *Grottanelli Shafer* cited above, it would be unable to find in the present case the existence of so direct and close a relationship with the war as there might be in the case of the requisition of an iron fence and copper utensils in order to make munitions (*engins de guerre*) of them. The flax belonging to the firm of Agache was requisitioned by the Allied Command, and if some of it perished and some of it was lost, that was as the result of the disorder which the war brought, in a general way, to rail traffic between Italy and France, and which was specially manifest in respect of merchandise which arrived at the fronter station of Modane on the day after the Italian declaration of war on France."

[Report: *Recueil des Décisions*, Part 5, p. 225.]

NOTE.—The French representative on the Commission appended a dissenting " minority opinion ".

Treaties—Interpretation of—Principles and Rules of—Compatibility of Treaty with Requirements of Municipal Constitutional Law—Presumptions Governing Interpretation of Treaty—European Statute of the Saar—The Law of Germany.

STATUTE OF SAAR TERRITORY CASE.

German Federal Republic, Federal Constitutional Court. May 4, 1955.

THE FACTS.—An Agreement concluded between the Chancellor of the German Federal Republic and the Prime Minister of France on October 23, 1954, which formed part of the so-called Paris Agreements of 1954 and was duly ratified by the Parties, provided that the Saar was to have a special " European Statute " until such time as a formal treaty of peace might make definitive provision for its future permanent status. The Saar had been part of the German Reich until the end of hostilities in the Second World War, and its legal status had thereafter undergone several changes. Although at the time of the conclusion of the Agreement of October 23, 1954, the Saar enjoyed a certain degree of autonomy, it was then still subject to numerous restrictions resulting from the occupation of

Germany and the Saar itself, and it was one of the purposes of the Agreement to confer upon it a more favourable status of near-independence. In this case, a number of members of the German *Bundestag* objected to the federal law implementing the Agreement as being contrary to the Constitution, on the ground—*inter alia* and as far as here material—that some of its provisions were not wholly compatible with the German Constitution. The question therefore arose whether international treaties were to be considered binding only if wholly compatible with the Constitution, or also if as nearly compatible therewith as political circumstances permitted.

Held: that an international agreement, notwithstanding that it was not wholly in accordance with the German Constitution, was binding if it brought about a state of affairs which was in greater conformity with the Constitution than the state of affairs existing prior to the making of the agreement; in interpreting a treaty, preference must be given, where several interpretations are feasible, to an interpretation which permits a treaty to exist, having regard to the requirements of the Constitution.

The Court said in part: " In interpreting this Agreement we must apply the general principles governing the interpretation of international treaties. In accordance with these principles every agreement must be interpreted so as to enable the Parties to achieve the aim mutually desired, without thereby regarding the Parties as being bound beyond the limits intended. When this Court has to enquire into the constitutionality of international treaties it must disregard such alternative interpretations as are feasible in themselves but remote. It would not be permissible to declare a treaty incompatible with the Constitution because it would, on the basis of a remote interpretation, in fact violate the Constitution. We must, as a general rule, proceed on the basis that the political organs of the German Federal Republic who took part in the making of a treaty did not intend to undertake liabilities which are contrary to the Constitution. On the contrary, we must proceed on the basis that they investigated its compatibility with the Constitution, and that they intend to observe an interpretation and application of the treaty which is in conformity with the Constitution. Where several interpretations are feasible, preference must be given to an interpretation which permits the treaty to exist, having regard to the requirements of the Constitution . . . The constitutional principle—which is not doubted—that *all* exercise of State power in the Federal Republic of Germany is bound by the Constitution (Article 20 (3) of the Constitution) raises the question as to whether only those stipulations in treaties concluded by the Federal Republic can be accepted as being in conformity with the Constitution as are wholly compatible therewith, or whether it may not suffice that the measures contemplated in the treaty have been taken with an intention—and have a tendency—to prepare, as far as politically feasible, the way for a state of affairs wholly in conformity with the Constitution. This Court is of opinion that this question must be answered in the latter sense."

The Court, applying the principles of interpretation here enunciated, arrived at the conclusion that the Agreement of October 23, 1954, and the Federal Law of March 24, 1955, which implemented it, were compatible with the Constitution. The complaint was accordingly dismissed.

[Reports: B Verf G, 4 (1955), p. 157; JZ, 10 (1955), p. 417.]

Note.—The "European Statute" of the Saar was subsequently rejected by a plebiscite held in the Saar on October 23, 1955.

Treaties—Interpretation of—Principles and Rules of—Interpretion by Reference to Other Treaties *in pari materii*.

See p. 705 (*In the matter of International Bank for Reconstruction and Development and International Monetary Fund* v. *All American Cables & Radio, Inc. and Other Cable Companies*).

Treaties—Interpretation of—Principles and Rules of—Comparison of Languages of Text—Reference to Other Parts of Treaty—*Travaux prèparatoires*—Reference to Municipal Code.

See p. 103 (*Italy* v. *Libya*).

Treaties—Interpretation of—Principles and Rules of—Principle of Good Faith—Intention of the Parties—Consideration of Object of the Agreement—Circumstances in which Agreement Concluded —Principle of Effectiveness—" Clear and Unambiguous Clauses ".

See p. 820 (*In the Matter of the Diverted Cargoes*).

Treaties—Interpretation of—Principles and Rules of—Interpretation in Accordance with General Intention of the Parties.

See p. 160 (*Grey et Al.* v. *American Airlines, Inc.*).

Treaties—Interpretation of—Principles and Rules of—Relevance of Conduct of Parties Subsequent to Conclusion of Treaty.

See p. 257 (*United States* v. *Robertson*).

Treaties—Interpretation of—Principles and Rules of—Treaty concerning International River—Rights of Individuals Under—Construction of Treaty Consistently with Municipal Law—Preference for such Construction—The Law of the United States of America.

See p. 572 (*Hidalgo County Water Control and Improvement District No. 7 et Al.* v. *Hedrick et Al.*).

Treaties—Interpretation of—Principles and Rules of Interpretation—Existence of—Avoidance of Absurdity—Intention of the Parties—Comparison of Texts in Different Languages—Conformity with Rules of International Law—Literal Interpretation —Restrictive Interpretation.

See p. 867 (*Re Competence of Conciliation Commission*).

Treaties—Interpretation of—Principles and Rules of—Interpretation by Reference to Subsequent Treaty of Similar Kind.

See p. 235 (*Borga* v. *Russian Trade Delegation*).

Treaties—Interpretation of—Principles and Rules of—Interpretation by Reference to Decision of Another Conciliation Commission —Meaning of " injury or damage suffered as a result of the war ".

See p. 301 (*Currie Claim*).

Treaties—Interpretation of—Principles and Rules of—Literal Interpretation.

See p. 966 (*Grant-Smith Claim*).

Treaties—Interpretation of—Principles and Rules of—Literal Meaning of Treaty—Intention of the Parties—" Illogical or Irrational " Interpretation.

See p. 972 (*Gassner Claim* (*The M.Y.Gerry*)).

Treaties—Interpretation of—Principles and Rules of—" Ordinary Meaning "—" Natural Meaning "—Interpretation by Reference to Decision of Another Tribunal—Interpretation by Reference to Contemporary Memorandum Submitted by Signatory State.

See p. 945 (*Armstrong Cork Company Claim*).

Treaties—Interpretation of—Principles and Rules of—Construction of Definition Clauses—Comparison of Texts in Various Languages—Interpretation by Reference to Grammatical Construction—Reference to Logic.

See p. 340 (*Carnelli Claim*).

Treaties—Interpretation of—Principles and Rules of—Construction in the Light of the Facts of the Case.

See p. 330 (*Hoffman Claim*).

Treaties—Interpretation of—Principles and Rules of—Interpretation by " linguistic analysis "—*Travaux prèparatoires.*

See p. 959 (*Shafer Claim*).

Treaties—Interpretation of—Principles and Rules of—Interpretation by Reference to *ratio legis*.

See p. 642 (*Feldman Claim*).

Treaties—Interpretation of—Principles and Rules of—Interpretation by Reference to Intention of the Draftsman—Literal Interpretation—" The spirit of the treaty "—Restrictive Interpretation—Interpretation by Reference to Principles of International Law —Interpretation by Reference to Authoritative Writings.

See p. 443 (*Mergé Claim*).

Treaties—Interpretation of—Principles and Rules of—Comparison with Wording of Earlier Clause in Same Treaty.

See p. 317 (*Re Rizzo and Others* (*No.* 3)).

Treaties—Interpretation of—Principles and Rules of—Intention of the Parties.

See p. 317 (*Re Rizzo and Others* (*No.* 3)).

III.—Bilingual Treaties

Treaties—Interpretation of—Bilingual Treaties.

See below (*Koninklijke Hollandsche Lloyd* v. *Dampskibsselskabet Torm A.S.*).

IV.—Consideration of Preparatory Work

Treaties—Interpretation of—Preparatory Work—Proceedings of the Conference which Adopted the Treaty—Bilingual Treaties.

KONINKLIJKE HOLLANDSCHE LLOYD *v.* DAMPSKIBSSELSKABET TORM A.S.

Holland, District Court of Rotterdam. June 24, 1955.

THE FACTS.—On January 14, 1951, a collision occurred in the port of Montevideo (Uruguay) between the Netherlands vessel *Salland* and the Danish vessel *Herdis* which, respectively, were owned by plaintiff and defendant in this case. The *Salland* was damaged. Since the date of the collision the *Herdis* had never come into Netherlands jurisdiction. On August 18, 1953, the plaintiff, on account of the damage suffered in the collision, obtained an attachment of another vessel owned by the defendant which was then moored in the port of Rotterdam. On August 25, 1953, the plaintiff served a summons upon the defendant for compensation. The attachment was withdrawn once the defendant had put up a bank guarantee and the parties agreed to bring the matter before the Court. The defendant argued that the plaintiff's claim had lapsed by virtue of Article 7, para. 1, of the Brussels Convention of September 23, 1910—reproduced in the *Held* below—for the Unification of Certain Rules of Law with respect to Collisions between Vessels. The plaintiff contested this plea by invoking (in a manner which appears in the *Held*) paragraphs 3 and 4 of that Article, as well as the last paragraph of Article 742 of the Netherlands Commercial Code which reads as follows:

> " If the claimant is domiciled in the Netherlands or if the principal seat of his business is situated there the prescription will not begin until he has an opportunity to attach the ship in the Netherlands for the purpose of securing his claim."

Held: that the plaintiff's claim for damages had lapsed and that the action must fail.

The Court said: " The Convention applies directly to the present collision between a Netherlands and a Danish vessel because it falls within the category of public international law agreements which bind directly the subject of Netherlands law.[1] Article 7 of the Convention reads:

> ' Les actions en réparation de dommages se préscrivent par deux ans à partir de l'événement.
>
> ' Le délai pour intenter les actions en recours admises par l'alinéa de l'article 4 est d'une année. Cette Prescription ne court que du jour de paiement.
>
> ' Les causes de suspension et d'interruption de ces prescriptions sont déterminées par la loi du tribunal saisi de l'action.
>
> ' Les Hautes Parties contractantes se réservant le droit d'admettre dans leurs législations, comme prorogeant les délais ci-dessus fixés, le fait que le navire défendeur n'a pu être saisi dans les eaux territoriales de l'Etat dans lequel le demandeur a son domicile ou son principal établissement.'[2]

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[1] This sentence refers to a traditional rule of Netherlands constitutional law according to which a self-executing treaty is directly binding upon the subject without any " transformation " into Netherlands law by means of an Act of Parliament being necessary. For many years this rule was purely "judge made", since neither the Constitution nor any Act of Parliament said anything about it. It was only in 1953 that this rule was expressly formulated in the Constitution: see *infra*, p. 637, n. 1.]

[2] *Translation*: Claims for damages are barred by prescription two years after the event. The period for lodging the appeal as provided in the sub-paragraph of Article 4 is one year. That period runs only as from the date of payment. The causes of suspension or interruption of the period of prescription are determined by the law of the Tribunal before which the action has been brought.

The High Contracting Parties reserve the right to admit in their legislation, as a reason for prolonging the above periods of delay, the fact that the defendant vessel could not be seized in the territorial waters of the State in which the plaintiff has his domicil or his principal establishment.]

From this Article it follows that the principal rule of the Convention on prescription is that claims for damages arising from a collision governed by the Convention lapse two years after the date of the collision. As far as concerns the causes which may suspend or stop such prescription, Article 7 of the Convention refers to the laws of the land the Courts of which are " saisi de l'action " for damages. In Netherlands law the reasons for interrupting prescription in the sense of Article 7 have been laid down in Articles 2023–2029 of the Civil Code and for putting an end to it in Articles 2015–2022 of that same Code. Article 7, para. 4, of the Convention empowers the High Contracting Parties to incorporate in their legislation the fact defined as " comme prorogeant les délais ci-dessus fixés ". The Netherlands translation of Article 7 calls this fact a cause for *suspension* (" *opschorting* "). It is, however, the French text of the Convention which is to be considered as the authentic text, and not the Netherlands translation. The correct translation of the French " proroger " in this connection cannot be the Netherlands " opschorten " (to suspend), but must be " verlengen " (to extend). Article 7, para. 4, of the Convention does not allow the Contracting Parties to attribute to the fact mentioned in that provision in their national legislation the character of a reason suspending the prescription, but rather of a reason extending the term of prescription mentioned in Article 7, para. 1.

" This interpretation of Article 7 is confirmed by the history of the Convention as it appears in the official records of the sessions of the International Conference for Maritime Law held in Brussels in 1905, 1909 and 1910. These records prove that at the time of the plenary session of the Conference of February 24, 1905, the present Article 7 of the Convention only provided for those subject-matters which now have their places in paras. 1 and 3 of that Article (*Official Records*, 1905, p. 28). At the plenary session of October 20, 1905, the Belgian delegate, who was also Rapporteur, proposed that a provision be added to Article 7 which in the present text of the Convention became para. 4 of Article 7. He explained his proposal by pointing out that its object was to meet the British objections to Article 7. These objections were that British law did not recognize prescription in the case of claims for damages as a result of a collision (*Official Records*, 1905, pp. 118–119). On the agenda of the Conference of 1910 there was a French proposal to substitute the word " suspendant " for the word " prorogeant " in the final paragraph of Article 7. This proposal was explained as follows:

> " *Prorogeant* n'a pas semblé être le mot propre; *suspendant* paraîtrait répondre plus exactement à l'idée qui est exprimée dans cette disposition " (*Official Records*, 1910, p. 44).

During the plenary session of the Conference of September 19, 1910, the Rapporteur made the following statement:

> "A l'article 7, relatif à la prescription, il a été proposé de remplacer le mot "proproger" par le mot "suspendre". Mais, après explications, il a été reconnu qu'il valait mieux retenir le texte actuel en vue de bien marquer qu'il ne s'agissait point d'accorder, dans le cas dont question au paragraphe dernier de l'article, un nouveau délai de deux ans, mais simplement le temps nécessaire pour agir lorsque le navire défendeur se trouvait dans les eaux territoriales de l'Etat dans lequel le demandeur a son domicile ou son principal établissement. . . ." (*Official Records*, 1910, pp. 97–98).

It has obviously been the intention of the Netherlands Legislature to use in Article 742 of the Commercial Code the competence attributed to the Netherlands by Article 7, para. 4, of the Convention. The Legislature has, however, deviated in an inadmissible way from that provision because it created as regards claims for damages as provided for in the Convention, next to the causes for suspension of prescription laid down in the Convention—which for the Netherlands have been defined in Articles 2023–2029 of the Civil Code—a new cause for suspension. By virtue of Article 65 [1] of the Constitution of the Kingdom, the provision of the last paragraph of Article 742 of the Commercial Code must therefore be held not to apply. In the present case there are no causes for suspending or stopping the prescription in the sense of the Civil Code. No other provisions but those of Article 7, para. 1, of the Convention can be held to apply. The collision having occurred on January 14, 1951, and the summons not having been served until August 25, 1953, the plaintiff's claim for damages must therefore be held to have lapsed."

[Report: *N.J.*, 1955, No. 713.]

[[1] Article 65 of the Netherlands Constitution of 1953 reads:

"Legislation within the Kingdom shall not apply if such legislation is contrary to [international] agreements which, pursuant to Article 66, have been promulgated either before or after such legislation has been enacted."

Article 66 reads:

"The law shall provide for rules as to the promulgation of [international] agreements. Such agreements are binding upon all persons provided they have been promulgated."

Both articles have since been amended. In the Constitution of 1956 they respectively read as follows:

Article 65: "Provisions of [international] agreements which as to their effect can be binding upon all persons possess such binding force upon their promulgation. The law shall provide for rules as to the promulgation of [international] agreements."

Article 66: "Legislation within the Kingdom shall not apply if its application is contrary to provisions of [international] agreements which are binding upon all persons and which have been concluded before or after such legislation has been enacted."]

Treaties—Interpretation of—Preparatory Work—Text Imperfectly Reflecting Intention of Parties as shown in *Travaux Préparatoires* —Principle of Good Faith.

KARLSRUHER PARFÜMERIE- UND TOILETTENSEIFENFABRIK F. WOLFF & SOHN G.m.b.H. *v.* KALODERMA A.-G.

Switzerland, Federal Tribunal. June 14, 1955.

THE FACTS.—The appellant Company, whose principal place of business was in Germany, had from 1911 until 1935 a branch in Basle, Switzerland, for the purpose of marketing its cosmetic products in Switzerland. In this connection it had entered a number of trade-marks, and in particular that of " Kaloderma ", in the Swiss register. In 1935 the Swiss branch was transformed into a limited liability company under the name of Kaloderma A.-G.; its entire share capital, however, remained in the hands of the parent company, and it was able to use the trade-marks originally registered by the parent company.

In 1945 the rights of the appellant Company in Kaloderma A.-G. were blocked as being German property. In 1948 the shares were sold by auction. The Office for the Settlement of Claims (*Verrechnungsstelle*) informed the purchaser that he had acquired, together with the shares, all trade-mark rights connected with Kaloderma A.-G., that he could have a number of trade-marks, entered in the name of the original owner, struck off the international register in respect of Swiss territory, and that he could register these trade-marks in Switzerland in his own name. This was done in December 1950. In October 1951 the appellant Company registered a number of trade-marks in Switzerland corresponding to those of Kaloderma A.-G. It also established a new company in Switzerland for marketing its products there, under the description, in particular, of " Kaloderma ". Kaloderma A.-G. sued for infringement of its trade-mark rights. The appellant Company counterclaimed on the ground of illegal transfer of their original trade-mark rights.

The Commercial Court of the Canton of Zürich held that the transfer of the original trade-mark rights could not be contested, by reference to Article 10 of an Agreement between the Federal Republic of Germany and Switzerland of August 26, 1952. That Article provides in para. 1 as follows:

> " The Federal Republic of Germany will not raise any objections of any kind on its own behalf or that of its nationals against the transformation of German assets in Switzerland undertaken by Switzerland in pursuance of the decision of the Federal Council of February 16, 1945 . . . "

The Court took the view that this provision must be interpreted to mean that the Federal Republic of Germany renounced, on behalf of its nationals, all possibility of instituting claims relating to the transformation of German assets.

The appellant Company now appealed to the Federal Tribunal against that decision. It was contended on its behalf that the relevant provision of the Agreement between the Federal Republic of Germany and Switzerland must be interpreted to mean merely that the Government of the Federal Republic would refrain from pressing the claims of its nationals through the diplomatic channel.

Held: that the appeal must be rejected. The interpretation which the appellant Company sought to place on the contested provision, and which was based on the literal text, was irreconcilable with the principle of good faith and credit in view of the light thrown on the intention of the parties by the *travaux préparatoires*.

The Court said: " The interpretation placed by the appellant Company on the provision, which is exclusively based on the actual text, is irreconcilable with good faith and credit. The principle of good faith and credit applies also in international law, in the conclusion, interpretation and application of international treaties (see Guggenheim, *Traité*, p. 142; Verdross, *Völkerrecht*, 2nd ed., pp. 24 ff.).

" It was Switzerland which requested the inclusion of the contested provision in the Agreement and made its acceptance the essential condition for the release of German assets. This appears clearly from the German Memorandum of December 6, 1952, where it is stated:

> ' The renunciations and obligations imposed by Article 10 on Germany are the price without which it would have been impossible to obtain the release of German assets by Switzerland. It was therefore necessary to agree to it. . . . '

" Article 10 is thus without doubt one of the principal provisions of the Agreement, and its acceptance by Germany was the price for the release of German assets. The reason why Switzerland attached so much importance to the inclusion of that provision in the Agreement is also clear: it had in mind the transformation of assets which had been or might still be carried out where it had been or might be necessary to prevent the diminution in value of blocked assets. That these transformations, to a total amount of some 35 million francs, determined the position of Switzerland, is confirmed not only by the final text of Article 10, but also by the explanation of the origin of the contested provision given on September 15, 1953, by the Office for the Settlement of Claims (*Verrechnungsstelle*). According to this explanation, Switzerland wanted to prevent all discussion of the transformation of assets and any challenge thereof, both for its own protection and for the protection of persons who had acquired assets so transformed. It insisted on this, and Germany had to accept the provision even though it regarded it as a ' painful sacrifice '.

" In the first draft of the Agreement the provision, corresponding to its purpose, read as follows: ' Germany and its nationals recognize the legality of the transformation of assets.' This drafting clearly and unequivocally excluded all objection on the part of both the German State and its individual nationals; what is recognized to be legal cannot be alleged before any tribunal to be illegal. This wording was altered because the German Government refused to ' recognize ' the legality of the transformation of assets. However, the German Government declared in the text proposed by it, and included in the Agreement, that the Federal Republic would not raise *any objections of any kind on its own behalf or that of its nationals* against the transformation of assets. This text, which was proposed by the German representative for ' internal political reasons ', admittedly no longer formally admits the legality of the transformation of assets, but it comports the practical consequence of such recognition, namely, the unlimited renunciation of objections *of any kind*. The position is similar to that of a compromised action: one party undertakes to do something ' without thereby recognizing the legal contention of the other party '. It is unnecessary to decide whether the final drafting really constitutes a weakening of the original text in form. Objectively this is certainly not the case, seeing that the renunciation of ' objections of any kind ' seems to mean more than mere ' recognition of the legality of the transformation of assets '. From the practical point of view the new drafting is more comprehensible, and gives clear expression to the content and purpose of the provision.

" The same can admittedly not be said of the replacement of the original wording by the new text from the point of view of its subjective scope, at any rate at first sight. If one looks merely at the letter of the new text, as does the appellant Company, one is tempted to conclude that only the Federal Republic is under an obligation not to raise any objections, on its own behalf or that of its nationals, against the transformation of assets, while its nationals remain free to do so on their own behalf, for it appears that the renunciation of objections by the State was not made at the same time with effect binding on nationals. However, according to the principle of good faith and credit, the appellant Company cannot rely on this somewhat unsatisfactory text. For this conclusion it is not necessary to refer to the letter of the Office for the Settlement of Claims of September 15, 1953, concerning the origin of Article 10, para. 1, which was signed also by the Swiss representative in the negotiations, and according to which the German representative had expressly declared that the new wording did not change or weaken either the meaning or the purpose of the original text. It appears clearly from all the circumstances, and in particular from various facts admitted also by Germany, that the new text has the meaning placed upon it by the lower Court.

" The first point in support of this view is that Article 10, para. 1, was undoubtedly intended to be all-embracing. A renunciation by a Government with effect binding on its nationals is not a rarity in modern treaties; another example of it is provided by paragraph 4 of the same Article. Moreover, the provision could not serve the purpose recognized by both sides if its effect were limited to international relations, *i.e.*, if it were interpreted to mean that Germany had renounced only its right of diplomatic intervention on behalf of its nationals. If it had had that meaning, the use of the phrase ' objections *of any kind* ' would be inexplicable. What Switzerland, according to both parties, sought to prevent once and for all was not only a subsequent diplomatic step by the German Government concerning the transformation of assets, but the obvious and therefore likely attempt of German individuals and companies affected by these measures to contest any transformation of business undertakings and other commercial assets which had been to their disadvantage with reference either to the admissibility of its effect, or with reference to its extent or to the procedure followed. The intention was to prevent such attempts by declaring both administrative complaints and civil actions to be inadmissible; the former for the protection of the administration, and, in particular, of the Office for the Settlement of Claims, the latter primarily for the protection of purchasers of German assets and undertakings. The contention of the appellants that there was no reason for Germany to renounce the right of appeal of its nationals is thus clearly not borne out by the facts.

" The lower Court referred in support of this interpretation to the Message of the Federal Council of August 29, 1952, as well as to the German Government's Memorandum of December 6, 1952, to the Federal Assembly. It correctly emphasized that the German Memorandum clearly stated and underlined the fact that Article 10 constituted an extensive concession on the part of Germany, comporting sacrifices, which had been the price for the release of German assets in Switzerland. These explanations only make sense if Article 10, para. 1, is interpreted as it was by the lower Court. It confirms that the German State not only renounced its own right of diplomatic objection, but also renounced in the name of and with effect binding on its nationals all possible private law objections. And the Swiss Message, in referring to Article 10, states: ' The German Federal Republic renounces on behalf of itself and on behalf of *its nationals* all objections against the transformation of assets. . . .'

" This passage of the Message does not admit of any interpretation other than the one arrived at in this decision. The German Government was in possession of the Swiss Message at the time of drafting its Memorandum, and was thus aware of the Swiss conception of Article 10 which, according to the German Memorandum itself, was a major provision accepted by Germany as the price for the release of the blocked German assets. The German Government expressed no reservations as to the statement of the Swiss Message, either directly or in its Memorandum. Faith and credit would have required it to do so, and it would no doubt have done so, if the Swiss statement had not corresponded to the intention of both Governments parties to the Agreement. This constitutes a further, conclusive, confirmation of the foregoing interpretation of Article 10, para. 1, of the Agreement."

[Report: *Arrêts du Tribunal Fédéral Suisse*, 81 (1955), II, p. 366.]

V.—Miscellaneous

Treaties — Interpretation of — Miscellaneous — Peace Treaties — Meaning of Phrase " have been treated as enemy "—Article 78 of Peace Treaty with Italy, 1947.

Feldman Claim.

Italian-United States Conciliation Commission. December 1954.

(Matturri, Sorrentino, Sandström.)

The Facts.—The Italian Royal Decree of July 8, 1938 (hereinafter called " the War Law "), gave certain powers to the Executive in case of war. Article 3 of the War Law defined those persons who were to be deemed enemies. Paragraph 3 of that Article defined as enemy subjects " stateless persons who may at any time have been in possession of the nationality of an enemy State or were born of parents who are or may have been in possession of enemy nationality or who reside in enemy territory ". Article 295 of the War Law contained in its first two paragraphs the following provisions:

" Property belonging to the enemy State which is not subject to confiscation under Articles 292 and 293, and property belonging to persons of enemy nationality can be sequestrated.

" Sequestration under the preceding paragraph may also be ordered in the case of property in respect to which there is reason to suspect that it belongs to enemy nationals, even though it appears to be owned by persons of a different nationality."

Under Article 296, sequestration was to be decreed by the Prefect, who was to appoint a sequestrator, and provision was made, *inter alia*, for the sale of the sequestrated property.

On April 12, 1943, the Ministry of Exchange and Currencies wrote to the Director of the " Magazzini Generali " (General Warehouses) at Trieste a letter which stated that the government departments concerned had agreed to regard the " numerous lots of household goods owned by Jews emigrated from Germany or other countries who now reside in enemy countries " then lying in the Free Port of Trieste as of suspected enemy ownership. The General Warehouses, private warehouses and forwarding agents of Trieste were therefore invited to report to the Prefecture household effects lying in their depots. By its letter dated May 6, 1943, the same Ministry requested the Prefecture of Trieste to order the sequestration of the effects owned by Jews which had been reported to the Prefecture. The latter accordingly on May 11, 1943, issued a Decree the preamble of which stated that it was "being issued on the basis of the War Law and of laws subsequently enacted which established additional rules with respect to the treatment of enemy property during the war, and 'considering that the chattels belonging to emigrated Jews and deposited in the local "Magazzini Generali" are to be considered as enemy property' ". The Decree subjected to sequestration "the cases and trunks containing chattels belonging to emigrated Jews", specified in a list appended to the Decree, lying in the "General Warehouses", and appointed a sequestrator.

On May 19, 1943, the Prefecture wrote to the private warehouses in Trieste inviting them to submit to the Prefecture lists of the lots of household effects owned by or suspected to be owned by Jews emigrated from Germany or other countries, lying in those warehouses. On May 22, 1943, the Sequestrator appointed under the Decree of May 11, 1943, himself wrote to the private warehouses notifying them that all household effects owned by Jews who had emigrated to enemy countries had been placed under sequestration and that he had been appointed Sequestrator. In fact, no steps were taken by the Sequestrator to implement the Decree of May 11, 1943, except to prepare a list of some of the Jewish property concerned.

On September 3, 1943, Italy surrendered and on October 1, 1943, the German High Commission for the Adriatic Zone assumed the civil and public authority in that Zone and on January 12, 1944, issued an Order for the clearing of the Free Port. Househood goods in store were to be removed and those owned by Jews were sequestrated.

In the meantime, the Government of the Italian Socialist Republic, which was established in Northern Italy by the Fascist régime after its fall in Rome and after the Armistice of September 3, 1943, had enacted certain laws which declared that persons who belonged to the Jewish race were aliens and during the war were enemy aliens.[1]

The claimant in this case was born in Russia in 1881. After the First World War he settled in Germany, where a passport was issued to him by the Government-in-Exile of the Ukrainian Republic. In 1932 he moved to Czechoslovakia. In 1939, after the Germans had set up the Protectorate of Bohemia and Moravia, the claimant emigrated to the United States of America, receiving on his departure a "*Fremdenpass*" from the German authorities. He settled in the United States of America, of which he became a national in 1946. When he left Czechoslovakia, the claimant sent his household and personal effects to Trieste for transshipment to the United States, but they were not in fact forwarded. The property remained in a private warehouse in Trieste and on June 7, 1944, was seized by the German authorities under the Order of January 12, 1944.

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[1] Cf. the *Bacharach Claim*, *infra*, p. 646.

The claimant now submitted a claim under Article 78 of the Treaty of Peace with Italy of 1947 for compensation for loss and damage sustained in Italy during the war. On behalf of the Italian Government it was contended that the claimant was never treated as enemy under the laws in force in Italy during the war and that therefore Article 78, para. 9(*a*), second part, of the Treaty of Peace was not applicable to him.

Held: that the claim must succeed. In the circumstances of this case Feldman had been treated as enemy under the laws in force in Italy during the war.

The Commission said: "As to the admissibility of the claim, Article 78 requires that the claimant be a 'United Nations national'.

"It is agreed that the claimant does not fulfil this requirement by reason of his United States nationality, because in order to qualify under para. 9(*a*), first part, of that Article, he should have had this status on September 3, 1943, the date of the Armistice with Italy, and this claimant did not acquire United States nationality until February 27, 1946.

"The question then is whether the second part of para. 9(*a*) is applicable. This part reads as follows:

> 'The term "United Nations nationals" also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy.'

The first point to be examined in this respect is whether for the application of this second part of para. 9(*a*) it is required that the claimant have been treated as enemy before September 3, 1943. In the opinion of the Commission this is not necessary.

"It is to be noted that the second part [of para. 9(*a*)] was drafted as a separate provision without reference to the first part. If it had been intended to establish the same limitation in the second part as in the first part, there would have been greater reason to have mentioned the date of September 3, 1943, because in the text of the second part of para. 9(*a*) reference is made to the 'laws in force in Italy *during the war*'.

"Nor does the *ratio legis* for the limitation contained in the first part apply to the second part. The *ratio legis* of the first part is not that the Italian Government is not to be held responsible for damage which may have occurred after the Armistice. It is, instead, a limitation on the number of potential claimants, obviously so limited because it was not considered equitable that the number of potential claimants should have been increased after the date of the Armistice, since such increase could only be brought about by international acts of the individuals themselves (*e.g.*, naturalization, or organization of a corporation, in one of the victorious States).

" The situation is different under the second part, where the qualification as United Nations national coincides with the damaging treatment as enemy. Under these circumstances it is necessary to examine whether the claimant has been treated as enemy under such conditions as to engender the responsibility of the Italian Government.

" In previous Decisions of the Commission it has been stressed that the expression ' have been treated as enemy ' envisages something more than that a person has been considered as enemy under the laws in force. In Decision No. 22 of February 19, 1954, in the *Hilde Gutman Bacharach Case*,[1] this is expressed in the following way:

' To be treated as enemy necessarily implies on the one hand that there be an actual course of action on the part of the Italian authority . . . , and on the other hand that said course of action be aimed at obtaining that the individual who is subjected to it be placed on the same level as that of enemy nationals.'

" Such action has been deemed by the national Representatives on the Commission, in cases similar to the one under consideration, to have taken place not only when the lift van containing the property was sequestrated (Decision No. 13, of January 9, 1953, *Hilde Menkes Case*[2]), but also when the warehouse firm had delivered to the Sequestrator appointed by the Prefect's Decree of May 11, 1943, a list of Jewish property lying in the private warehouse, and that property, including the claimant's property, was included in the list of Jewish property drawn up by the Sequestrator (Decision No. 14, of March 30, 1953, *Alexander Bartha Case*[3]).

" It is true that in the case under review there is no evidence that such a list was delivered by [the claimant's forwarding agents] to the Italian authorities prior to the Armistice, and it is true that the claimant's name is not included among those listed by the Sequestrator.

" On the other hand, it cannot be overlooked that by the letter of the Ministry of Exchange and Currencies of April 12, 1943, its Order to the Prefect of Trieste by letter of May 6, 1943, and by the Prefect's circular letter of May 19, 1943, to the private warehouse firms, including Fratelli Uccelli, action had been taken by the Italian authorities which was directed towards the sequestration of Jewish property in the Port of Trieste, and that thereby for all practial purposes the claimant had lost control over his property, even if at the time of the Armistice the measures had not been completed by a formal sequestration decree with regard to the specific property involved in this claim. This final measure was taken almost immediately after the Armistice: the formal sequestration by the Order of the German High Commissioner then exercising the civil authority in the area.

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[1] See *infra*, p. 646.]

[2] See *supra*, p. 389.]

[3] See *supra*, p. 391.]

" That these last-mentioned measures were taken under a régime which had replaced the regular Italian Government and which was not recognized by it does not alter the fact that these measures were taken in pursuance of the policy upon which the regular Government had previously embarked under the authority of the Italian War Law and which was followed by administrative measures.

" Without prejudice to the question whether, in general, in order to entitle a person to claim under Article 78, para. 9(*a*), second part, account can be taken of acts performed by the authorities in that area of Italy occupied at the time by the Germans, it must be held, under the circumstances of this case, that Feldman had been treated as enemy under the laws in force in Italy during the war.

" The Commission consequently finds the claim admissible."

[Report: *Collection of Decisions*, vol. 2, Decision No. 28.]

Note.—The Italian representative appended a " statement of the reasons for his dissent " from this decision, dated January 10, 1955.

Treaties—Interpretation of—Miscellaneous—Peace Treaties—Performance of—Restitution and Reparation—Meaning of " treated as enemy "—Whether Existence of Anti-Jewish Legislation Constitutes Treatment as Enemy of Jews Not Actually Affected Thereby—Ordinary Meaning of Words.

Bacharach Claim.

Italian-United States Conciliation Commission. February 19, 1954.

(Sorrentino, Matturri.)

The Facts.—The claimant was a United States national, having been naturalized in 1946. Previously, she had been stateless, having lost her German nationality under German anti-Jewish legislation. In 1934, she had settled in Italy. In September 1938, the Royal Decree No. 1381 of that year prohibited the residence in Italy of foreign Jews. The claimant thereupon moved first to France and later to the United States, leaving her effects in store in Milan, where they were destroyed in an air raid in August 1943. She now claimed compensation under Article 78, para. 9(*a*) (second paragraph), of the Treaty of Peace with Italy of 1947, for the loss of her property.

On behalf of the claimant it was contended: (a) that the claimant, who was stateless by virtue of the German nationality laws, was regarded as an enemy in Italy under the Italian War Law of July 8, 1938; (b) that the Italian Government's anti-semitic legislation established a régime according to which Jews were in fact regarded as enemies of the Italian State; and (c) that this was even more evident in the anti-semitic laws of the Republic of Salò,[1] laws which must be regarded as being in force in non-liberated Italy, and therefore laws in Italy within the meaning of Article 78 of the Peace Treaty.

On behalf of the Italian Government, it was contended: (1) that the claimant was not treated as an enemy under the laws in force in Italy during the war, because no specific and concrete discriminatory measure was taken against her; (2) that the anti-semitic legislation of 1938 and thereafter was in actual fact never applied to the claimant and that in any event this legislation did not provide for the treatment of Jews as enemies and hence could not be brought within the meaning of para. 9 of Article 78 of the Peace Treaty; and (3) that the so-called laws of Salò could not have been applied against the claimant, who was no longer in Italy when they were passed, or against her property, which had by then been destroyed: moreover, the acts of the Italian Socialist Republic could not be regarded as " laws in force in Italy during the war ".

Held: that the claim must be rejected. The claimant had not been treated as an enemy under the laws in force in Italy during the war.

The Commission said: " It is not disputed that, as the claimant acquired the nationality of the United States of America only on December 3, 1946, she cannot be considered to be a United Nations national within the meaning of Article 78, paragraph 9, letter *a*, first paragraph, of the Treaty of Peace.

" The dispute involves the applicability of the second part of the cited provision which reads textually as follows:

' The term " United Nations nationals " also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy.'

" The Commission cannot accept the argument of the Agent of the United States of America that the word ' treated ' in the English version and the word ' traitées ' in the French version were intended by the framers of the Treaty to mean merely ' considered ' or ' regarded ', which are, at the best, secondary or tertiary meanings of the words ' treat ' and ' traiter '. The Commission agrees with the Italian Agent that the more common meaning of the words ' treat ' and ' traiter ' is ' to act towards someone or something in a given manner '. Moreover, the verb form used in the English version is the compound form ' have been treated '; if the meaning ' considered ' or ' regarded ' had been intended by the framers of the Treaty, would it not have been more suitable to use the form ' were treated ', indicating continued action, rather than the more decisive, more concrete past perfect ? The verb tense used in the English version supports the argument of the Italian Agent that the notion of concrete specific action is implicit in the verb ' treated '.

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[1] *I.e.*, the Italian Socialist Republic, set up in Northern Italy between 1943 and 1945.

" The Commission fails to perceive any reason why the framers of the Treaty would have used the words ' treated ' and ' traitées ' if they had intended to mean ' considered '. To adopt the construction urged by the Agent of the United States of America would be to extend the ordinary meaning of ' treated ' and ' traitées ' beyond reasonable limits.

" To be treated as enemy necessarily implies on the one hand that there be an actual course of action on the part of the Italian authority (and not an abstract possibility of adopting one), and on the other hand that said course of action be aimed at obtaining that the individual who is subjected to it be placed on the same level as that of enemy nationals.

" [The claimant] left Italy after the enactment of Royal Decree Law No. 1381 of September 7, 1938, and in compliance with the same, and therefore a long time before the outbreak of war; her property, which remained in Italy, was neither then nor later subjected to sequestration or to other measures of control.

" Even admitting that said decree law forced the claimant to leave Italy and therefore was a measure taken against her, it is certain that the measure did not constitute ' treatment as enemy '. The racial legislation enacted, beginning in 1938, by the Fascist régime was certainly inhuman and barbarous, but it was not legislation enacted within the framework of a state of war, as the term is used in international law (State, or national of a State, with which one is at war). Article 78 refers to ' enemy ' with a more definite meaning, that is, in the sense that an individual received the same treatment he would have received had he been a national of one of the States with which Italy was at war.

" The Agent of the Government of the United States of America refers also to the provisions of Article 3 of the Italian War Law which declares that stateless persons residing in enemy countries are considered enemy nationals; but this provision contains an abstract statement which is not sufficient in itself alone to constitute treatment as enemy; this provision could become important only in the event that it were the basis for any restrictive measure that may have been taken against the claimant or her property, which does not seem to be the case.

" Finally, neither do the racial laws of the Salò Republic have any bearing on the claimant and this is so because, assuming, without here deciding, that the laws of the Salò Republic were ' laws in force in Italy during the war ', the laws of the Salò Republic were never applied either to the claimant or to her property. The claimant was outside of Italian territory at the time of the Salò Republic and her property had already been destroyed (August 12/13, 1943) at the time of the promulgation of the laws and programs of the Salò Republic (beginning November 18, 1943). Therefore, concrete treatment as enemy under the laws of the Salò Republic was impossible as regards the claimant and her property."

[Report: Unpublished (Decision No. 22).]

Treaties—Interpretation of—Miscellaneous—Meaning of Words " patent misconstruction of the Treaty ".

See p. 750 (*Government of the Kingdom of the Netherlands* v. *The High Authority*).

Treaties—Interpretation of—Miscellaneous—Provisions in Derogation of Rules of International Law.

See p. 443 (*Mergé Claim*).

Treaties—Interpretation of—Miscellaneous—Statement of Executive Department—The Law of France.

See p. 478 (*In re Bertrina*).

Treaties—Interpretation of—Miscellaneous—Peace Treaty—Jurisdiction of Conciliation Commission Set Up under.

See p. 867 (*Re Competence of Conciliation Commission*).

Treaties—Interpretation of—Miscellaneous—Peace Treaty—Restitution and Reparation Provisions.

See p. 953 (*Beaumont Claim*).

Treaties—Interpretation of—Miscellaneous—Peace Treaty—Restitution and Reparation Provisions.

See p. 972 (*Gassner Claim* (*The M.Y. Gerry*)).

Treaties—Interpretation of—Miscellaneous—Peace Treaty—Restitution and Reparation Provisions—Whether Measures Taken against Property Discriminatory.

See p. 301 (*Currie Claim*).

Treaties—Interpretation of—Miscellaneous—Peace Treaty—Restitution and Reparation Provisions.

See p. 966 (*Grant-Smith Claim*).

Treaties—Interpretation of—Miscellaneous—Peace Treaties—Restitution Provisions.

See p. 964 (*Rosasco Claim*).

E—SPECIAL KINDS OF TREATIES

II.—Peace Treaties

Treaties—Special Kinds of—Peace Treaties—Nature of.

See p. 867 (*Re Competence of Conciliation Commission*).

F—MISCELLANEOUS

Treaties—Miscellaneous—Rights of Individuals under—Waiver of—Necessity for Express Waiver.

See p. 972 (*Gassner Claim* (*The M.Y. Gerry*)).

Treaties—Miscellaneous—Lend-Lease Agreement—Transfer of Property to Government Agency under Agreement—Physical Delivery of Property to Private Company—Purchase of Property from Government Agency—Whether Purchaser Entitled to Claim Delivery from Private Company—Displacing Presumption of Article 2279 of French Civil Code—The Law of France.

See p. 980 (*Baechler* v. *Société Lorraine Aciéries de Rombas-Fau*).

Treaties—As Source of International Law.

See p. 533 (*Lagos* v. *Baggianini*).

PART IX

INTERNATIONAL ORGANIZATION AND ADMINISTRATION

B—THE UNITED NATIONS

II.—The General Assembly

United Nations — General Assembly — Procedure of — Voting Procedure—"Important Questions" within the Meaning of Article 18, paragraph 2, of the Charter—Decisions of General Assembly on Questions Relating to Reports and Petitions Concerning Territory of South-West Africa—" Degree of Supervision " of General Assembly in the Matter of Territory of South-West Africa—Whether a Matter of Procedure—Supervision Conforming " so far as possible " with Supervision Exercised by the League of Nations—Whether Implying Continuation of Unanimity Rule Obtaining under Covenant of the League—Whether Voting Procedure under Article 18, paragraph 2, Consistent with Correct Interpretation of Principle that Degree of Supervision of General Assembly Shall Approximate So Far as Possible to That of League of Nations—Interpretation of Previous Advisory Opinion of the Court.

VOTING PROCEDURE ON QUESTIONS RELATING TO REPORTS AND PETITIONS CONCERNING THE TERRITORY OF SOUTH-WEST AFRICA.

International Court of Justice. Advisory Opinion of June 7, 1955.

(Hackworth, President; Badawi, Vice-President; Guerrero, Basdevant, Winiarski, Zoričić, Klaestad, Read, Hsu Mo, Armand-Ugon, Kojevnikov, Sir Muhammad Zafrulla Khan, Lauterpacht, Moreno Quintana, Cordova, Judges.)

THE FACTS (as stated by the Court).—" With a letter of December 2nd, 1954, filed in the Registry on December 6th, the Secretary-General of the United Nations transmitted to the Court a certified true copy of a Resolution 904 (IX) of the General Assembly of the United Nations of November 23rd, 1954, which was in the following terms:

' *The General Assembly,*

' *Having accepted,* by resolution 449 A (V) of 13 December, 1950, the advisory opinion of the International Court of Justice of 11 July 1950 with respect to South-West Africa,[1]

' *Having regard,* in particular, to the Court's opinion on the general question, namely, " that South-West Africa is a Territory under the international Mandate assumed by the Union of South Africa on 17

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[1] *I.C.J. Reports,* 1950, p. 128; *International Law Reports,* 1950, Case No. 16.]

December, 1920 ", and to the Court's opinion on question (*a*), namely, " that the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court ",

' *Having expressed*, in resolution 749 A (VIII) of 28 November 1953 its opinion " that without United Nations supervision the inhabitants of the Territory are deprived of the international supervision envisaged by the Covenant of the League of Nations " and its belief " that it would not fulfil its obligation towards the inhabitants of South-West Africa if it were not to assume the supervisory responsibilities with regard to the Territory of South-West Africa which were formerly exercised by the League of Nations ",

' *Having regard* to the opinion of the International Court of Justice that " the degree of supervision to be exercised by the General Assembly should not . . . exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations " and that " these observations are particularly applicable to annual reports and petitions ",

' *Having adopted*, by resolution 844 (IX) of 11 October 1954, a special rule F on the voting procedure to be followed by the General Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South-West Africa,

' *Having adopted* this rule in a desire " to apply, as far as possible, and pending the conclusion of an agreement between the United Nations and the Union of South Africa, the procedure followed in that respect by the Council of the League of Nations ",

' *Considering* that some elucidation of the advisory opinion is desirable,

' *Requests* the International Court of Justice to give an advisory opinion on the following questions:

' (*a*) Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950:

> " Decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations " ?

' (*b*) If this interpretation of the advisory opinion of the Court is not correct, what voting procedure should be followed by the General Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South-West Africa ? ' "

Held (unanimously): that Rule F was a correct interpretation of the Advisory Opinion of July 11, 1950.

The Court said: "... The General Assembly asks, in the first place, whether this Rule is a correct interpretation of the Advisory Opinion given by the Court on July 11th, 1950. This is the first question to be considered. The second question arises only in the event that the Court expresses the opinion that Rule F is not a correct interpretation of the Advisory Opinion of 1950.

" By Resolution 449 (V) A of December 13th, 1950, the Opinion of 1950 was adopted by the General Assembly as the basis for the supervision of the administration of the mandated Territory of South-West Africa. There followed prolonged and unfruitful negotiations between representatives of the Government of the Union of South Africa and an *ad hoc* Committee of the General Assembly.

" At the Eighth Session, the General Assembly, by Resolution 749 (VIII) of November 28th, 1953, established a Committee on South-West Africa. It was requested to:

> ' (*a*) Examine, within the scope of the Questionnaire, adopted by the Permanent Mandates Commission of the League of Nations in 1926, such information and documentation as may be available in respect of the Territory of South-West Africa;
>
> ' (*b*) examine, as far as possible, in accordance with the procedure of the former Mandates System, reports and petitions which may be submitted to the Committee or to the Secretary-General;
>
> ' (*c*) transmit to the General Assembly a report concerning conditions in the Territory taking into account, as far as possible, the scope of the reports of the Permanent Mandates Commission of the League of Nations;
>
> ' (*d*) prepare, for the consideration of the General Assembly, a procedure for the examination of reports and petitions which should conform as far as possible to the procedure followed in this respect by the Assembly, the Council and the Permanent Mandates Commission of the League of Nations.'

" Acting under this authority, the Committee on South-West Africa prepared two sets of rules. One set of rules relates to its own procedure, and to the examination of reports, petitions and other information concerning the Territory of South-West Africa. The procedure was designed to be analogous to that which was followed by the Permanent Mandates Commission under the League of Nations. Provision was made for obtaining the views of the Mandatory Power and for the submission of reports and observations by the Committee to the General Assembly. The other set of rules prepared by the Committee prescribed the procedure to be followed by the General Assembly in its consideration of the reports and observations of the Committee on South-West Africa. The rules covered such matters as reports, petitions, and private meetings, as well as the way in which decisions of the General Assembly with regard to reports and petitions were to be made, the last-mentioned matter being dealt with in Rule F.

" It appears that Rule F is part of a regime established by Resolutions of the General Assembly of November 28th, 1953, and October 11th, 1954, in which the expressed intention of the General Assembly was to conform to the Opinion of 1950.

" The scope of Question (*a*) is thus limited by the wording used and by the reference to the General Assembly's acceptance of the Opinion previously given by the Court. It is therefore essential that the Court should keep within the bounds of the question put to it by the General Assembly.

" In the question submitted to the Court there is a slight difference between the wording of the English and the French texts. The French version seems to express more precisely the intention of the General Assembly in submitting the matter to the Court for its Opinion. It asks whether Rule F corresponds to a correct interpretation of the previous Opinion. It refers generally to the previous Opinion, but the debates in the Fourth Committee and in the General Assembly indicate that the latter was primarily concerned with the question whether the rule as to the system of voting corresponds to a correct interpretation of the following passage:

> ' The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations.'

" At this stage consideration will be given to the first part of this passage, namely, the statement that ' The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System. . . .' The task of the Court is to establish the true meaning of this statement. The question is whether this statement may properly be construed as including the system of voting to be followed by the General Assembly.

" The function of supervision exercised by the General Assembly generally takes the form of action based on the reports and observations of the Committee on South-West Africa, whose functions are analogous to those exercised by the Permanent Mandates Commission. The words ' the degree of supervision ' relate to the extent of the substantive supervision thus exercised, and not to the manner in which the collective will of the General Assembly is expressed.

" Accordingly, these words, if given their ordinary and natural meaning, should not be interpreted as relating to procedural matters. They relate to the measure and means of supervision. They comprise the means employed by the supervising authority in obtaining adequate information regarding the administration of the Territory and the methods adopted for evaluating such information, maintaining working relations with the Mandatory, and otherwise exercising normal and customary supervisory functions. The statement that the degree of supervision to be exercised by the General Assembly should not exceed that which was applied under the Mandates System means that the General Assembly should not adopt such methods of supervision or impose such conditions on the Mandatory as are inconsistent with the terms of the Mandate or with a proper degree of supervision measured by the standard and the methods applied by the Council of the League of Nations.

" Consequently, the action of the General Assembly in adopting Rule F, which prescribes the two-thirds majority rule, cannot be regarded as relevant to the ' degree of supervision '. It follows that this Rule cannot be considered as instituting a greater degree of supervision than that which was envisaged by the previous Opinion of the Court.

" This interpretation of the words used is confirmed by an examination of the circumstances which led to their use.

" The Court, in the previous Opinion, was answering the question: ' Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations ? ' It was dealing with two kinds of international obligations assumed by the Union of South Africa under the Mandate.

" The first kind of obligation was directly related to the administration of the Territory and corresponded to the sacred trust of civilization referred to in Article 22 of the Covenant. The Court found that these obligations did not lapse on the dissolution of the League of Nations.

" The second kind of obligations related to the supervision of the administration of the mandated Territory by the League. The Court, taking into account the Resolution of the Assembly of the League of Nations of April 18th, 1946, and the provisions of Articles 10 and 80 of the Charter, recognized that the General Assembly was legally qualified to exercise the supervisory functions which had previously been exercised by the Council of the League. It was necessary for the purpose of defining the international obligations of the Union to indicate the limits within which it was subject to the exercise of supervision by the General Assembly.

" In order to indicate those limits, it was necessary to deal with the problem presented by methods of supervision and the scope of their application. The General Assembly was competent, under the Charter, to devise methods of supervision and to regulate, within prescribed limitations, the scope of their application. These were matters in which the obligations could be subjected to precise and objective determination, and it was necessary to indicate this in a clear and unequivocal manner. This was done when it was said in the previous Opinion that: 'The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System. . . .'

"On the other hand, in marking out those limits, the Court did not need to deal with the system of voting. In recognizing that the competence of the General Assembly to exercise its supervisory functions was based on the Charter, the Court also recognized implicitly that decisions relating to the exercise of such functions must be taken in accordance with the relevant provisions of the Charter, that is, the provisions of Article 18. If the Court had intended that the limits to the degree of supervision should be understood to include the maintenance of the system of voting followed by the Council of the League of Nations, it would have been contradicting itself and running counter to the provisions of the Charter. It follows that the statement that 'The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System' cannot be interpreted as extending to the voting system of the General Assembly.

"Accordingly, the Court finds that the statement in the Opinion of July 11th, 1950, that 'The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System', must be interpreted as relating to substantive matters, and as not including or relating to the system of voting followed by the Council of the League of Nations.

"In the course of the proceedings in the General Assembly and Committees of the United Nations, it was contended by representatives of the Union of South Africa that Rule F would not correspond to a correct interpretation of the previous Opinion. It was argued that the rule of unanimity governed the proceedings in the Council of the League of Nations, in which the mandatory Power was entitled to participate and vote; and that Rule F, by substituting a two-thirds majority rule, would lead to a degree of supervision exceeding that which applied under the Mandates System.

"These contentions were questioned by representatives of other Governments and also in the written statements submitted to the Court in the present proceedings.

"In view of the finding of the Court that the statement in the Opinion of 1950 that 'The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System' does not include or relate to the system of voting, it is unnecessary to deal with the issues raised by these contentions or to examine the extent and scope of the operation of the rule of unanimity under the Covenant of the League of Nations.

"The Court will now consider whether Rule F is in accord with the statement in the Opinion of 1950, that the supervision to be exercised by the General Assembly 'should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations '.

" While, as indicated above, the statement regarding the degree of supervision to be exercised by the General Assembly over the Mandate of South-West Africa, relates to substantive matters, the statement requiring conformity ' as far as possible ' with the procedure followed in the matter of supervision by the Council of the League of Nations, relates to the way in which supervision is to be exercised, a matter which is procedural in character. Thus, both substance and procedure are dealt with in the passage in question and both relate to the exercise of supervision. The word ' procedure ' there used must be understood as referring to those procedural steps whereby supervision is to be effected.

" The voting system of the General Assembly was not in contemplation when the Court, in its Opinion of 1950, stated that ' supervision should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations '. The constitution of an organ usually prescribes the method of voting by which the organ arrives at its decisions. The voting system is related to the composition and functions of the organ. It forms one of the characteristics of the constitution of the organ. Taking decisions by a two-thirds majority vote or by a simple majority vote is one of the distinguishing features of the General Assembly, while the unanimity rule was one of the distinguishing features of the Council of the League of Nations. These two systems are characteristic of different organs, and one system cannot be substituted for the other without constitutional amendment. To transplant upon the General Assembly the unanimity rule of the Council of the League would not be simply the introduction of a procedure, but would amount to a disregard of one of the characteristics of the General Assembly. Consequently the question of conformity of the voting system of the General Assembly with that of the Council of the League of Nations presents insurmountable difficulties of a juridical nature. For these reasons, the voting system of the General Assembly must be considered as not being included in the procedure which, according to the previous Opinion of the Court, the General Assembly should follow in exercising its supervisory functions.

" There is, however, another aspect of this question. Rule F is contained in a group of six special rules, which were adopted by the General Assembly in Resolution 844 (IX) of October 11th, 1954. They were designed to apply ' as far as possible, and pending the conclusion of an agreement between the United Nations and the Union of South Africa, the procedure followed in that respect by the Council of the League of Nations '. It seems to be clear that, both in adopting Rule F and in referring Question (*a*) to the Court, the General Assembly was proceeding upon the assumption that the word ' procedure ', as used in the second part of the passage in question, includes the voting system. It is also necessary to examine the question on the basis of that assumption. Looking at the matter from that point of view, there is equally no incompatibility between Rule F and the previous Opinion.

" It is to be recalled that the Court, in its previous Opinion, stated that ' The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations '. Thus, the authority of the General Assembly to exercise supervision over the administration of South-West Africa as a mandated Territory is based on the provisions of the Charter. While, in exercising that supervision, the General Assembly should not deviate from the Mandate, its authority to take decisions in order to effect such supervision is derived from its own constitution.

" Such being the case, it follows that the General Assembly, in adopting a method of reaching decisions in respect of the annual reports and petitions concerning South-West Africa should base itself exclusively on the Charter. Article 18 of the Charter authorizes the General Assembly to decide whether decisions of this nature involve ' important questions ' or ' other questions '. The General Assembly has concluded that decisions by it on questions relating to reports and petitions concerning the Territory of South-West Africa shall be regarded as decisions on important questions to which the two-thirds majority rule should apply. It is from the Charter that the General Assembly derives its competence to exercise its supervisory functions; and it is within the framework of the Charter that the General Assembly must find the rules governing the making of its decisions in connection with those functions. It would be legally impossible for the General Assembly, on the one hand, to rely on the Charter in receiving and examining reports and petitions concerning South-West Africa, and, on the other hand, to reach decisions relating to these reports and petitions in accordance with a voting system entirely alien to that prescribed by the Charter.

" When the Court stated in its previous Opinion that in exercising its supervisory functions the General Assembly should conform ' as far as possible to the procedure followed in this respect by the Council of the League of Nations ', it was indicating that in the nature of things the General Assembly, operating under an instrument different from that which governed the Council of the League of Nations, would not be able to follow precisely the same procedures as were followed by the Council. Consequently, the expression ' as far as possible ' was designed to allow for adjustments and modifications necessitated by legal or practical considerations.

" In the matter of determining how to take decisions relating to reports and petitions concerning the Territory of South-West Africa, there was but one course open to the General Assembly. It had before it a text, Article 18 of the Charter, which prescribes the methods for taking decisions. The Opinion of 1950 left the General Assembly with Article 18 of the Charter as the sole legal basis for the voting system applicable to decisions in connection with its supervisory functions. It was on that basis that Rule F was adopted. In adopting that Rule, the General Assembly acted within the bounds of legal possibility.

" There is thus no incompatibility between Rule F and the Opinion of 1950 in which the Court stated that the supervision to be exercised by the General Assembly should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations.

" The Court therefore considers that Rule F, recited in Question (*a*) of Resolution 904 (IX) of the General Assembly of November 23rd, 1954, is in accord with the passage contained in the Court's previous Opinion, namely, that ' The degree of supervision to be exercised by the General Assembly should not . . . exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations '. Accordingly, the Court concludes that Rule F corresponds to a correct interpretation of its Advisory Opinion of 1950.

" Question (*a*) having been answered in the affirmative, it is not necessary to consider Question (*b*).

" For these reasons,

" THE COURT IS UNANIMOUSLY OF OPINION

with regard to Question (*a*):

> ' Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950:
>
> > " Decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations " ? '

that the said rule is a correct interpretation of the Advisory Opinion of July 11th, 1950.

[Report: *I.C.J. Reports*, 1955, pp. 68–78.[1]]

Judge Basdevant delivered the following Separate Opinion:

" . . . In order to give a reply to the question put to the Court, I feel that it is necessary to consider, in the first place, the operative clause of the Opinion given in 1950. I there find an assertion of the competence of the

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[1] The English text of the Opinion is authoritative.

United Nations in respect of supervision, but no indication of the competent organ or of the way in which its decisions are to be reached. This seems to me to involve reference on these points to the provisions of the Charter, and particularly to Articles 10 and 18, and consequently to involve the conclusion that Rule F, which has been submitted for the Court's consideration, accords with a correct interpretation of the Opinion of 1950.

" From this point I pass to a consideration of the reasons on which the Opinion of 1950 was based. Among these I find an assertion of the competence of the General Assembly based on Article 10 of the Charter. Since what is involved is a competence conferred by the Charter, it is quite natural that the Assembly should exercise it in accordance with the provisions of the Charter, in this case, of Article 18. This is what is prescribed by Rule F. The tentative conclusion previously anticipated is thus confirmed.

" Is there to be found, in the grounds on which the Opinion was based, any indication of sufficient strength to upset this conclusion ? It is at this point, and at this point only, that it becomes necessary to consider the sentence, quoted by the Assembly's Resolution, from the reasons given in support of the Opinion of 1950, a sentence which has doubtless given rise to the hesitation displayed by the General Assembly, but which, in order to arrive at a correct interpretation of the Opinion of 1950, must be considered with due regard to the place which it occupies in that Opinion.

" In this sentence there are two propositions.

" The first is, as is clear from its terms, concerned with the determination of the framework within which supervision is to be exercised, with the fixing of limits beyond which supervision should not extend. This is confirmed by the place in the Opinion in which this proposition is to be found; it appears after a reference to annual reports and petitions. With this purpose in mind, it defines the substance of the obligation to submit to the exercise of supervision, which is in consonance with the request for an Opinion addressed to the Court, whereas the Court was not, in 1950, questioned as to the way in which decisions of the General Assembly were to be made. Rule F, which is now submitted for the Court's consideration, makes reference to reports and petitions: it is in this respect within the limits stated by the Opinion. The marking out of those limits is one thing, the fixing of a rule for the making of decisions with regard to reports and petitions is another. The first proposition now being considered is in no way inconsistent with the conclusion as to the compatibility of the Rule so far contemplated.

" The second proposition prescribes or recommends that the degree of supervision to be exercised by the General Assembly should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations. This doubtless includes the provision to be made for an organ corresponding to the Permanent Mandates Commission, its method of operation and its relationship with the General Assembly. But does it apply to the way in which the General Assembly is to make decisions—a qualified majority instead of the unanimity prescribed by the Covenant for decisions of the Council of the League of Nations ?

" Resolution 904 (IX) of the General Assembly would tend to suggest that it does, since it speaks of voting procedure in connection with Rule F which, by reference to Article 18 of the Charter, adopts the two-thirds majority rule for the making of a decision. But this Resolution cannot furnish any assistance in the interpretation of a sentence in the Opinion of 1950, with regard to the intrepretation of which this very Resolution seeks elucidation by the Court.

" The word ' procedure ' is often used to include not only the way in which votes are cast, but also the determination of their weight in the making of a decision. The word ' procedure ' is then used in a general and a vague sense. Was it such a sense that the Court intended to be given to this word when it referred, in connection with the supervision to be exercised by the General Assembly, to the procedure followed by the Council of the League of Nations ?

" If the Court had so intended, it would have constituted disregard by it of the more precise terminology adopted by the Charter in connection with the General Assembly and repeated in connection with the Security Council, the Economic and Social Council and the Trusteeship Council. The rules governing the way in which the General Assembly is to make its decisions (Article 18) are set out under the heading ' Voting ', and not under the heading ' Procedure '; under the latter heading, Articles 20 and 22 contain provisions of lesser importance. The limited scope of the word ' procedure ' is again demonstrated by the fact that, under Article 27 of the Charter, a majority constituted by seven members is sufficient to make decisions on procedural matters, whereas the requirement is greater for the making of decisions on all other matters. It is difficult to suppose that the Opinion was disregarding this terminology and using the word ' procedure ' in its general and vague sense.

" It is the more difficult in that the classification thus made by the Charter corresponds to a profound reality. The majority rule laid down by Article 18 of the Charter and the unanimity rule prescribed by the Covenant of the League of Nations are something other than rules of procedure; they determine an essential characteristic of the organs in question and of their parent international institutions. The character of these rules appears to me to be beyond question and, in my view, it provides a decisive element in reaching the answer to be given to the question which has been put.

" Furthermore, when the Opinion, in setting forth the grounds on which it was based, stated the proposition now under consideration, it did so in connection with the obligation binding upon the Union of South Africa to submit to supervision exercised by the General Assembly. The Union of South Africa, it was intended to say, is only bound to submit to this supervision in so far as such supervision is effected in accordance with a procedure which conforms as far as possible to that followed in this respect by the Council of the League of Nations. But when, at the close of the discussions in the Assembly, that body proceeds to vote, the Union of South Africa does not take part in the voting in its capacity as a mandatory Power, in pursuance of its obligation to submit to supervision by the General Assembly; it does so as a Member of the United Nations, and consequently has the rights and duties flowing from the Charter and not those flowing from the Mandate. The Opinion of 1950 was concerned with the obligations of the Union of South Africa by virtue of the Mandate; it was not necessary in that Opinion to deal with the Union's participation in the decisions of the General Assembly, and the Opinion cannot be interpreted on the basis that that was done.

" It may be added that when the Opinion of 1950 stated that, in exercising its supervision, the General Assembly should conform as far as possible to the procedure followed by the Council of the League of Nations, it intended to indicate that the Assembly would, in this connection, have a certain discretion in determining to what extent it was possible for it so to conform. This can be easily understood in respect of decisions as to the organ it would call upon for assistance and as to the form such assistance should take: such matters must be left to the discretion of the General Assembly. The position is entirely different with regard to the way in which the Assembly must make its decisions; this is not a matter in which it has any discretion. It cannot be open to the General Assembly, depending upon its assessment of what it regards as possible in this connection, to alter what is laid down by Article 18 of the Charter in order to adapt that Article more or less to the methods employed in the League of Nations for the making of decisions of the Council. It cannot have been supposed, and therefore cannot have been accepted in the Opinion of 1950, that the General Assembly was invested with any such power in the case now under consideration.

" These considerations lead me to think that the Opinion of 1950 intended no derogation, in respect of decisions to be made by the General Assembly with regard to reports and petitions concerning the Territory of South-West Africa, from the application of Article 18 of the Charter. The rule submitted by the General Assembly for consideration by the Court refers to this Article; it therefore appears to me to correspond to a correct interpretation of the Opinion of 1950.

" In setting forth the above considerations, I lay no claim to have presented a complete argument. To do so, I should be prepared to adopt parts of the reasoning set out in the Opinion. I have sought only to indicate the general outline of my argument."

Judge Klaestad delivered the following Separate Opinion :

" I have arrived at the same final conclusion as the Court; but as my approach to the matter is entirely different, I consider it my duty to state as briefly as possible the reasons upon which I base my opinion.

" I. In the Resolution by which the present Request for an Advisory Opinion was adopted, the General Assembly of the United Nations referred to a statement made by the Court in giving the reasons on which its Advisory Opinion of July 11th, 1950, was based—a statement which, for the purpose of answering the Question now put to the Court, calls for a brief comment. After having expressed the view that South-West Africa was still to be considered as a territory under the Mandate of December 17th, 1920, and that the Union of South Africa was under an obligation to submit to the supervision and control of the General Assembly, the Court stated:

> ' The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations. These observations are particularly applicable to annual reports and petitions.'

" This statement was made by the Court in connection with its consideration of the international obligations which the Union of South Africa had assumed under the Mandate and which the Union, in the opinion of the Court, continued to have. The General Assembly had, in its Request for an Opinion, asked:

> ' Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations ?'

" The above-mentioned statement is to be found in the part of the Opinion in which the Court examined this Question relating to the obligations under the Mandate, and when the Court said that the ' degree of supervision to be exercised by the General Assembly ' should not exceed that which applied under the Mandates System, it was dealing with and referring to the international obligations which the Union of South Africa continued to have, including the obligation to submit to international supervision. As appears from the context, the Court was thereby giving expression to the view that the Union of South Africa should not, as a consequence of a supervision exercised by the General Assembly, be subjected to other or more onerous legal obligations than the Union had under the supervision previously exercised by the League of Nations.

" Having due regard to the discussions in the United Nations which preceded the present Request for an Advisory Opinion, including the view expressed by the Union of South Africa, I consider that the task of the Court now is to determine whether decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa would, by the operation of the voting procedure indicated in the Request, subject the Union of South Africa to other or more onerous legal obligations than the Union had previously under the supervision of the League of Nations. On the solution of this question depends, in my opinion, the answer to be given to the present Request.

" The determination of this general question necessitates a previous examination of two particular questions relating to

(*a*) the voting procedure in the competent organ of the League of Nations and in the General Assembly of the United Nations;

" (*b*) the legal effect of decisions taken by the competent organ of the League and by the General Assembly, when applying their respective voting procedures.

" II. In accordance with Article 22 of the Covenant of the League of Nations, the supervision of mandated territories was to be exercised by the Council. The Permanent Mandates Commission was to advise the Council on all matters relating to the observance of the mandates. The Assembly had, under Article 3, a general competence to deal with any matter within the sphere of action of the League.

" The competence to take decisions with regard to reports and petitions relating to mandated territories was conferred upon the Council. In accordance with Article 5 of the Covenant, these decisions required the agreement of all the Members of the Council represented at the meeting, except in matters of procedure which were decided by a majority. Article 4 prescribed that a Member of the League, not represented in the Council, should be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member. Each Member had one vote, including the Member invited to send a representative. By virtue of these rules, the Union of South Africa was entitled to be represented with voting power, when the Council considered matters relating to the Mandated Territory of South-West Africa, and it could, in its capacity as a Member of the League, prevent the adoption of a decision by voting against it.

" It has been argued that the rule requiring the agreement of all Members represented at the meeting was subject to an important exception as a consequence of the view expressed by the Permanent Court of International Justice in its Advisory Opinion of November 12th, 1925, concerning the *frontier between Iraq and Turkey*. It is said that, as a consequence of that Opinion, the vote of a Mandatory Power should not be taken into account in ascertaining whether there was unanimity, when a question relating to the Mandate of that Power was considered.

" The principle enunciated in that Advisory Opinion, namely, that ' no one can be judge in his own suit ', was found to be applicable in view of the special competence which was conferred upon the Council of the League by the Treaty of Lausanne of 1923—a competence of a judicial character to give a definitive and binding decision in a particular dispute between two States with regard to the final determination of a frontier. As far as I have been able to ascertain, this principle was never extended by the Council to comprise decisions taken by the Council in the course of its supervision of the administration of mandated territories. I am not aware of a single instance in which a resolution concerning reports or petitions was adopted by the Council against the vote of the Mandatory Power.

"Article 5 of the Covenant, which lays down the rule of unanimity, makes —apart from matters of procedure—no other exceptions than those ' expressly provided in this Covenant or by the terms of the present Treaty '. As no such exception was expressly made for matters concerning Mandates, and as the practice of the Council does not disclose any such exception showing that a decision on reports or petitions was ever taken against the negative vote of a Mandatory Power, it is difficult not to conclude that decisions relating to reports and petitions were governed by the general rule of Article 5. It is not for the Court to consider whether the Council would have been justified in modifying the rule of absolute unanimity in matters of Mandates in view of the Advisory Opinion of 1925 or of considerations of reasonableness or general principles of law.

" When the Court delivered its Advisory Opinion of 1950, it was not unaware of the fact that the Charter of the United Nations had rejected the principle of unanimity, and when the Court expressed the view that the supervisory functions with regard to the Territory of South-West Africa, previously exercised by the Council of the League, were henceforth to be exercised by the General Assembly of the United Nations by virtue of Article 10 of the Charter, it was implicitly referring to that body with the organization and functions conferred upon it by the provisions of the Charter, including the provisions of Article 18.

" In accordance with Article 18, decisions of the General Assembly on ' important questions ' shall be made by a two-thirds majority of the members present and voting. Decisions on other questions shall be made by a simple majority of the members present and voting. In virtue of the competence conferred upon it by Article 18, § 3, the General Assembly, by Resolution 844 (IX) of October 11th, 1954, adopted a special rule on voting procedure, to the effect that decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa should be regarded as important questions within the meaning of Article 18, § 2, of the Charter.

" It is this difference between the voting procedure in the Council of the League of Nations and in the General Assembly of the United Nations which has given rise to the question now before the Court, namely, whether the Union of South Africa, by the operation of this rule as to a two-thirds majority of the General Assembly, would be subjected to other or more onerous legal obligations than it had previously under the rule of unanimity of the Council of the League. In order to answer this question it becomes necessary to consider the legal effect of decisions taken by the Council of the League and by the General Assembly with regard to reports and petitions concerning the Territory of South-West Africa.

" III. As mentioned above, the Council of the League of Nations was governed by the rule of unanimity when voting on matters relating to Mandates. When the Union of South Africa, by a concurrent vote in the Council, gave an expression of its acceptance of a Resolution concerning reports or petitions relating to the Territory of South-West Africa, the Union Government became, by reason of that acceptance, legally bound to comply with the Resolution. This view finds support in the Advisory Opinion of the Permanent Court of International Justice of October 15th, 1931, concerning *railway traffic between Lithuania and Poland.* The Court expressed the view that the Governments of Lithuania and Poland, by participating in the adoption of a Resolution of the Council of the League, became bound by their acceptance of the Resolution.

"As to the legal significance of decisions taken by the General Assembly of the United Nations on questions of reports and petitions, the following considerations appear to be relevant:

" In its Advisory Opinion of 1950 the Court stated that the competence of the General Assembly to exercise supervisory functions with regard to a mandated territory and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions within the scope of the Charter and to make recommendations on these questions to the Members of the United Nations. Such recommendations relating to reports and petitions concerning the Territory of South-West Africa shall, as already mentioned, in accordance with the General Assembly's Resolution 844 (IX) of October 11th, 1954, be regarded as important questions within the meaning of Article 18, § 2, of the Charter and therefore be made by a two-thirds majority of the Members present and voting.

"Article 18 does not make any distinction between ' decisions ' and ' recommendations '. It refers to ' decisions ' as including ' recommendations '. These decisions of the General Assembly on ' important questions ' are of different categories. Some are decisions with a final and binding effect, such as, for instance, the election of members of the various organs of the United Nations or decisions approving the budget of the Organization by virtue of Article 17. Some other decisions are recommendations in the ordinary sense of that term, having no binding force. Recommendations adopted by virtue of Article 10 concerning reports and petitions relating to the Territory of South-West Africa belong in my opinion to the last-mentioned category. They are not legally binding on the Union of South Africa in its capacity as Mandatory Power. Only if the Union Government by a concurrent vote has given its consent to the recommendation can that Government become legally bound to comply with it. In that respect the legal situation is the same as it was under the supervision of the League. Only a concurrent vote can create a binding legal obligation for the Union of South Africa.

"It is true that against a negative vote of the Union Government no decision could be reached in the League, while a decision in the United Nations can be made by a two-thirds majority of the General Assembly without the concurrent vote of that Government. But such a decision (recommendation) adopted by the General Assembly without the concurrent vote of the Union Government does not create a binding legal obligation for that Government. Its effects are, in my view, not of a legal nature in the usual sense, but rather of a moral or political character. This does not, however, mean that such a recommendation is without real significance and importance, and that the Union Government can simply disregard it. As a Member of the United Nations, the Union of South Africa is in duty bound to consider in good faith a recommendation adopted by the General Assembly under Article 10 of the Charter and to inform the General Assembly with regard to the attitude which it has decided to take in respect of the matter referred to in the recommendation. But a duty of such a nature, however real and serious it may be, can hardly be considered as involving a true legal obligation, and it does not in any case involve a binding legal obligation to comply with the recommendation.

" IV. As far as the binding force of a decision is concerned, there is thus no difference between the rules on voting procedure in the Council of the League and in the General Assembly of the United Nations. In order to become legally bound to comply with a decision, the Union Government must, in the League as well as in the United Nations, have consented to the decision by a concurrent vote. By the operation of the rules on voting procedure in the General Assembly, the Union Government cannot therefore become subjected, against its will, to other or more onerous legal obligations than it had under the supervision of the League.

" This view—that a concurrent vote of the Union is necessary for the extension of its obligations under the Mandate—is confirmed by a consideration of another nature, deduced from the Advisory Opinion of 1950. In reply to the last Question put to it in the Request for that Opinion, the Court expressed the view:

> ' that the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa,

and that the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations '.

" In the reasons given in support of this answer, the Court stated:

' The international status of the Territory results from the international rules regulating the rights, powers and obligations relating to the administration of the Territory and the supervision of that administration, as embodied in Article 22 of the Covenant amd in the Mandate.'

" The international status of the Territory is thus determined, *inter alia,* by the provisions of the Mandate which lay down, in Articles 3–6, the particular obligations of the Union of South Africa as the Mandatory Power, such as obligations with regard to slave trade, forced labour, traffic in arms and ammunition, intoxicating spirits and beverages, military training and establishments, as well as obligations relating to freedom of conscience and free exercise of worship, including special obligations with regard to missionaries, and the obligation to make an annual report containing full information with regard to the Territory.

"An extension of any of these obligations relating to the administration of the Territory and the supervision of that administration would affect the international status of the Territory and would consequently, in accordance with the previous Advisory Opinion, necessitate an agreement between the Union of South Africa and the General Assembly. Such an extension would not be legally binding upon the Union unless its consent has been given.

" For these reasons I am of opinion that an application of the rule on the voting procedure indicated in the Request does not conflict with the previous Advisory Opinion and may be considered as corresponding to a correct interpretation of that Opinion."

Judge Lauterpacht delivered the following Separate Opinion :

" In the present case the General Assembly has asked the Court for an Advisory Opinion on the question whether the special Rule F, which, on 11 October, 1954, the Assembly adopted with regard to the voting procedure to be followed by it in taking decisions on questions relating to reports and petitions concerning the Territory of South-West Africa is a correct interpretation of the Opinion of the Court given in 1950 on the *International Status of South-West Africa.* Rule F laid down that such decisions shall be regarded as important questions within the meaning of Article 18 (2) of the Charter, that is to say, that a majority of two-thirds shall be required for their adoption. In the Preamble to its request the General Assembly drew special attention to certain passages of the Opinion of 1950. These passages are referred to below.

" I have considered it incumbent upon me to append the present Separate Opinion for, while I concur in the unanimous Opinion of the Court inasmuch as it gives an affirmative answer to the question put to it, I do so on grounds and by a method substantially different—and differing—from those on which that Opinion is based. On the subject of method I find it necessary to devote some preliminary observations to the question as to the legal issues which ought to find an answer in the Opinion of the Court. This matter raises the more general question of the character of the function of the Court and the nature of its judicial pronouncements.

" The present Opinion can be decided, in addition to what may be described as the method of pure construction, by exclusive reference to any of the following three legal questions:

" (1) Inasmuch as the main issue arises from the contention of South Africa that absolute unanimity was required for the decisions of the Council of the League of Nations acting as a supervisory organ of the Mandates

System, the Opinion could be based on the rejection of that contention as being unfounded in law. In that case it might be said—though, as will be seen, not quite accurately—that Questions (2) and (3) do not arise.

" (2) It is possible to base the Opinion of the Court on the view adopted by the Court that whatever may be the answer to the other two questions the General Assembly is absolutely prevented from acting by a method of voting other than that laid down in Article 18 of the Charter, and that for that reason it must be held, in adopting Rule F, to have complied ' as far as possible ' with the Opinion of the Court given in 1950. If that view is adopted, it might be said that Questions (1) and (3) need not be answered.

" (3) It is possible to base the Opinion of the Court on the view that as, unlike the decisions of the Council of the League, the decisions of the General Assembly are not legally binding, Rule F clearly does not imply any excess of supervision as compared with that of the Council of the League and that therefore neither Question (1) nor Question (2) need be answered.

" Finally, and this is substantially the method followed by the Court, it is possible to answer the question put to the Court without primary reference to any of these questions but merely on the basis of a construction of the relevant passages of the Opinion of the Court of 1950.

" In my view it is essential, having regard both to the circumstances of the case and to the objects of the judicial function of the Court in general, that its Opinion should contain an answer to the legal issues relevant to the case, especially when relied upon by the Members of the General Assembly, including South Africa.

" Thus with regard to Question (1)—namely, that arising out of the contention of South Africa that the absolute unanimity of the Members of the Council of the League was required for its Resolutions relating to mandates—although the Court has come to the conclusion that the relevant passage of its Opinion of 1950 does not apply to the voting procedure, I consider that that argument of South Africa ought to be answered in all requisite detail. It ought not to be disregarded on the ground that it is irrelevant for the reason that it is ruled out by what is described as the ordinary and natural meaning of the words of the Opinion of 1950. For this was the main argument put forward by South Africa in the course of the discussions before the General Assembly and its Committees. It was the question of the justification of that contention which exercised Members of the General Assembly, which troubled their consciences, and which was largely responsible for the request for the present Opinion. The circumstances of the case are such that full consideration ought to be given to the principal legal argument of the State which, as a mandatory, has put itself in opposition to the repeatedly expressed judgment of the United Nations and whose conduct has been the object of wide disapproval. For this reason, although I do not accept this particular contention of the Government of South Africa, I must consider it in detail.

" The same considerations apply to what may be called the constitutional issue as expressed in Question (2). The Opinion of the Court is based on the view that the General Assembly is absolutely precluded from acting by a voting procedure other than that laid down in the Charter and that for that reason Rule F complies with the Opinion of the Court, given in 1950, which laid down that the procedure of the General Assembly must approximate to that of the Council of the League ' as far as possible '. It is possible to dispose of the entire issue by reference to the simple proposition that the provisions of the Charter in the matter of voting are mandatory and peremptory and that any modification of the voting procedure of the General Assembly, designed to meet the circumstances of the case, would constitute a violation of the Charter or, more emphatically, that it would constitute a juridical impossibility. But that proposition is controversial. Some previous practice, to which reference will be made later, suggests the permissibility of a different voting procedure if an extraneous instrument so provides—although the Court seems to have accepted the view that there is no such instrument in the present case seeing that the powers of the General Assembly are, it is said, derived from the Charter and not from an extraneous instrument. That, too, is controversial. Above all, it appears that the constitutional problem as stated underlay a great deal of the debate before the General Assembly and that most of its Members—as indeed does the Opinion of the Court—were prepared to regard the constitutional objection as decisive and sufficient. This being so, it seems to me desirable that the solution of that aspect of the matter should not be taken for granted or as being self-evident. For this reason, having regard to conflicting considerations of principle and to divergence of practice, I believe it to be my duty to examine fully that aspect of the matter.

" The same considerations apply, once more, to Question (3)—a question by reference to which it may be possible to dispose of the issue before the Court on the ground that the decisions of the General Assembly are of no legal effect or of more limited effect than those of the Council of the League. It is a ground by reference to which—and mainly to which—it may be thought, as I do in the present Opinion, that an affirmative answer can be given to the question put by the General Assembly. For this reason I am not at liberty to disregard that issue on account of any difficulties or complications inherent in it. The absence, in general, of full legal binding force in the Resolutions of the General Assembly is a proposition so fundamental and so rudimentary that an attempt to apply and to circumscribe it need not be regarded as dangerous or unhelpful. I cannot disregard that aspect of the matter on the alleged ground that the Court cannot answer this—or any other legal question—incidental to the Opinion, seeing that the General Assembly has not specifically asked for an answer to these questions. The General Assembly has asked only one substantive question; that issue, and that issue only, is answered in the operative part of the unanimous Opinion of the Court. Clearly, in order to reply to that question, the Court is bound in the course of its reasoning to consider and to answer a variety of legal questions. This is of the very essence of its judicial function which makes it possible for it to render Judgments and Opinions which carry conviction and clarify the law.

" For these reasons I cannot attach prominent—and certainly not exclusive—importance to what may be described as the ' mere construction ' point of view, such as that implied in the argument that the question of voting is not at all germane to either of the two crucial passages of the Opinion of the Court of 1950, namely, those relating to ' degree of supervision ' and ' procedure ' of the Council of the League. It is possible to hold the view that there is an implied reference to voting procedure in both these expressions; it may be held that such reference is implicit only in one or only in the other of these expressions; and there is room for the view, which finds some support in the Opinion of the Court, that neither of these expressions contains any reference to voting. This diversity of construction provides some illustration of the unreliability of reliance on the supposed ordinary and natural meaning of words.

" Neither, having regard to the integrity of the function of interpretation, is it desirable that countenance be given to a method which by way of construction may result in a summary treatment or disregard of the principal issue before the Court. Thus it may be said that, as according to the Opinion of the Court given in 1950, the General Assembly, acting under Article 10 of its Charter, is to be responsible for the task of supervision, it cannot fulfil that function otherwise than in accordance with its own procedure and that by applying its voting procedure, deemed unalterable, it approximates ' as far as possible ' to the procedure of the Council of the League. However, this —the ' constitutional ' issue—is one of the principal questions before the Court. I would not feel justified in answering it—without adequate examination of available practice—by reference to assumed logical impossibility.

" These considerations I believe to be in the highest interest of the authority of international justice. They do not exclude the necessity of basing the Opinion of the Court on, *inter alia*, a construction of the texts before it.

" *Do the expressions ' degree of supervision ' and ' procedure of the Council of the League ' refer to voting procedure* ?

" One of the main passages of the Opinion of 1950 which the Court is now requested to interpret lays down two directives: (i) that the degree of supervision to be exercised by the General Assembly should not exceed that which applied under the Mandates System, and (ii) that it should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations.

" The expression ' degree of supervision ' has two meanings: it signifies primarily the means of supervision. Thus it is clear that the place assigned to periodic missions or to petitions in the System of Trusteeship exceeds the degree of supervision adopted in the Mandates System and that that means of supervision by the United Nations cannot, without the consent of the Government of the Union of South-West Africa, be applied to the Mandated Territory of South-West Africa. This is a question of means of supervision in their wider sense. The Court, whose Opinion is requested on the question of voting, is not concerned with them. However, the term ' degree of supervision ' covers also the methods of ensuring compliance with the means thus adopted and, in particular, the method of deciding whether the administering authority has complied with them and what steps it ought to take with that object in view. If the General Assembly were to be enabled to take binding decisions on petitions and reports subject to voting requirements less stringent than those obtaining in the Council of the League of Nations –such decisions including request for further information, expression of regret at or disapproval of the action or inaction of the Administering Authority, and call for the cessation of the action disapproved of—then the innovation thus effected would appear to amount to a degree of supervision exceeding that previously in force. This is so although on occasions such decisions may amount to an approval or support of the action of the Administering State —in which case it might be argued that the less exacting vote implies a relaxation of the degree of supervision. However, the State subject to supervision is primarily concerned with the potential interference with its freedom of action by the supervisory organ. Thus viewed, the less exacting method of voting adds to the stringency and the degree of supervision—just as a change of the procedure of voting may add to the extent of the obligations. If I agree to accept the obligation to pay taxes in pursuance of unanimous decisions of a committee, then my obligation is increased if the committee, by changing its procedure, can impose taxation by a majority vote. This seems to be a proposition of common sense.

" My view, as expressed below, is that Rule F does not result in an excess of supervision for the reason that the decisions of the Council of the League did not require absolute unanimity and that, in any case, the decisions of the General Assembly are not of the same legal authority as the decisions of the Council of the League. But I am not of the view that the Opinion of the Court ought to base the answer to the question put to it on the ground that the degree of supervision has no relation to the question of voting. The procedure of voting determines the degree of supervision. For even if we do not go to the length—to the unwarranted length—of conceding that a valid decision of the Council of the League of Nations acting as the supervisory organ of the Mandates System could be prevented by a veto of the Mandatory States, the fact remains that, according to the contemplated Rule F, for the otherwise unanimous decisions of the Council which included all the principal Powers that were Members of the League, there is to be substituted a decision of two-thirds of the General Assembly which may or may not include the vote of any permanent Member of the Security Council, which may represent less than one-fourth of the budgetary contributions or less than one-fourth or one-fifth of the total population of the Members of the United Nations, and which acts by methods different from those which characterised the Council of the League which, in turn, in conformity with the entire political climate of the League, tended to proceed, ultimately, by agreement rather than by counting of votes. Neither is it altogether irrelevant that on the Council of the League of Nations that unanimity or quasi-unanimity had the additional safeguard of being influenced by the reports and the point of view of a commission of experts—for the Mandates Commission was a commission of experts—of high standing and independent of governments. The decisions of the General Assembly, which will be reached according to the contemplated Rule F, will be formed under the impact of the Committee on South Africa—a body whose devotion and disinterestedness must not be questioned but which is of different composition.

" These factors are directly relevant to the question of the ' degree of supervision '. This is not inconsistent with the fact that the second part of the passage (' and should conform as far as necessary to the procedure followed by the Council of the League of Nations ') also, and more directly, refers to voting. Accepted usage includes voting within matters of procedure. It is probable that, while the first part of the passage refers to the major principle of not exceeding the degree of supervision hitherto obtaining, the last quoted passage is directed to the more specific problem of the approximation, as far as possible, of that procedure to that obtaining under the Council of the League of Nations. For these reasons I am reluctant to admit that the ordinary and natural meaning of words excludes the method of voting from the notion of degree of supervision. There is no ordinary and natural meaning of the term ' degree of supervision ' in the abstract. Its meaning is not something which appears on the surface; it is relative to the situations and problems with which the Court is concerned. Moreover, it is relative to the legal issues directly connected with the situation. Thus, assuming that the main South African contention on the question of unanimity is correct, it would be reasonable to assume that the expressions used by the Court with regard both to ' degree of supervision ' and ' procedure ' were not used with the intention of ignoring the legal position thus established. It may not be profitable to regard the entire issue as non-existing on the ground that the words used have a meaning which is fixed, certain and immutable.

" It is, of course, possible that the question of voting was not before the mind of the Court when it gave the Opinion in 1950. This does not mean that the procedure of voting is not an essential element in the situation. On the contrary, it is for this Court, confronted as it is with an apparent gap in the Opinion of the Court of 1950 with respect to a situation which calls for clarification, to fill the lacuna by all available means of interpretation. These do not include the knowledge of any particular member of the present Court as to the state of his—or his colleagues'—minds at the time when the Advisory Opinion was rendered in 1950.

" It is of importance, in this connection, to bear in mind the relation between the two passages here discussed. In my view, of the two conditions there prescribed, the first, relating to the degree of supervision, is the governing directive of a substantive character; the second, which is qualified by the words ' as far as possible ', is, in terms, procedural. The question is whether the Opinion of 1950 can be properly interpreted in a way which would subject the substantive rule to considerations of procedural conformity and convenience. The question is whether such considerations can properly be permitted to affect or impair the governing principle laid down by the Court in 1950 according to which, in the absence of agreement on the part of the Union of South Africa, the degree of supervision by the United Nations must not exceed that exercised by the Council of the League of Nations.

" There is room for the view that the Union of South Africa is legally entitled to resist any attempted extension of the scope of its accountability and of the corresponding degree of scrutiny, interference and supervision by the United Nations, even if such extension is of a procedural nature, for instance, by way of a particular system of voting, so long as no conclusive proof has been adduced that such extension is unavoidable on account of an imperative necessity of relying on the procedure in force in the General Assembly and unalterable in any circumstances.

" The System of Trusteeship under the United Nations has not replaced the Mandates System; the latter remains in force so far as South-West Africa is concerned. As repeatedly stated in the Opinion given in 1950 the continued exercise of the Mandate must be subject to supervision surrounded by the same, but not greater, obligations and safeguards as those which existed under the League of Nations. Now the obligations of a country can be decisively influenced by the voting procedure in respect of the decisions which interpret and apply those obligations. When the Opinion of 1950 said, and reiterated, that the obligations of the Mandatory remained unaltered, it did not mean only that South Africa continued to be bound by these obligations and that she must not subtract from them; it meant also that these obligations ought not to be increased. The continuation of the obligation must in all fairness be held to work both ways. This seems to me to be the governing consideration. In relation to it, the interpretation, however necessary, of the terms ' degree of supervision ' and ' as far as possible ' seems almost to assume the complexion of a technicality. In relation to it, exclusive reliance on the supposed ordinary and natural meaning of the expression ' degree of supervision ' as bearing no relation to the voting procedure would seem to me highly questionable.

"As I see it, the words ' as far as possible ' do not mean that the unqualified injunction against exceeding the degree of supervision under the League of Nations is in fact qualified by the obligation to follow ' as far as possible ' —and only as far as possible—the procedure of the Council of the League of Nations and that if such approximation to that procedure is not possible having regard to the voting procedure of the General Assembly of the United Nations as laid down in Article 18 of the Charter, then the degree of supervision must unavoidably be exceeded. The Opinion of the Court rendered in 1950 did not say that the degree of supervision as it existed under the Mandates System must not be exceeded *provided* that that is possible under the then existing voting procedure of the General Assembly. On the face of it, the words ' as far as possible ' may be interpreted as meaning that, within the framework of compliance with the overriding prohibition of exceeding the degree of supervision of the League of Nations and if there is a variety of procedures available, that procedure must be followed which corresponds more closely to that of the Council of the League of Nations. For reasons stated elsewhere in this Opinion, I cannot accept the view that the words ' as far as possible ' contained an implied and imperative reference to an existing and unalterable procedure of the General Assembly and that any such interpretation has the legitimate effect of overriding the basic prohibition of extending the degree of supervision under the League of Nations by dint of the statement that by adopting the rule of two-thirds majority the General Assembly went ' as far as possible ', i.e., as far as is legally permissible under the Charter. That statement must be proved by a rigorous and searching examination. Such examination may show, as suggested in another part of this Separate Opinion, that it was legally possible for the General Assembly to go somewhat further than does Rule F in complying with the direction to approximate ' as far as possible ' to the procedure of the Council of the League.

" My own conclusions with regard both to construction and [to] the three main questions as formulated above are such that it is not necessary for this Court to adopt an interpretation of the Opinion given in 1950 which in my view would amount to saying that in that Opinion the Court laid down, as the result of an oversight or otherwise, two mutually contradictory directives, and that, by way of an implied reference to an unalterable voting procedure of the General Assembly, it reduced to meagre proportions the essence of its substantive ruling on one of the principal aspects of its Advisory Opinion on the International Status of South-West Africa.

" Question 1: *Did the Rule of Absolute Unanimity obtain in the Council of the League acting as a Supervisory Organ of the Mandates System*?

" I now come to the first of the three principal legal issues with which the Court must properly be deemed to be confronted in the present case: Does the contemplated Rule F correctly interpret the Opinion of the Court inasmuch as it replaces by a less stringent system the rule of absolute unanimity which, according to the contention of the Government of South Africa, obtained in the Council of the League of Nations in respect of its supervisory functions under the Mandates System? Did any such rule obtain in the Council of the League of Nations?

" With regard to this question, I am unable to accept the contention advanced by the Government of the Union of South Africa that there is an inconsistency between the proposed Rule F and the procedure followed by the Council of the League of Nations for the alleged reason that the latter was based on the rule of absolute unanimity, including the vote of the Mandatory State concerned. This has been the principal view put forward by the Government of South Africa in the matter. I have given reasons why it was desirable that the Court should examine it in all its aspects.

"Admittedly, the procedure of the Council of the League of Nations was governed by the principle of unanimity not only of the Members of the Council but of States who, though not ordinarily Members thereof, were invited to sit at its table in connection with a matter under its consideration—a rule which applied also to the representatives of the Mandatory State invited to take part in the proceedings of the Council. However, having regard both to principle and practice, as I interpret them, the ruling of the Court given in its Twelfth Advisory Opinion on the *Interpretation of the Treaty of Lausanne* must be held to apply also to the question with which the Court is now concerned. In that case, the Court held that the principle which was enshrined in Article 15 of the Covenant and which excluded the vote of the parties to the dispute from the requirement of unanimity as a condition of the validity of a recommendation made by the Council, was of general application in so far as it embodied the ' well-known rule that no one can be judge in his own suit ' (Series B, No. 12, p. 32). That ' well-known rule ', henceforth sanctioned by a pronouncement of the Permanent Court of International Justice, must be held to apply to the case in which an international organ, even when acting otherwise under the rule of unanimity, judges in a supervisory capacity the legal propriety of the conduct of a State administering an international mandate or trust. The supervisory organ may do so either directly by pronouncing a verdict upon the conformity of the action of the administering State with its international obligations or indirectly by calling upon it to adopt—or desist from—a certain line of action.

" In the absence of cogent proof to the contrary, there is no justification for rendering legally permissible a situation in which a State, bound by virtue of solemn international obligations to observe a definite rule of conduct and to submit to the international supervision of its observance, is at the same time entitled to render, by its adverse vote, such supervision nominal and ineffective. Undoubtedly, international practice knows instances of States reserving for themselves the right to determine the extent of their own obligation and, in a sense, to remain judges in their own case. However, unless such right is reserved in explicit terms, States which thus attempt to avail themselves of their contractual capacity for purposes alien to its primary purpose—which is the creation of binding obligations—act at their peril. Such express reservation of this exceptional right, obnoxious to legal principle and to tenets of good faith, cannot be conclusively inferred from the mere fact that the basic instrument provides for the rule of unanimity. It could not, in particular, be inferred from the rigid wording of Article 5 of the Covenant, which laid down that, unless expressly provided to the contrary, the rule of unanimity should obtain. For, in the absence of a clear provision to the contrary, that rule is in itself qualified by the principle laid down by the Permanent Court of International Justice in the Advisory Opinion on the *Interpretation of the Treaty of Lausanne*. In that Opinion the Court considered this rule to be of general application for the decisions of the Council when acting in a judicial or arbitral capacity. Its ruling was not limited to cases brought before it by virtue of an extraneous treaty.

" It must be conceded that the application of the principle *nemo judex in re sua* to what is in essence a controversy between the mandatory and the otherwise unanimous Council constitutes an extension of that principle as laid down by the Court. However, the extension is more apparent than real. For the reasons stated above, there does not seem to exist any solid ground for distinguishing between decisions taken in pursuance of the supervisory functions of an international organ and decisions of a judicial or arbitral nature such as that with which the Council of the League was confronted in the matter of the determination of the boundary between Turkey and Iraq. In all cases in which there is a difference of opinion, brought to the point of a formal discordant vote, between the supervising organ and the administering authority as to the conformity of the conduct of the latter with its international obligations, such difference has the essential elements of a dispute as to the application of a binding international instrument. In any such controversy the principle that no one is judge in his own cause must be deemed to apply. To put it differently, there is no valid reason for distinguishing, in connection with the applicability of the principle that no one is judge in his own cause, between the judicial and the supervisory organs. Both administer, in different ways, a system of binding rules of conduct.

" I will now turn from principle to practice. The practice, as I read it, of the League of Nations, does not conclusively support the view that there was an invariable, or even predominant, tendency—in cases in which a Member of the Council was itself a party to the dispute—to attach literal importance to the seemingly rigid or exhaustive provisions of Article 5 of the Covenant in the matter of unanimity. On occasions, the principle of absolute unanimity, including the votes of the parties to the dispute, was acted upon with some rigidity. This occurred in two cases in connection with the application of Article 11 of the Covenant, namely, in the dispute between Poland and Lithuania in 1928 (*Official Journal of the League of Nations*, 1928, p. 896), and, in particular, in the course of the Sino-Japanese dispute in 1931 (*Official Journal of the League of Nations*, 1931, p. 2358). In both cases a resolution of the Council, assented to by all its Members save one of the parties to the dispute, was formally stated not to be binding. It may be observed that with regard to the latter case, Professor Brierly, a writer of authority noted for his restraint, stated that the interpretation of Article 11 then adopted was ' unexpected and doubtfully correct ' (*The Covenant and the Charter*, 1947, p. 15). Apart from these rare cases, the tendency was either in the direction of an express amendment of these provisions of the Covenant which, on the face of it, left room for the frustration of an otherwise unanimous decision by a vote of an interested party or in the direction of regarding such amendment as unnecessary and of acting on the view that the principle *nemo judex in re sua* was already an integral part of the Covenant. Thus, in 1921, the Assembly recommended that, pending the ratification of an express amendment of the Charter to that effect, the votes of the parties to the dispute should be excluded in the voting on the question whether a Member of the League had gone to war in breach of the Covenant (*Records of the Second Assembly, Plenary Meeting*, p. 806). In 1922, the Council seems to have proceeded in two cases on the view that when acting in an arbitral or semi-judicial capacity it was bound to exclude the votes of the parties for the purpose of ascertaining the unanimity required by the Covenant. The first of these cases concerned the claim of India to be included among the eight States of chief industrial importance in connection with representation on the Governing Body of the International Labour Organisation. In that case, the Council endorsed and acted on the legal opinion submitted to it by the Secretariat to the effect that ' the Council would act in this affair as arbitrator, and that India could not be both judge and party to the case ' (*Official Journal*, 1922, p. 1160). The case is of special importance in the present connection inasmuch as the Council acted in an administrative rather than judicial capacity. In the acute Greco-Bulgarian dispute in 1925, the Council, acting in a private meeting in the absence of the representatives of the two parties, prepared what was described as a ' dictatorial request ' for acceptance by the parties who declared themselves ready to accept the *decision* of the Council thus subsequently sanctioned by a unanimous vote (*Official Journal*, 1925, p. 1700). In the same year, in the Hungarian Optants dispute between Hungary and Roumania, which came before it under Article 11, paragraph 2, of the Covenant, the Council accepted a recommendation by a unanimous vote exclusive of the representatives of the parties after the President of the Council stated that, in inviting the Council to pronounce itself on the recommendation contained in the report, he ' deliberately excepted two members of the Council who are parties to the dispute ' (1927, p. 1413).

" It would thus appear that the Twelfth Advisory Opinion of the Court, in addition to being based on a general principle of law of cogent application, was not without support in the practice of the League, both prior and subsequent to the time when it was rendered. It may be useful in this connection to draw attention to the official publication of the Secretariat of the League of Nations, entitled ' The Council of the League of Nations, 1920–1938 ', in which, on page 69, according to the view of the Secretariat, on the question of the inclusion of the votes of the parties in determining unanimity ' there is a certain division of opinion as to whether the votes of the parties should or should not be counted '.

" It has been maintained that whatever may have been the practice of the Council of the League of Nations in the matter of international disputes, in other spheres it strictly adhered to the principle of absolute unanimity. From this the conclusion is drawn that the Mandatory State enjoyed a power of veto with regard to the supervisory function of the Council. I am not persuaded of the accuracy either of what is supposed to be the factual premise or of the conclusion which is being drawn from it. An account of some of the practice of the Council in this sphere is given in a paper prepared by the Secretariat of the United Nations for the working group of the Committee on South Africa and included as No. 39 in the file of documents put at the disposal of the Court. There are other cases to which reference will be made presently. My reading of the practice as recorded is that, while there is no instance of a resolution of the Council being formally declared adopted as against the opposing vote of the mandatory State, there is, on the evidence, no authentic and recorded instance of a contemplated resolution of the Council being frustrated as the result of the adverse vote of the mandatory State. A study of these cases, which were concerned with the mandated territory of South-West Africa, shows that while in no instance a resolution was adopted contrary to the express attitude of the Government of South Africa, this was not necessarily so because of any threatened exercise of the power of veto. In some of these cases, that Government, after having stated its doubts or objections, did not insist on them; in two other cases the Council modified an alternative text submitted by the representative of South Africa; in the sixth case the Government of South Africa eventually decided not to be represented at the resumed discussion of the issue in question. The same solution was adopted by the South African Government in some other cases, of which one relating to the status of the South African Mandate calls for special mention. In its Report, made in 1935, the Mandates Commission noted that it had been informed by the Mandatory Power that the latter had appointed a special Committee to study certain constitutional problems raised by a motion of the Legislative Assembly of the territory aiming at its incorporation as 'a fifth province of the Union'. The Report concluded with the following passage: 'As the guardian of the integrity of the institution of Mandates, the Commission therefore expects to be informed of the Mandatory Power's views on the question, which it will not fail to subject to that careful examination that its international importance demands. The Commission wishes, on this occasion, to draw attention to the Mandatory Power's fundamental obligation to give effect, not only to the provisions of the Mandate, but also to those of Article 22 of the Covenant.' (*League of Nations Official Journal*, 1935, p. 1235.) The Report of the Commission on this and other matters was adopted by the Council which instructed the Secretary-General to communicate to the Mandatory Powers the observations of the Commission and to request them to take the action asked for by the Commission (*ibid.*, p. 1148). The Government of South Africa informed the Secretary-General that it would not be represented at the meeting of the Council. It may or may not be profitable to enquire into the reasons which prompted abstention from participation in a decision which had a distinct bearing on an important issue touching upon an essential aspect of the rights and duties of the mandatory. At least on six other occasions the Government of South Africa was not represented at meetings of the Council at which Resolutions were adopted or discussions took place concerning South-West Africa.

" The fact which thus emerges with some clarity from a survey of the practice of the Council of the League of Nations on the subject is that it supplies no conclusive or convincing evidence in support of the view that as a matter of practice the rule of unanimity operated and was interpreted in a manner substantiating any right of veto on the part of the mandatory Power. It would probably be more accurate to say that, assuming that it existed during the initial period of the functioning of the League, that right fell into desuetude and lapsed as the result. Undoubtedly, importance was attached to securing the concurring vote of the Mandatory Power by patient efforts at compromise and accommodation, especially with respect to the language of the Resolutions of the Council. It is therefore probable that a case, repeatedly—though rather vaguely—referred to in the argument of the Government of South Africa before the United Nations, in which the Council of the League of Nations desisted in deference to the attitude of South Africa from a proposed course of action, is not wholly apocryphal. There were bound to be a number of cases of that nature. However, these do not tell the whole story. In other—and probably more frequent—cases unanimity was achieved for the reason that the Mandatory Power adapted its attitude to the general sense of the Council, or, in some cases, for the reason that it decided not to participate in the meeting at which the Council accepted the Resolution. It is probable —we cannot put it higher than that—that it adopted that course because it deemed it preferable to open disagreement with an otherwise unanimous Council or to a public debate before an antagonistic and practically unanimous Assembly. From this point of view there is a distinct measure of unreality in the insistence on the absolutely unanimous vote in the Council. The Council was not a mere voting machine.

" It is of interest to note that Professor Quincy Wright, in the most exhaustive treatise on the subject of mandates, comes to the following conclusion: ' Thus it is possible that a resolution dealing with a particular mandatory might be effective over the adverse vote of that mandatory. On the other hand, it may be thought that the Council in dealing with mandates acts in an administrative rather than a quasi-judicial character, in which case absolute unanimity might be required. It is probable that the character of the particular question before the Council would determine the matter but up to date there has always been absolute unanimity.' (*Mandates under the League of Nations* (1930), p. 132. A similar view is expressed on p. 522.) However, as already suggested, the Council, in passing resolutions on mandates, acted essentially in a quasi-judicial capacity. Apart from procedural safeguards, there is probably no basic difference between the judicial and the administrative application of the law. As shown, the circumstance that resolutions had in fact been accepted by absolute unanimity throws no decisive light on the legal position here examined. When Professor Wright stated—a statement subsequently repeated by other well-informed commentators (see Duncan Hall, *Mandates, Dependencies and Trusteeship* (1948), p. 175)—that as a matter of fact decisions of the Council in the matter of mandates were unanimous, the statement, if we disregard the occasional abstention of the Mandatory Power from participation in the meetings, was on the face of it correct. But, as shown, it was clearly intended only as a statement of fact, not of law. That fact is open to varying—and divergent—legal construction.

" There is thus in the practice of the Council no conclusive factor which is apt to override the basic legal considerations to which I have referred above, namely, that in an instrument such as the Covenant of the League of Nations the general requirement of unanimity is not in itself sufficient to displace the principle that a party cannot be judge in its own case; that the requirement of unanimity, however expressly stated, is implicitly qualified by the latter principle; and that nothing short of its express exclusion is sufficient to justify a State in insisting that it should, by acting as judge in its own case, possess the right to render inoperative a solemn international obligation to which it has subscribed. This principle ought to be kept prominently in mind when it is a question of the supervised State claiming the right to frustrate by its own vote the legal efficacy of the supervision. The effectiveness of international obligations may not be the only governing consideration in the interpretation of treaties seeing that the parties occasionally intend to render them less effective than is indicated by their apparent purpose. But it is a consideration which cannot be ignored. In so far as the principle *nemo judex in re sua* is not only a general principle of law, expressly sanctioned by the Court, but also a principle of good faith, it is particularly appropriate in relation to an instrument of a fiduciary character such as a mandate or a trust in which equitable considerations acting upon the conscience are of compelling application. This, too, is a general principle of law recognized by civilized States. There is therefore no sufficient reason for assuming that if the Permanent Court of International Justice had been called upon to apply its ruling in the Twelfth Advisory Opinion to the question of unanimity in connection with the supervisory function of the Council in the matter of mandates, it would have abandoned the principle there enunciated. It may be strange that ten years after the dissolution of the League this Court should be confronted with the same question, but this is not a valid ground for departing from that principle. There is, it may be added, no reason why the Court should not interpret the Covenant of the League as it existed in 1945. The determination of rights validly acquired under treaties or statutes which have lapsed is a frequent occurrence in judicial practice. There is no occasion for any excess of judicial caution in this respect. Moreover, in the present case the Court interprets primarily the Mandate which, as it repeatedly stated in its Opinion of 1950, continues to exist.

" I cannot say that I have arrived without hesitation at my conclusion on this aspect of the question or that I would have been prepared to base my affirmative answer to the question put by the General Assembly solely on this ground. I am impressed by the doubts voiced in this connection by Judge Klaestad in his Separate Opinion. For we ought to attach due weight to the general rule of unanimity in the Covenant and the fact that there is no explicit case on record in which the Council affirmed its right to give a valid decision in face of a formal objection of the interested mandatory State. At the same time, I must attach equal—and, I believe, decisive—weight to the general principle as here outlined and as acted upon by the Court itself in the Twelfth Advisory Opinion; to the preponderant practice of the Council of the League in a sphere not confined to the settlement of disputes; and, above all, to the custom—to what in English practice is referred to as a constitutional convention—according to which the Mandatory States never in fact exercised any right of veto. Also, I have some doubts as to the existence of any vested right of South Africa to an immutable system of voting in face of actual or potential changes in the practice of the League of Nations on the subject of the voting procedure. There is no doubt that, in the course of time and without any formal amendment, the rule of absolute unanimity ceased to be a factor to which there was invariably attached decisive importance. This, in addition to the practice outlined above, is shown by the gradual adoption of such practices as passing of resolutions by way of a '*vœu*' or recommendation by simple majority; by treating some substantive matters as being questions of procedure; by considering abstention as absence: and by the practice of majority voting in Committees. When in 1937 Members of the League of Nations expressed their view as to whether absolute unanimity of the Council was required for a request for an Advisory Opinion, a large majority of those who formulated their attitude denied the existence of any such requirement. This was so although in this case there were reasons of some cogency for maintaining the rule of absolute unanimity having regard to the principle that States cannot be compelled, directly or indirectly, to bring their disputes before the Court. A proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization. This being so, although I am not prepared to say that the main contention of South Africa was wholly unfounded, I cannot accept it as being legally correct.

" For these reasons, my conclusion is that the proposed Rule F is not inconsistent with a correct interpretation of the Opinion of the Court of 1950 inasmuch as it is based on the view that the opposing vote of the mandatory State could not in all circumstances adversely affect the required unanimity of the Council of the League of Nations.

"Question 2: *Has the General Assembly the Power to Proceed by a Voting Procedure other than that laid down in Article* 18 *of the Charter* ?

"Although the Court has decided that it is not necessary for it to consider the South African contention in so far as it is based on the notion that the absolute unanimity of the Council of the League was required for the validity of its decisions, it has not thereby disposed of the issue before it. For there remains the possibility, foreshadowed in the Request for the present Opinion, of alternative voting procedures other than absolute unanimity or the two-thirds majority of Rule F. The General Assembly expressly asked the Court to indicate what other voting procedure should be followed in case it finds that Rule F is inconsistent with its Opinion of 1950. There may be a qualified unanimity (i.e., one not including the vote of the Administering State), or some kind of majority half-way between unanimity and two-thirds such as a majority of three-fourths or four-fifths, or any kind of majority which includes certain States or groups of States such as the States represented on the Trusteeship Council or such of these States as administer Trust Territories. Can it be said that all these procedures, as well as that of absolute unanimity, are ruled out for the reason that they are constitutionally inadmissible having regard to the Charter of the United Nations and the fact that the only voting procedure permitted to the General Assembly is that of simple majority or of a two-thirds majority ? Is it legally possible for the General Assembly, in any circumstances, to adopt a voting procedure different from that laid down in the Charter, namely, simple majority or a two-thirds majority ? Is it legally possible for it to determine that a certain type of question shall be decided in the future by any of the alternative voting procedures as outlined above ? If it is legally possible for the General Assembly to adopt any of these voting systems and if Rule F, which replaces the unanimity rule by a two-thirds majority, is not, upon examination, shown to represent the closest possible approximation to the procedure of the Council of the League of Nations, then there arises in an acute form the question of its compatibility with the Opinion of the Court given in 1950. What is the answer to these questions ?

" To put it in different words, must Rule F be regarded as approximating ' as far as possible ' to the procedure of the Council of the League for the reason that under the voting system of the Charter no other voting procedure save that of simple majority or a two-thirds majority is possible or permissible ? Did the Court have that limitation in mind when it used the expression ' as far as possible '? That this was so was repeatedly asserted during the debates in the General Assembly and in the Committee for South-West Africa. It is a problem which is essential to the whole question. Its examination—and an answer to it—cannot be avoided on the ground that a positive answer constitutes a juridical impossibility. The General Assembly did not consider it in that light for, as stated, it specifically asked the Court to say what should be its alternative voting procedure in case the Court should give a negative answer to the main question put to it. Neither can the answer to the constitutional aspect of the question be taken as self-evident by way of ' construction ' in the sense that as the Court held that the supervision must lie with the General Assembly, the General Assembly can resort for that purpose to a procedure no other than that laid down in the Charter, and that by adopting Rule F it followed the procedure of the Council of the League as far as possible. To do so is to beg the question. Neither do I think it permissible to avoid it because of the difficulty raised by a baffling practice and by conflicting considerations of principle.

" Principle would seem to suggest that it is not legally possible for the General Assembly to decide—whether by an ordinary majority or a two-thirds majority—that any question or category of questions, or all questions, shall be in the future decided by a majority of three-fourths or four-fifths or by a unanimous vote. The reasons for that view are persuasive. If the General Assembly were to make any such decision, it would be depriving some, as yet undetermined, Members of the General Assembly of the right, safeguarded by the Charter, to have a matter determined by a two-thirds majority in which they participate. If that is so, then it would appear that the General Assembly is not legally in the position to adopt any such special procedure of voting even in pursuance of an Advisory Opinion of the Court. Any such change must be the result of an amendment of the Charter. This view is strengthened by jurisprudential considerations of obvious cogency:

" The size of the majority required for the validity of the decisions of a corporate political body is not a mere matter of technical convenience or mathematical computation. It is expressive of the basic political philosophy of the organization. A study of the preparatory work of the Conference of San Francisco, including that of the Dumbarton Oaks proposals, shows that the adoption of the existing system of voting was the result of prolonged deliberation. In any case it now forms part of the law of the Charter. Unlike in the League of Nations, the basic philosophy of the Charter of the United Nations is, to put it in a negative form, that of the rejection of the rule of unanimity. There is not a single provision of the Charter which prescribes or authorizes for voting in the General Assembly the requirement of unanimity or any kind of majority other than a simple or two-thirds majority (although, significantly, there is in Articles 108 and 109 a provision for a majority which must include permanent Members of the Security Council). It is outside the purpose of this Opinion to enquire into the reason and objects of that system of voting based on the rejection of unanimity or anything approaching it. It suffices to say that the system as adopted is in accordance with the structure of the United Nations conceived as an entity existing, as it were, independently of its Members and endowed with a personality of its own—one aspect of which is vividly illustrated by the Opinion of the Court in the *Injuries* Case—as distinguished from the League of Nations which in acting, by virtue of the principle of unanimity, by agreement rather than by majority, bore the character of an association of a different character.

" Principle would seem to demand that whenever the basic instrument of a corporate political body prescribes the manner in which its collective will is to be formed and expressed, that basic instrument is in this respect paramount and overriding and nothing save a constitutional amendment as distinguished from legislative action can authorize an alternative procedure of voting. On that view it would not seem to matter, in the case of the United Nations, whether the action is taken in pursuance of the objects of organization, or in pursuance of a function accepted under some extraneous instrument such as a treaty. Such function must in any case lie within the orbit of its competence as laid down in the Charter. For the organization cannot accept the fulfilment of a task which lies outside the scope of its functions as determined by its constitution. Thus, for instance, if two or more States were to confer by treaty upon the General Assembly certain functions in the sphere of pacific settlement—e.g., by appointing an arbitration commission or by itself deciding the disputed issue—and if the treaty provided that these functions shall be fulfilled by a three-fourths or four-fifths majority or qualified unanimity, principle would seem to suggest that the General Assembly cannot act in that way. It cannot override a seemingly mandatory provision of the Charter by the device of accepting a task conferred by a treaty. It might otherwise be possible to alter, through extraneous treaties, the character of the Organization in an important aspect of its activity.

" These were probably the reasons—although they do not seem to have been expressed in articulate language—which made some Members of the United Nations insist that in giving its Opinion in 1950 the Court must have envisaged the voting procedure of the General Assembly such as it is and must have ruled out the possibility of its being adapted to the governing requirement that the degree of supervision must not exceed that under the System of Mandates. In doing so, they were able to point to the Advisory Opinion

No. 12 on the *Interpretation of the Treaty of Lausanne* in which the Court appeared to have laid down the principle that a political body entrusted with a decision by virtue of an extraneous instrument can proceed in the matter only in accordance with its own procedure of voting. If that view, so cogently supported by principle and, apparently, by the Court, is correct, then, clearly, Rule F cannot be challenged on the ground that it is tainted by an avoidable failure to approximate to the voting procedure of the Council of the League. It means, to put it in different words, that Rule F is a correct interpretation of the Opinion of 1950 for the reason: (*a*) that the absolute unanimity rule, even if it were correct, could not be given effect having regard to the binding character of the voting procedure of the Charter; and (*b*) that, for the same reason, it was not legally possible for the General Assembly to contemplate or to adopt any alternative procedure falling short of absolute unanimity.

" However, although the view as here outlined seems to be supported by principle and practice, there are opposing considerations both of practice and principle. In fact, the Permanent Court of International Justice, after enunciating in the Twelfth Advisory Opinion the rule which seems to go one way, qualified it in the same Opinion in the opposite direction. It began by rejecting the view, put forward by Great Britain, that the unanimity rule as laid down in Article 5 of the Covenant, contemplated only the exercise of powers granted in the Covenant itself. It said: ' The fact that the present case concerns the exercise of a power outside the normal province of the Council, clearly cannot be used as an argument for the diminution of the safeguards with which, in the Covenant, it was felt necessary to surround the Council's decisions ' (Series B, No. 12, p. 30). It thus seems to have adopted the view, which I have described as seemingly being in accordance with principle, that a political body can act only in accordance with the procedure as laid down in its constitution. However, after having said that, the Court proceeded to qualify the apparent general rule. It said: ' On the other hand, no one denies that the Council can undertake to give decisions by a majority in specific cases, if express provision is made for this power by treaty stipulations ' (at p. 30). Again, after referring to the binding character of the voting procedure of a ' body already constituted and having its own rules of organization and procedure ', it qualified that statement by adding: ' unless a contrary intention has been expressed ' (at p. 31).

" In thus qualifying the major principle which it enunciated and on which it acted, the Court was in fact able to rely—although it did not refer to—on some substantial practice of the League of Nations. Of that practice the Rules of Procedure adopted by the Assembly and the Council of the League provide a significant example. Article 5 (1) of the Covenant laid down as follows: ' Except when otherwise provided in this Covenant or by the terms of the present treaty, decisions of any meeting of the Assembly, or of the Council, require the agreement of all the Members represented at the meeting.' However, the Rules of Procedure, subsequently framed with respect to both the Assembly and the Council, effected in this matter an important—though at first sight inconspicuous—change. In Rule 19 (1) of the Rules of Procedure of the Assembly the words of Article 5, paragraph 1, of the Covenant were reproduced with a significant modification. In place of the words ' by the terms of the present treaty ' there were substituted the words ' of *a* treaty '. Article 8, paragraph (1), of the Council's Rules of Procedure made the same change. In the Rules of Procedure of the Council adopted on May 26th, 1933, this aspect of the matter was expressed even more clearly. Article 9 of the revised Rules provided as follows: ' Except where otherwise expressly provided by the Covenant, or by the terms of any other instrument which is to be applied, decisions at any meeting of the Council require the agreement of all the Members of the League represented at the meeting.'

" Moreover, in a large number of treaties adopted subsequent to the Peace Treaties and in some cases expressly accepted by the Council, provision was made for voting by some kind of majority as distinguished from unanimity. This applied in particular to the ' Minorities Treaties ' which all contained provisions allowing the Council to proceed by a majority of votes in proposing modifications to these treaties. Similar provisions were incorporated in some other instruments such as Article 4 of the Declaration of November 9th, 1921, of the Principal Allied Powers concerning Albania; Article 15 of the second Geneva Protocol of March 14th, 1924, concerning the economic rehabilitation of Hungary; Article 14 of Annex 2 and Article 4 of Annex 3 of the Memel Agreement of May 8th, 1924, between the Principal Allied Powers and Lithuania; Article 9 of the Financial Agreement of 9 December, 1927, between Bulgaria and Greece; Article 7 of the Agreement of 20 October, 1921, concerning the non-militarization and neutralization of the Aaland Islands; Article 8 of the Locarno Pact of October 16th, 1925; Article 28 (3) of the Agreement on Financial Assistance of 2 October, 1930. And, of course, there were numerous provisions to that effect in the various Peace Treaties to which, as stated, express reference was made in the Covenant. There was no disposition among authors who commented in detail upon the amended Rules of Procedure and the provisions of these treaties to question their propriety in any way (see Schücking-Wehberg, *Die Satzung des Völkerbundes*, 3rd ed., Vol. I (1931), pp. 517, 521; Ray, *Commentaire du Pacte de la Société des Nations* (1930), pp. 226, 227; Stone in *British Year Book of International Law*, 14 (1933), pp. 33–35).

" Having regard to the practice of the League of Nations and to the important qualification of the apparent major principle expressed by the Court in the Twelfth Advisory Opinion, as well as to considerations of a practical character, it cannot be said, by way of an absolute rule, that in no circumstances may the General Assembly act by a system of voting other than that laid down in the Charter. There is no room for any emphasis of language suggesting that any such modification of the voting procedure is a juridical impossibility. Frequent practice of the League of Nations accomplished that juridical impossibility and the Court expressly gave it its approval. On the other hand, in view of the persuasiveness of the contrary considerations outlined above, it does not seem to me permissible to go as far as the Rules of Procedure of the Assembly or the Council of the League—or, indeed, the Court itself in the Twelfth Advisory Opinion—went in this respect and to hold that a modification of the system of voting is permitted every time when the Organization acts under a treaty other than its own constitutional Charter. The correct rule seems to lie half-way between these two solutions. The available practice and considerations of utility point to the justification of a rule which recognizes in this matter a measure of elasticity not inconsistent with the fundamental structure of the Organization. Within these limits, it is in my view a sound legal proposition that such modification is permissible under the terms of a general treaty, in the general international interest, and in relation to institutions and arrangements partaking of an international status—in particular, in cases in which the General Assembly acts in substitution for a body which has hitherto fulfilled the functions in question. This is the position in the present case. While the powers of the General Assembly in the matter are to be exercised primarily in pursuance of the Charter as interpreted by the Court in its Opinion rendered in 1950, and in particular of Articles 10 and 80, they are also to be exercised in pursuance of the continuing system of Mandates whose obligations were declared by the Court to be binding upon the Union of South-West Africa in respect of the territory which continues to be held under the international Mandate assumed by her in 1920. In view of this, there is room, as a matter of law, for the modification of the voting procedure of the General Assembly in respect of a jurisdiction whose source is of a dual character inasmuch as it emanates both from the Charter and the Mandate. In so far as considerations of international interest constitute a legitimate factor in the situation, they do so with much cogency in a situation which concerns the exercise of an international trust in respect of a territory which is endowed with an international status, which is the subject of an Opinion of this Court, and which has been the cause of international friction.

" The question which calls for an answer is whether in the present case there exists a treaty of a character as described above. The words of the Opinion of 1950 seem to suggest a negative answer inasmuch as the Opinion lays down that ' the competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter ' (at p. 137). However, the passage must be read not in isolation but in the general context of the Opinion and in the light of the dual character of the source of the supervisory function of the General Assembly. The true meaning of the passage in question is that Article 10 of the Charter confers upon the General Assembly the competence to fulfil the functions as derived from the international instrument which establishes the international status of the territory in question, namely, the Mandate. It is the Mandate which is the original source of the powers of the General Assembly. The competence to apply the Mandate is derived from Article 10.

" It follows from what has been said above that there is no warrant for considering as a dogma, for which no proof is required and with regard to which any contrary evidence can be ignored, the rule that under no circumstances may the General Assembly act under a voting procedure other than that laid down in Article 18. This being so, what are the modifications of the voting procedure of the General Assembly which may properly be contemplated in this connection ? It is clear that any application of the principle of absolute unanimity—which in any case would be ruled out by virtue of the answer given above to Question 1—is inadmissible under the legal principle here formulated for the reason that it offends against a fundamental tenet of the constitution of the United Nations, namely, the abandonment of the doctrine of unanimity. For the same reason there would seem to be no room for a system of qualified unanimity not including the vote of the administering State—a system which would be open to the additional objection that it would place South Africa in some ways in a better position than that obtaining under the procedure of the Council of the League. For the number of States required for unanimity in the General Assembly is about four times as large as in the Council of the League.

" Yet there was—and there is—room for exploring the practicability of voting procedures lying half-way between qualified unanimity and a two-thirds majority. This Opinion is not the appropriate occasion for an examination of these solutions. There may be an element of artificiality in some of them inasmuch as they must of necessity leave out of account the differences in the composition of the General Assembly and the Council of the League. The discussions on the General Assembly show a somewhat disturbing absence of attempts to explore some of the more practicable possibilities—though this fact may perhaps be explained by the repetitive and rigid adherence on the part of the Government of South Africa, an adherence unrelieved by alternative proposals, to the notion of absolute unanimity. In particular, there is room for the consideration of a solution consisting, on the analogy of Articles 108 and 109 of the Charter, in qualifying the requirement of a two-thirds majority, as laid down in Rule F, by the additional requirement that it must include either all the Members of the Trusteeship Council other than South Africa or all its Members other than South Africa administering Trust Territories. I am not prepared to say that some such solution, couched in the very language of Article 18 of the Charter, would be inconsistent with it. There is only limited merit in a judicial interpretation intent upon extracting every ounce of rigidity from a written constitution or in simplifying the issue by concentrating exclusively on extreme solutions. Thus, while unanimity, absolute or qualified, may be entirely alien to the spirit of the Charter and as such inconsistent with it, this does not apply to alternative solutions falling short of unanimity. In particular, when the General Assembly takes over functions from a body whose procedure it is enjoined to follow as far as possible, it seems to me reasonable to explore, in a spirit of accommodation free from exaggerations of language, other solutions appropriate to the situation and not basically inconsistent with the Charter.

"Accordingly, in so far as Rule F fails to provide for practicable modifications of the voting procedure of the General Assembly, not inconsistent with the fundamental principles of the Charter of the United Nations on the subject, I might, if not prevented by my answer to Question 3, feel bound to hold that Rule F does not approximate as far as possible to the voting procedure of the Council of the League and that in so far as it involves a higher degree of supervision it fails to conform with the Opinion rendered in 1950. However, I cannot so hold for the reason that my answer to Question 3 is that, as the decisions of the General Assembly are not of a legal effect equal to that of the decisions of the Council of the League, Rule F does not involve a degree of supervision exceeding that in force under the Mandates System and that it therefore constitutes a correct interpretation of the Opinion rendered by the Court in 1950.

"Question 3: *Do the decisions of the General Assembly possess the same legal force in the system of supervision as the decisions of the Council of the League of Nations?*

"The final, and in my view decisive, question is whether it cannot correctly be said that Rule F is in accordance with the Opinion of the Court rendered in 1950 for the reason that what South Africa is now asked to accept are majority decisions which are not binding or not fully binding in place of decisions which were binding—which means in effect that she is asked to accept a system of supervision which, far from being more exacting, is much less so. Even if it is assumed that she was not bound by decisions of the League Council to which she did not agree and that she could prevent any such decision from coming into force, can it not be said that she is not bound or not fully bound by the decisions of the General Assembly for the simple reason that these are not binding or not duly binding? If the Court were to accept that argument, it would have to reject the assertion that Rule F implies a degree of supervision in excess of that obtaining under the System of Mandates. There would be such excess of supervision if the decision of the General Assembly reached by a two-thirds majority had the same legal and binding force as unanimous resolutions of the Council of the League of Nations. On the other hand, if the position is in fact that, while the supervision by the General Assembly exceeds that of the Council of the League of Nations inasmuch as it is exercised by a majority vote of two-thirds and thus deprived of the safeguards of unanimity, it is at the same time less exacting inasmuch as it is exercised by means of decisions of a character less binding than those of the Council of the League of Nations—if that is the position, can it not be fairly held that there is established a rough equivalence of supervision which brings Rule F within the terms of the ruling of the Court in its Advisory Opinion rendered in 1950? My view is that that contention is fully relevant to the present case and that it is substantially correct.

"Although decisions of the General Assembly are endowed with full legal effect in some spheres of the activity of the United Nations and with limited legal effect in other spheres, it may be said, by way of a broad generalisation, that they are not legally binding upon the Members of the United Nations. In some matters—such as the election of the Secretary-General, election of members of the Economic and Social Council and of some members of the Trusteeship Council, the adoption of rules of procedure, admission to, suspension from and termination of membership, and approval of the budget and the apportionment of expenses—the full legal effects of the Resolutions of the General Assembly are undeniable. But, in general, they are in the nature of recommendations and it is in the nature of recommendations that, although on proper occasions they provide a legal authorization for Members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them. This is so although Rule F and the General Assembly's request for the present Opinion both refer to ' decisions ' which, in ordinary connotation, signify binding expressions of will. In fact, the request of the General Assembly and the special Rule F, in referring to ' decisions ', contemplate decisions in their wider, somewhat non-technical, sense as used in Article 18 of the Charter of the United Nations. The intended reference is to Resolutions generally, a generic term which, although it does not occur in the Charter, has found an accepted place in the practice of the United Nations. Now ' resolutions ' cover two distinct matters: They cover occasionally decisions which have a definite binding effect either in relation to Members of the United Nations or its organs or both, or the United Nations as a whole. But normally they refer to recommendations, properly so called, whose legal effect, although not always altogether absent, is more limited and approaching what, when taken in isolation, appears to be no more than a moral obligation.

" This, in principle, is also the position with respect to the recommendations of the General Assembly in relation to the administration of trust territories. The Trusteeship Agreements do not provide for a legal obligation of the Administering Authority to comply with the decisions of the organs of the United Nations in the matter of trusteeship. Thus there is no legal obligation, on the part of the Administering Authority, to give effect to a recommendation of the General Assembly to adopt or depart from a particular course of legislation or any particular administrative measure. The legal obligation resting upon the Administering Authority is to administer the Trust Territory in accordance with the principles of the Charter and the provisions of the Trusteeship Agreement, but not necessarily in accordance with any specific recommendation of the General Assembly or of the Trusteeship Council. This is so as a matter both of existing law and of sound principles of government. The Administering Authority, not the General Assembly, bears the direct responsibility for the welfare of the population of the Trust Territory. There is no sufficient guarantee of the timeliness and practicability of a particular recommendation made by a body acting occasionally amidst a pressure of business, at times deprived of expert advice and information, and not always able to foresee the consequences of a particular measure in relation to the totality of legislation and administration of the trust territory. Recommendations in the sphere of trusteeship have been made by the General Assembly frequently and as a matter of course. To suggest that any such particular recommendation is binding in the sense that there is a legal obligation to put it into effect is to run counter not only to the paramount rule that the General Assembly has no legal power to legislate or bind its Members by way of recommendations, but, for reasons stated, also to cogent considerations of good government and administration.

" In fact States administering Trust Territories have often asserted their right not to accept recommendations of the General Assembly or of the Trusteeship Council as approved by the General Assembly. That right has never been seriously challenged. There are numerous examples of express refusal on the part of the Administering Authority to comply with a recommendation. This occurred, for instance, with regard to the recommendation of the Trusteeship Council at its Third Session (A/603, *Official Records of the General Assembly*, Third Session, Suppl. No. 4, p. 31) which considered that the existing tribal structure in Tanganyika is an obstacle to the political and social advancement of the indigenous inhabitants—a recommendation which the Administering Authority rejected on the ground that ' the great mass of the people everywhere are strongly attached to their tribal institutions and in most cases offer strong resistance to any suggestions of serious modification ' (*Report for 1948*, p. 52). When the Trusteeship Council recommended that consideration be given to the introduction of a system of universal suffrage applicable to all inhabitants of Western Samoa (A/933, *Official Records of the General Assembly*, Fourth Session, Supplement No. 4, p. 58) the Administering Authority informed the Council that ' it would be entirely wrong to force on the Samoans any radical change in their customs since the introduction of universal suffrage at this stage would be incompatible with that respect for Samoan culture to which it and the Government of Western Samoa are equally urged by the Trusteeship Council ' (Document A/1903/ Add. 2, p. 9). When the Trusteeship Council recommended in respect of Nauru that the long-term royalty investment funds should not necessarily be limited to Australian Government securities, but should be invested freely in the best interest of the Nauruans, the Administering Authority explained why it was unable to act upon the recommendation (A/933, *Official Records of the General Assembly*, Fourth Session, Suppl. No. 4, p. 77, A/1306, Fifth Session, Suppl. No. 4, p. 134). When the Trusteeship Council recommended the reconsideration of the head tax in the Pacific Islands, the Administering Authority explained why in its opinion this was a satisfactory and desirable form of tax under the economic and political conditions prevailing in the Trust Territory (S/1358, p. 13; S/1628, p. 15: Reports of the Trusteeship Council to the Security Council).

" I have elaborated at what may appear to be excessive length a point which seems non-controversial, namely, that recommendations of the General Assembly are not binding. I have done it by reference to recommendations which are relevant to the issue now before the Court, namely, the recommendations with respect to Trust Territories. They are so relevant although, of course, the territory of South-West Africa is not a Trust Territory. However, unless adequately explained and qualified, this statement of the legal position is bound to be incomplete to the point of being misleading. For reasons stated at the end of this Opinion, although I am basing my answer to this question on the view that the decisions of the General Assembly do not possess the same legal value as those of the Council of the League, I consider it essential to explain and to qualify this aspect of the present Separate Opinion. It is one thing to affirm the somewhat obvious principle that the recommendations of the General Assembly in the matter of trusteeship or otherwise addressed to the Members of the United Nations are not legally binding upon them in the sense that full effect must be given to them. It is another thing to give currency to the view that they have no force at all whether legal or other and that therefore they cannot be regarded as forming in any sense part of a legal system of supervision.

" In the first instance, not all the resolutions of the General Assembly in the matter are in the form of recommendations addressed to the Administering Authority. They are often, in form and in substance, directives addressed to the organs of the United Nations such as the Trusteeship Council or the Secretary-General. As such, they are endowed with legal validity and effect. They are measures of supervision of a force comparable with the legal effects of such acts of the General Assembly as the election of members of the Trusteeship Council or the confirmation of the Trusteeship Agreements. A survey of the resolutions passed by the General Assembly in the sphere of trusteeship shows the frequency of this aspect of the supervisory function of the General Assembly.

" However, even in relation to the Administering Authority the question of the effect of the decisions of the General Assembly cannot accurately be answered by the simple statement that they are not legally binding. In general it is clear that as the General Assembly has no power of decision—as distinguished from recommendation—imposing itself with binding force upon the substantive action of the Member States, its Resolutions have *per se* no binding force in relation to the Administering State. Thus that State is not bound to comply with any specific Resolution recommending it to undertake or to abstain from any particular legislative or administrative action. As stated, no considerations of practical persuasiveness permit any different interpretation of the existing law on the subject. I have referred to cases in which the Administering Authority has expressly declined to act upon the recommendation addressed to it. Its right to do so has never been challenged. What has been challenged—and, I believe, properly challenged—is its right simply to ignore the recommendations and to abstain from adducing reasons for not putting them into effect or for not submitting them for examination with the view to giving effect to them. What has been questioned is the opinion that a recommendation is of no legal effect whatsoever. A Resolution recommending to an Administering State a specific course of action creates *some* legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If, having regard to its own ultimate responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its decision. These obligations appear intangible and almost nominal when compared with the ultimate discretion of the Administering Authority. They nevertheless constitute an obligation; they have been acknowledged as such by the Administering Authorities. This appears with some clarity from the searching discussion at the Sixth General Assembly in 1952 which followed upon the presentation by the Secretary-General, in pursuance of a previous recommendation of the General Assembly, of a series of documents entitled *Information on the Implementation of Trusteeship Council and General Assembly Resolutions relating to Trust Territories* (Documents A/1903; A/1903/Add.1; A/1903/Add.2; October 1952. In Resolution 436 (V) of 2 December, 1950, the General Assembly requested the Secretary-General to report to it on the measures taken by the Administering Authorities to implement the Resolutions of the General Assembly and the Trusteeship Council and if there had been no action on the part of an Administering Authority in respect of any particular Resolution to set forth the reasons given concerning that matter). While pointing to the difficulties in the way of giving effect to some of the recommendations and while affirming their own final responsibility and their own right of ultimate decision, various delegations of the Administering States made no attempt to assert that these recommendations were *bruta fulmina* devoid of any element of legal obligation. Thus at the Sixth General Assembly, in the course of the debate of the Trusteeship Committee, the representative of the United Kingdom stated as follows: ' The United Kingdom considered that, in cases where the Trusteeship Council and the General Assembly had adopted Resolutions concerning the Trust Territories, they were perfectly entitled to be informed of the decisions taken by the Administering Authorities in regard to them.' (245th Meeting of 12 January, 1952; *Sixth General Assembly*, IVth Committee, p. 295.) Although, as stated, the Trusteeship Agreements do not provide for a legal obligation of the Administering Authority to comply with the decisions of an organ of the

United Nations, they are not in this respect devoid of an element of legal obligation. In practically all of them the Administering Authority undertakes to collaborate fully with the General Assembly and the Trusteeship Council in the discharge of their functions, to facilitate periodic missions, and the like. Such collaboration, which is a matter of legal duty, is initiated by decisions of the organs of the United Nations.

" Both principle and practice would thus appear to suggest that the discretion which, in the sphere of the administration of Trust Territories or territories assimilated thereto, is vested in the Members of the United Nations in respect of the Resolutions of the General Assembly, is not a discretion tantamount to unrestricted freedom of action. It is a discretion to be exercised in good faith. Undoubtedly, the degree of application of good faith in the exercise of full discretion does not lend itself to rigid legal appreciation. This fact does not destroy altogether the legal relevance of the discretion thus to be exercised. This is particularly so in relation to a succession of recommendations, on the same subject and with regard to the same State, solemnly reaffirmed by the General Assembly. Whatever may be the content of the recommendation and whatever may be the nature and the circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly. The same considerations apply to Resolutions in the sphere of territories administered by virtue of the principles of the System of Trusteeship. Although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, there is a legal obligation to act in good faith in accordance with the principles of the Charter and of the System of Trusteeship. An administering State may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organization, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction.

" Moreover—and for similar reasons—even if the view is adopted that the effect of a decision of the General Assembly is no greater than its moral force, a decision thus conceived still constitutes a measure of supervision. A system of supervision devoid of an element of legal obligation and legal sanction can nevertheless provide a powerful degree of supervision because of the moral force inherent in its findings and recommendations. It will be noted—and the matter is not without significance—that the Advisory Opinion of 1950 lays down not only that the new system must not add to the legal obligations of South Africa; it says that the degree of supervision must not exceed that obtaining under the League of Nations. The phrase ' degree of supervision ' used in the Advisory Opinion of 1950 does not refer necessarily or exclusively to supervision exercised by means of legally binding or enforceable pronouncements. Moral reprobation following upon non-compliance with a valid recommendation adopted in conformity with the Charter may provide a means of supervision as potent or more potent than a legal sanction.

" This absence of a purely legal machinery and the reliance upon the moral authority of the findings and the reports of the Mandates Commission were in fact the essential feature of the supervision of the Mandates System. Public opinion—and the resulting attitude of the Mandatory Powers—were influenced not so much by the formal Resolutions of the Council and Assembly as by the reports of the Mandates Commission which was the true organ of supervision. In legal theory the Mandates Commission was no more than a subsidiary and expert organ of the Council which received and approved its reports and which occasionally softened their impact by the use of diplomatic language intent upon not offending the susceptibilities of the Mandatory Power. The Commission could not communicate directly with the Mandatory Powers and was often reminded of the limitations of its authority. Its representatives who appeared before the Council often acknowledged those limitations and deprecated any intention of exceeding them. But it was a fact which was generally recognized and of which judicial notice must be taken that the actual scrutiny of the conduct of the Mandatory Power rested with the Mandates Commission. Yet no legal sanction was attached to non-compliance with or disregard of the recommendations, the hopes and the regrets of the Commission. The legal sanction of the judicial supervision by the Permanent Court of International Justice, although forming part of all Mandates, was never invoked. The occasional public and detailed discussions before the General Assembly and the Council, which influenced powerfully public opinion and the conduct of the Mandatory, were in pursuance of the reports of the Mandates Commission.

" There are two reasons why I have considered it essential to elaborate the point—which in a sense seems to put in doubt the grounds of my final conclusion—that decisions of the General Assembly in the matter of territories administered under the principles of trusteeship have, after all, some legal and certainly some moral effect and that they may therefore be regarded as a factor in the legal system of supervision in which the system of voting is relevant:

" In the first instance, the preceding observations show that I have not reached the final conclusion without some hesitation and without having fully weighed the correctness of an opposite conclusion, which is that although the decisions of the General Assembly have no full legal effect they are nevertheless a weighty factor in the system of supervision and that therefore the procedure of the voting by which they are reached is decisive for the purpose of the Opinion of the Court.

" The second reason is that, after full allowance has been made for the necessity of stating what is the inexorable legal position resulting from the very nature of ' recommendations ', it is not admissible to give currency to an interpretation, without qualifying it in all requisite detail, which gratuitously weakens the effectiveness of the Charter. It would be wholly inconsistent with sound principles of interpretation as well as with the highest international interest, which can never be legally irrelevant, to reduce the value of the Resolutions of the General Assembly—one of the principal instrumentalities of the formation of the collective will and judgment of the community of nations represented by the United Nations—and to treat them, for the purpose of this Opinion and otherwise, as nominal, insignificant and having no claim to influence the conduct of the Members. International interest demands that no judicial support, however indirect, be given to any such conception of the Resolutions of the General Assembly as being of no consequence.

" These considerations, as well as actual practice, prevent me from basing my conclusion on the proposition that the decisions of the General Assembly have no binding effect at all. However, there is no escape from the fact that they are of a legal potency lower than that implicit in the Resolutions of the Council of the League. To that fact I must attach decisive importance. It is unreasonable to claim that decisions of distinctly more limited legal value than that inherent in the decisions of the Council of the League of Nations must be reached by the same exacting and rigid system of voting. The fact that some resolutions of the General Assembly in the matter of trusteeship and elsewhere have a definite legal effect does not alter decisively the normal situation. This being so, I come to the conclusion, with regard to Question 3, that Rule F constitutes a correct interpretation of the Opinion of the Court given in 1950.

"Accordingly, while I have reached the final result on grounds different from those underlying the Opinion of the Court, I concur in its operative part for the reason:

" (1) that, in so far as the doubts as to the correctness of Rule F were prompted by the contention that the vote of the General Assembly on reports and petitions from South Africa is subject to the rule of absolute unanimity on the ground that this was the rule obtaining in the Council of the League of Nations, there is doubt whether such rule can correctly be held to have been in actual operation at the time of the dissolution of the League in the Council of the League acting as the supervisory organ of the Mandates System;

" (2) that, in so far as it is contended that the vote of the General Assembly on these questions might be subject to some other procedure of voting more exacting than a two-thirds majority, though falling short of absolute unanimity, Rule F is nevertheless in accordance with a correct interpretation of the Opinion of the Court given in 1950. This is so for the reason that the decisions of the General Assembly in the meaning of Rule F do not possess a degree of legal authority equal to that of the decisions of the Council of the League of Nations. In view of this, although adopted through a less stringent voting procedure, they cannot be held to involve a degree of supervision exceeding that which obtained under the Mandates System. These considerations would also apply if, contrary to the conclusion (1), it could be held that the decisions of the Council of the League on the subject required absolute unanimity."

IV.—Other Organs of the United Nations

International Organizations — United Nations — Administrative Tribunal—Competence to Interpret Earlier Judgments—Interpretation in Respect of Undecided Points—Reimbursement to Judgment Creditors of Income Tax on Indemnities Awarded by Tribunal—Deduction of Notice and Termination Indemnities from Tribunal Awards of Compensation and Arrears of Salary.

CRAWFORD *ET AL. v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. December 2, 1955.
(Mme Bastid, President; Petrén, Loutfi.)

THE FACTS.—In August 1953, Crawford and other employees[1] of the United Nations Organization had obtained from the Tribunal judgments for the payment to them by the defendant Organization of compensation for loss of salary on unjustified dismissal. In paying the compensation, the defendant Organization had deducted from the sums paid the amount of United States income tax thereon. The applicants now applied to the Tribunal for a determination of the amount of the compensation actually payable to them. Four of the applicants, Eldridge, Svenchansky, Glaser and Crawford, also requested the Tribunal to declare that the amount of the " notice and termination indemnities " payable to them was not deductible from the arrears of salary paid to them.

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[1] See *Crawford* v. *Secretary-General of the United Nations* (Judgment No. 18, U.N. Doc. AT/DEC/18, *International Law Reports*, 1953, p. 501); *Bancroft* v. *Same* (*ibid.*, p. 499); *Eldridge* v. *Same* (*ibid.*); *Elveson* v. *Same* (*ibid.*); *Glaser* v. *Same* (Judgment No. 38, U.N. Doc. AT/DEC/38, *International Law Reports*, 1953, p. 513); *Glassman* v. *Same* (*ibid.*, p. 499); *Gordon* v. *Same* (Judgment No. 29, U.N. Doc. AT/DEC/29, *International Law Reports*, 1953, p. 493); *Harris* v. *Same* (*ibid.*, p. 499); *Older* v. *Same* (*ibid.*); *Reed* v. *Same* (*ibid.*, p. 500); *Svenchansky* v. *Same* (*ibid.*, p. 499).

In all the judgments, the Tribunal had ordered the payment of arrears of salary to the applicants " less the amount paid at termination in lieu of notice and less also the amount of termination indemnity "; in cases where the applicants had not requested reinstatement the order was for payment of awards in lieu of reinstatement " up to the date of this judgment "; and where the applicants had requested reinstatement, the order was for reinstatement and arrears of salary " up to the date of reinstatement "; with 300 dollars costs in every case.

On September 2, 1953, the Secretary-General, in the exercise of his authority under the Statute of the Tribunal, notified the Tribunal of his decision not to reinstate the applicants in the cases in which reinstatement had been requested. Consequently, on October 13, 1953, the Tribunal rendered four fresh judgments [hereinafter referred to as " the October judgments "] ordering the payment of " full salary until the date of this [new] judgment " and various awards in lieu of reinstatement. In February 1955, the Secretary-General paid to the applicants the amounts awarded in lieu of reinstatement and costs ordered in the judgments. He also paid them arrears of salary, deducting in each case the amounts paid in lieu of notice which the applicants had received upon termination of their employment and the amount of the termination indemnity. For those applicants who had not requested reinstatement, the arrears of salary were calculated up to August 21, 1953. For the other applicants, who had requested reinstatement and in whose favour the October judgments had been given, the arrears of salary were calculated up to October 13, 1953. Before accepting payment, the applicants, by letter of February 9, 1955, notified the Legal Counsel of the United Nations that they reserved the right to make an application to the Administrative Tribunal relating to the reimbursement of taxes which the United States levied on the awards in lieu of reinstatement and an interpretation of the four judgments delivered on October 13, 1953. On October 21, 1955, the applicants filed a motion with the Tribunal requesting:

(a) a construction of the judgments of August 21 and October 13, 1953, which would require the Secretary-General to reimburse the applicants concerned for any taxes which they were required to pay under American law on the awards in lieu of reinstatement;

(b) that the Secretary-General be instructed to comply with the judgments of October 13, 1953, by remitting the applicants concerned the amounts deducted from their awards.

Held, as to the reimbursement of United States taxes: that the application must be dismissed. The interpretation of a judgment must not be confined to clarification of the meaning and scope of the points on which a decision had been made. No claim for reimbursement of income tax having been made by the complainants in their original submission, the Tribunal made no decision on this point. The applicants were seeking a new decision, and the application was therefore misconceived. As regards the interpretation of the October judgments, the application must be dismissed. The Tribunal had come to a decision in respect of the point at issue; the application was therefore in order. But the amount of notice and termination indemnities paid to the applicants were properly deductible from the amount of compensation and arrears of salary paid to them.

I. *Reimbursement of United States taxes.*—The applicants advanced the following main contentions:

(a) The Tribunal intended the awards in lieu of reinstatement to represent a net or irreducible compensation to the applicants for the injuries caused to them by the termination of their employment. The payment of United States taxes would reduce the amount to which the applicants were ultimately entitled and thus deprive them of full compensation.

(b) The Tribunal could not have intended, in its awards, to discriminate between American nationals and those of other countries. A reduction of these awards—by the payment by the applicants of United States taxes—would have the effect of placing the applicants in a position inferior to that of nationals of other countries awarded compensation by the Tribunal in lieu of reinstatement, since only the United States taxed its nationals who were employed by the United Nations. For example, in the *Howrani Case*,[1] the award made by the Tribunal in 1951 represented a net benefit to the applicant, who was not an American citizen. On the other hand, in the *Keeney*[2] Case, the applicant, who was an American citizen, was awarded damages which the United Nations paid in full together with the federal tax on the award. The applicants requested that the precedent thus established by the defendant organization also be applicable to them.

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[1] *Howrani et Al.* v. *Secretary-General of the United Nations* (*International Law Reports*, 1951, Case No. 142).

[2] *International Law Reports*, 1951, p. 455.

(c) The Tribunal could not have intended to discriminate among the American applicants. The award it made in Judgment No. 42 (one of the October judgments) would not be taxable under American law because the applicant did not have a permanent contract with the United Nations and the award received would not therefore constitute damages for breach of a contract of employment. The Tribunal surely did not mean that applicants with permanent contracts should be treated differently.

The following main contentions were advanced on behalf of the defendant organization:

(a) The amounts awarded in lieu of reinstatement were intended by the Tribunal as liquidated damages which, together with the other payments awarded, were meant as a final settlement of the rights of the parties. Thus, the awards in lieu of reinstatement were not subject to staff assessment under Staff Rule 103.17, and consequently no income tax reimbursement, in case taxes had to be paid, need be considered. (It would be recalled that salaries of United Nations officials were calculated as gross salaries, liable to internal taxation by the United Nations itself, under the Staff Assessment Plan, and that where income tax was levied on these salaries, as was the case in the United States with respect to salaries paid to American officials residing in the United States, it was reimbursed to the officials by the United Nations.)

(b) The Tribunal had indicated its intention that tax reimbursements should not be paid on the awards in lieu of reinstatement, not only by its total silence on the matter of reimbursement but also by the fact that the Tribunal expressly referred to gross salaries and quite clearly used them in calculating the amount of the awards. If the Tribunal had ordered income tax reimbursements on top of awards of gross salaries, it would have given several of the applicants more money than they would have received had they continued in the service of the United Nations for the periods for which the Tribunal found they had an expectancy. Awards of this kind would have no basis in ordinary breach of contract, but would have a punitive character. The Tribunal could not have intended to award punitive damages, which it had no competence to do under its Statute; it was limited by Article 9 to fixing " compensation . . . for the injury sustained ".

(c) The defendant organization refuted the applicants' claim that denial of tax reimbursement would constitute discrimination against them and against all applicants of United States nationality. The question now before the Tribunal was not whether reimbursement should ever be paid on any awards, but whether it should be paid on these particular awards, fixed in the light of the factors mentioned in the judgments. Whenever the question of tax reimbursement arose with regard to awards to applicants of any nationality, it would have to be resolved by examination and analysis of the particular judgments concerned.

(d) There was no " discrimination " by the Administration when a difference in treatment was indicated by the Tribunal itself. In this connection, the defendant organization denied that the *Keeney* Case (*supra*) was a parallel. That judgment was executed by the defendant organization in the sense that the award was considered to be equivalent to a termination indemnity which was recognized as subject to staff assessment and tax reimbursement. It was therefore evident that this case could not be a precedent binding upon the defendant organization and that in any event this was merely a matter of administrative procedure.

The Tribunal said: " The Applicants request, in the first place, an interpretation of judgments Nos. 29, 31, 33–37 [in which reinstatement had not been requested] and 39–42 [the October judgments] so far as they relate to the award to the Applicants of compensation in lieu of reinstatement.

" They contend that in rendering these judgments the Tribunal intended these awards to represent a net and irreducible compensation for the injuries caused by their dismissal. Consequently, they claim, the Secretary-General was bound by virtue of these judgments to reimburse to the Applicants the amount of any tax payable by them under United States laws in respect of the awards of compensation.

" Relying on the terms of the judgments and the method of computing the awards followed by the Tribunal, the Respondent argues that he does not consider himself bound to reimburse any amounts that might be payable as tax. He maintains that the Motion on this point is not a request for interpretation of past judgments, but rather a request for new judgments making large supplementary awards to the Applicants.

" The International Court of Justice has laid down the conditions in which it can take action on a request for interpretation as follows:[1]

' (1) The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided. Any other construction of Article 60 of the Statute would nullify the provision of the article that the judgment is final and without appeal.

' (2) In addition, it is necessary that there should exist a dispute as to the meaning or scope of the judgment.

' To decide whether the first requirement stated above is fulfilled, one must bear in mind the principle that it is the duty of the Court not only to reply to the questions as stated in the final submissions of the

[1] *Interpretation of the Judgment of November* 20, 1950, *in the Asylum Case*: *I.C.J. Reports*, 1950, p. 395, at p. 402; *International Law Reports*, 1950, Case No. 106.]

parties, but also to abstain from deciding points not included in those submissions.'

The Court added:

'Interpretation can in no way go beyond the limits of the judgment, fixed in advance by the Parties themselves in their submission.'[1]

The Tribunal considers that it should be guided by these general principles regarding the interpretation of judgments.

"The Tribunal notes that, in the course of the proceedings resulting in the judgments for which an interpretation is now requested, the Applicants did not submit any claim for reimbursement by the Respondent of any United States tax which might be payable on the amounts of compensation under Article 9 of the Statute of the Tribunal.

"Consequently, the question whether the Respondent might have an obligation in this respect over and above the obligation to pay compensation in lieu of reinstatement was never discussed in the original hearing before the Tribunal.

"By applying to the Tribunal for a ruling on this point in the form of an interpretation, the Applicants are seeking a decision on a new question not previously submitted to the Tribunal and not an interpretation of the afore-mentioned judgments, the limits of which were fixed in advance by the submissions of the Parties.

"The Tribunal therefore finds that the Motion requesting interpretation of judgments Nos. 29, 31, 33 to 37 and [the October judgments] so far as they awarded compensation against the Respondent in lieu of reinstatement is not receivable."

II. *Interpretation of the October judgments*.—The applicants advanced the following main contentions:

(a) Since the applicants had applied for reinstatement and since the application was upheld by the Tribunal and refused by the Secretary-General, they were entitled to greater benefits than those officials who had elected compensation in lieu of reinstatement. This position was supported by the October judgments, *e.g.*, in judgment No. 39 the Tribunal declared that "the injury to be indemnified is that which results from the Secretary-General's refusal to reinstate."

(b) The defendant organisation, in making payments in February 1955, did not make payment of "full salary until the date of this judgment" as ordered in the October judgments. Instead, he complied with the original judgments (Nos. 18, 30, 32, and 38 of 21 August, 1953) [in which reinstatement had not been requested] by deducting "the amount paid at termination in lieu of notice and . . . also the amount of termination indemnity". Moreover, the defendant organisation went even beyond this. In giving effect to judgment No. 41 in the case of *Glaser* [one of the October judgments], the defendant organisation applied the deductions against

[1] *I.C.J. Reports*, 1950, at p. 403.]

the award in lieu of reinstatement and costs so that the applicant, after the October judgment, was paid a sum inferior to the amount awarded in lieu of reinstatement.

(c) The defendant organisation was in error in making deductions in the four cases since the October judgments did not do so direct.

The following main contentions were advanced on behalf of the defendant organisation:

(a) The October judgments did not rescind those of 21 August 1953 and it was doubtful whether rescission would be possible under the Statute. The only course was to construe the two sets of judgments together and to apply the deductions, which under the August judgments were to apply to " full salary up to the date of reinstatement ", to the awards under the October judgments which granted an equivalent of reinstatement.

(b) The defendant organisation did not agree with the applicant's view that the applicants who requested reinstatement " were entitled to greater benefits " than those who did not, and pointed out in this connection that the factors enumerated as the basis of the awards made on 13 October were exactly similar to those referred to in judgments Nos. 18, 30, 32 and 38 delivered on 21 August 1953 in the case of the applicants who elected compensation in lieu of reinstatement. The only difference between the two sets of cases was that the October ones waited longer for settlement of the rights involved, and this delay was compensated for by the award of back salary up to 13 October.

(c) With regard to the carrying out by the defendant organisation of judgment No. 41 (*Glaser*) where the applicant after the judgment was paid less than the amount awarded in lieu of reinstatement, the respondent pointed out that this occurred because the applicant was "terminated" only in May 1953, and hence had less back salary than the other applicants. If she had been reinstated on 13 October 1953 she would, under the August judgment, have owed the United Nations about 1,000 dollars, since her termination indemnity and notice payment were that much larger than her back salary. This being the situation in the event of reinstatement, it was only reasonable to make the same deduction from the award in lieu of reinstatement.

The Tribunal said: " The Tribunal has before it a request for the interpretation of the judgments rendered on 13 October 1953 (No. 39 to 42) in favour of Mrs. Eldridge, Mr. Svenchansky, Mrs. Glaser and Miss Crawford so far as these judgments ordered the payment to each Applicant of ' full salary until the date of . . . [the] judgment '.

" The Applicants contend that, instead of making payment of full salary as prescribed by the judgments of 13 October 1953, the

Respondent complied with the judgments rendered on 21 August 1953 by wrongly deducting ' the amount paid at termination in lieu of notice and . . . also the amount of termination indemnity ' from the salary. He even applied those deductions against costs and against the compensation awarded in lieu of reinstatement, so that in Mrs. Glaser's case the full amount of the compensation was not paid. They claim that the judgments of 13 October 1953 should be construed as requiring full payment of salary up to 13 October 1953.

" The Respondent contends that the judgments of 21 August and of 13 October 1953 should be construed together, since the former were not rescinded by the latter. Hence, the Applicants are not entitled to retain the termination indemnities and payments in lieu of notice which had been paid to them on the theory that the original terminations were valid, when in fact they have been held invalid by the Tribunal.

" The Tribunal finds that the argument between the Parties relates to an issue which the [October judgments] decided with binding force. The Tribunal is consequently under a duty to give an interpretation.

" The Tribunal points out that the judgments of 13 October 1953 were rendered in accordance with Article 9 of its Statute as drafted at that date:

> ' If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked; but if, in exceptional circumstances, such rescinding or specific performance is, in the opinion of the Secretary-General, impossible or inadvisable, the Tribunal shall within a period of not more than sixty days order the payment to the applicant of compensation for the injury sustained.'

" In consequence of this provision, the Tribunal had to give two rulings on the legal consequences of its findings with reference to the validity of the application. The Statute does not say that the second judgment rescinds or supersedes the first. That being so, the Tribunal's second judgment must be regarded as having no object other than to award compensation in respect of that part of the first judgment which cannot be carried into effect.

" In its judgments of 21 August 1953, the Tribunal declared the decision regarding termination to be ' illegal ' (judgments Nos. 18,[1] 30 and 32) and ' the application to be well-founded ' (judgment No. 38[2]). It then went on to give a ruling on the claims for compensation ' up to the date of reinstatement ' and on costs.

" In its judgments of 13 October 1953, the Tribunal confined

[[1] *Crawford* v. *Secretary-General of the United Nations*: U.N. Doc. AT/DEC/18; *International Law Reports*, 1951, p. 501.]

[[2] *Glaser* v. *Secretary-General of the United Nations*: U.N. Doc. AT/DEC/38; *International Law Reports*, 1951, p. 518.]

itself to considering ' the injury . . . which results from the Secretary-General's refusal to reinstate ' the Applicants. Accordingly, those judgments do not affect that section of the operative part of the judgments rendered on 21 August which related to compensation and costs.

" That being so, the Tribunal decides that the sum paid in lieu of notice and the amount of the termination indemnity are properly deductible from the arrears of salary up to the date of judgments Nos. 18, 30, 32 and 38 rendered on 21 August 1953.

" Under the terms of the judgments of 13 October 1953, each applicant is also entitled to ' full salary up to the date of this judgment '. As the Tribunal had already given a ruling on the payment of arrears of salary up to 21 August 1953, its judgments of 13 October 1953 were clearly concerned solely with arrears of salary for the period beween 21 August and 13 October 1953.

" With regard to judgment No. 41 rendered on 13 October 1953 in favour of Mrs. *Glaser* [*supra*], the Motion states that, in deducting the sums paid in lieu of notice and as termination indemnity not only from the arrears of salary payable by the Respondent but also from the costs and the compensation awarded in lieu of reinstatement, the Respondent has disregarded the terms of the judgment. The Respondent explains that it was logical to deduct these sums from the compensation in lieu of reinstatement, since they would have been deducted from Mrs. Glaser's salary, had she been reinstated.

" The Tribunal notes that the payment made to the Applicant at the time of her termination was so made in pursuance of the provisions of the Staff Regulations and Rules relating to terminations by the proper procedure. In declaring the termination illegal, the Tribunal removed the reason for this payment. This reason did not revive in consequence of the Secretary-General's decision not to give effect to the judgment declaring the termination illegal and ordering reinstatement. Accordingly, Mrs. Glaser's services were not terminated by virtue of the provisions of the Staff Regulations, but in consequence of the application of the Statute of the Tribunal, as enacted by the General Assembly. In those circumstances, in evaluating the total injury resulting from the termination, the Tribunal is not bound by the provisions of the Staff Regulations relating to notice and termination compensation.

" The judgment of 13 October 1953 could not have the effect of cancelling the debt which remained due by the Applicant in consequence of the judgment of 21 August 1953. Thus, the Respondent could, in the particular circumstances, effect a set-off of two debts resulting from Tribunal judgments in one and the same case.

" The Tribunal consequently decides: (i) that the termination indemnity and the sums paid in lieu of notice are properly deductible from the arrears of salary awarded to the Applicants by the Tribunal in its judgments of 21 August and 13 October 1953; (ii) that, to the extent to which the sums to be deducted exceed the arrears payable by the Respondent, these sums may be deducted from the costs and from the indemnity in lieu of reinstatement which were held to be payable by the Respondent in the judgments of 21 August 1953 and 13 October 1953."

[Report: Judgment No. 61 of the Administrative Tribunal of the United Nations: U.N. Document AT/DEC/61.]

V.—Interpretation of the Charter of the United Nations

United Nations—Charter of—Objects of—Peaceful Settlement of Disputes—War between Members of the United Nations—General Armistice Agreement between Israel and Lebanon—Termination of War—Absence of Peace—Trading with the Enemy—Contracts.

JIDAY *v.* C.E.O. HAIFA AND ANOTHER.

Israel, Supreme Court (sitting as the High Court of Justice).

(Agranat, Goitein and Berinson JJ.)

February 4, 1955.

THE FACTS.—This was an application for an order that the Chief Execution Officer refrain from executing a judgment rendered against the petitioner by the Court of the Greek Catholic Melkite Community. That Community's Patriarch, who had appointed the members of the Court, resided in Lebanon, a country which refused to maintain normal relations with Israel and, indeed, so it was argued, was in a state of war, or at least not in a state of peace, with Israel. Relations between the two countries, both Members of the United Nations, were governed by the General Armistice Agreement of March 23, 1949 (*U.N.T.S.*, vol. 42, p. 287).

Held: that the application must be dismissed. There was no legal state of war between the two countries, and intercourse between their inhabitants was not illegal except where prohibited by statute. The common law prohibition on trading with the enemy did not apply to intercourse of a religious or spiritual character in the present circumstances. Consequently, there was no objection to the execution of the judgment rendered by this religious Court. Judgment was given by Goitein J., who said on this point:

" The third, and the most interesting, submission put forward by the petitioner relates to the fact that the appointment of the judges who constituted the Appellate Tribunal was made by the Melkite Patriarch, whose residence is in Lebanon. If I understood him correctly, Counsel for the petitioner based his submission on the following propositions:

a) Lebanon is in a state of war with Israel or at least is not in a state of peace with Israel;
b) Every person who resides in Lebanon is to be regarded as an enemy with whom all intercourse and contacts are prohibited;
c) The Melkite Patriarch resides in Lebanon: therefore he is an enemy and as such cannot appoint judges to determine any matter, religious or secular, in Israel;
d) In consequence, the judges who sat in the present appeal by virtue of an appointment made by the Patriarch in Lebanon, gave a judgment contrary to the law of Israel and therefore the first respondent cannot execute it.

" Counsel for the second respondent stressed that most of those submissions were of a political rather than a legal character. He did not reply *seriatim*, but argued that all were based on an incorrect supposition of fact, namely, that the Government of Israel does not permit contacts or intercourse with the Patriarch in Lebanon, whereas the opposite is true. The Government of Israel permits Monsignor Hakim to cross the Lebanese frontier in order to meet with the Patriarch and discuss with him religious questions of concern to the Melkite Community.

" It is a matter for regret that Counsel for the petitioner did not fully develop his ideas but merely placed them before us. He quoted no authority in support of the supposed prohibition upon religious intercourse. Nevertheless, the submission is a weighty one and we must deal with it.

"As in many other spheres, so in its relations with its neighbours the State of Israel is unique. It may not be possible to find any direct support for the submissions brought before us, neither in Oppenheim nor in any other book on public international law. But with Lebanon we have a particular Agreement, which clearly defines the legal aspects of relations between the two countries, and we must therefore first examine that Agreement very closely in order accurately to determine the legal nature of the relations subsisting between the two countries. Before doing so, let me stress that both Israel and Lebanon are Members of the United Nations and are bound to conduct themselves in accordance with what is laid down in the Charter. For that reason, in order to find the answer to the question whether Israel is in a state of war with Lebanon, we have to look to both these international documents, which have been published in the State Records of Israel (*Kitvei Amana—Israel Treaty Series*).

" Article 33 of the Charter of the United Nations provides:

> ' The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security,

> shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

Article 37, para. 1, states:

> ' Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.'

And according to Article 38:

> ' Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.'

" The consequence of this is that States Members of the United Nations cannot be in a state of war until at least they have made some effort to reach agreement with their enemy or while the Security Council has not yet reached a decision concerning the state of affairs which has come into existence between the two States.

" So far as we are concerned there also exists, as I have already mentioned, a particular and additional international obligation imposed upon Lebanon and Israel, not to employ warlike methods to achieve a political objective desired by one or other of them. Article 1 (1) of the Israel-Lebanese General Armistice Agreement of March 23, 1949, imposes the following obligations upon each of its parties:

> ' The injunction of the Security Council against resort to military force in the settlement of the Palestine question shall henceforth be scrupulously respected by both Parties.'

The sub-paragraph immediately following describes the situation so clearly that it is impossible to assume for one moment that a state of war exists between the two countries once they have signed the Agreement:

> ' No aggressive action by the armed forces of either party shall be undertaken, planned or threatened against the people or the armed forces of the other.'

And by sub-paragraph 3:

> ' The right of each party to its security and freedom from fear of attack by the armed forces of the other shall be fully respected.'

Article 3 of the Agreement establishes a general armistice between the armed forces of the two parties, paragraph 3 of that Article stating:

> ' No warlike act or act of hostility shall be conducted from territory controlled by one of the parties to this agreement against the other party.'

By Article 8:

> ' The present Agreement is not subject to ratification and shall come into force immediately upon being signed.'

It also is of interest to recall that, by Article 8, para. 3, if the parties wish to revise the Agreement or any of its provisions or to suspend its application other than Articles 1 and 3, they may do so by mutual consent. In short, the two countries bound themselves not to employ force one against the other. In addition to this it is a fact that the Agreement has now been in force for more than six years. It follows, therefore, that the underlying submission advanced by Counsel for the petitioner, that the two countries are in a state of war, is competely unfounded. True, they may not yet have reached a state of peace, but those principles which forbid the maintenance of contacts with the enemy apply to a very different situation, namely, one of actual war.

" Our situation might properly be described as one of termination of war. In Oppenheim's *International Law*, vol. II (7th ed., 1952), p. 596, it is written:

> ' A war may be terminated in three different ways. (1) Belligerents may abstain from further acts of war, and glide into peaceful relations without expressly making peace through a special treaty; . . .'

" Furthermore, when representatives of the Government of Egypt appear before the Security Council and argue that they are entitled to prevent Israel ships from passing through the Suez Canal on the ground that a state of war exists between Egypt and Israel, the representatives of Israel always give the same answer: there is no state of war between Israel and her neighbours.

" The second proposition, too, is unfounded. If there is no specific law in Israel—and Mr. Scharf has not referred us to any such law—prohibiting all relations between an Israeli and a resident of Lebanon, we cannot decide that such relations are illegal. In England, together with specific laws such as the Trading with the Enemy legislation, there exists also the common law, which prohibits intercourse, not only of commercial character, in time of war between persons resident in England and enemy territory. In the eighteenth century the judges restricted this prohibition to commercial intercourse, but during the nineteenth they extended it to cover other forms of contact. In the present century, when war has become global and all contact is considered dangerous, the prohibition has been broadened still further and in time of war almost every kind of contact between a person resident in England and a person resident in enemy or enemy-occupied territory is regarded with suspicion. See *Robson* v. *Premier Oil and Pipe Line Company Limited*, [1915] 2 Ch. 124.

" It is interesting to note that the modern judgments stress that the prohibition today is to be found, in nearly every case, in statute law and not in the common law; and excluded from the scope of the prohibition are all instances where the Crown has granted a licence, whether general or specific. The prohibition derives from the determination of the State to prevent activities likely to be of advantage to the enemy *in time of war*, and the judges do not prohibit benefits likely to accrue to the enemy after the termination of war. The *dictum* of Lord Parker is well-known and is often cited in the judgments:

> ' The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantages he may gain when peace comes ': *Tingley* v. *Miller*, [1919] 2 Ch. p. 158.

" In the recent judgment of the House of Lords in *Arab Bank Ltd.* v. *Barclays Bank* (*Dominion, Colonial and Overseas*), [1954] A.C. 495 at p. 498,[1] it was said:

> ' Meanwhile the State of Israel had passed certain legislation . . . On May 19th, it passed a Law and Administration Ordinance . . . By Article 11 of that Ordinance, it was provided that the law which existed in Palestine on May 14th, 1948, would remain in force . . . Since the law which existed in Palestine on May 14th, 1948, embraced the common law of England in regard to trading or communicating with the enemy, it became illegal for anyone in Israel to have intercourse with anyone in enemy territory.'

" From the arguments of Counsel in that case it appears that they agreed that the English common law concerning intercourse with the enemy in time of war also applies in Israel. But for that I would have thought, with all respect to the learned Law Lords, that they did not pay sufficient attention to Article 46 of the Palestine Order-in-Council which introduced into this country the English common law only in so far as local legislation does not extend or apply. But in Palestine (as now in Israel) legislation has been passed dealing with intercourse with the enemy, such as the Defence (Finance) Regulations, 1941, and the Trading with the Enemy Ordinance, 1939. According to this latter Ordinance, a person will be regarded as trading with the enemy if he has any ' commerical, financial or other intercourse or dealings with or for the benefit of an enemy . . .' From this it follows that the prohibition on an Israeli to trade with an enemy or to maintain intercourse with him derives not from the English common law but from the Mandatory Ordinance. To what does the Ordinance refer? To commercial or financial intercourse, but not to other types of intercourse with an ' enemy ' within the meaning of those laws. The fact that the word ' intercourse ' is inserted between ' commercial, financial ' and ' dealings ' suggests that the legislator had in mind commercial intercourse or at least did not have in mind intercourse of a religious nature. It is perfectly true that in the English judgments, from the end of the eighteenth century up to the year 1954, many *dicta* can be found to the effect that the prohibition on intercourse is not limited to commercial intercourse but extends to all intercourse (see the speech of Lord Dunedin in *Ertel Bieber & Company* v. *Rio*

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[1] *International Law Reports*, 1954, p. 443.]

Tinto Company Ltd., [1918] A.C. 260 at p. 267, 268), but there are no decisions concerned with intercourse other than of a financial, commercial or similar character. I do not include trials for treason, for they are concerned with circumstances of a completely different character. See *Joyce* v. *Director of Public Prosecutions*, [1946] A.C. 347 [*Annual Digest*, 1948, Case No. 31].

" Immediately after the termination of the Second World War the House of Lords dealt with the whole question of intercourse with the enemy in the leading case of *Schering Limited* v. *Stockholms Enskilda Bank Aktiebolag and Others*, [1946] A.C. 219 [*Annual Digest*, 1943–1945, Case No. 105], in which it relied on the *Ertel Bieber* case of the First World War and quoted the following *dicta* of Lord Dunedin:

> ' From these cases I drew conclusion that upon the ground of public policy the continued existence of contractual relations [note the words contractual relations] between subjects and . . . persons voluntarily residing in the enemy country which (1) give opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy . . . is obnoxious and prohibited by our law ! '

Lord Thankerton in the *Schering* case added (at p. 238):

> ' The contracts which fall under this principle of public policy are clearly contracts the performance . . . of which after the outbreak of war may involve the consequences which the principle . . . seeks to avoid, but it is equally clear that there are certain well established exceptions to the contracts thus broadly defined.'

" Can we deduce from these judgments—and as I have emphasized, the judgments deal with only one type of intercourse, commercial intercourse—that the appointment of judges by the Patriarch is likely to open the way to the conveyance of information which may hurt the conduct of the war (when there is no war), or may tend to increase the strength and resources of the enemy ? And the stress which the English judgments place upon the situation existing *in flagrante bello* excludes completely from their contemplation the type of relation subsisting today between Israel and the Lebanon.

" I have found nothing in the authorities—and Counsel for the petitioner has not referred us to any such authority—to indicate that the prohibition applies to priests when concerned with religious matters. For example: there are in Israel a number of Jews who have immigrated from Egypt. Suppose an immigrant to bring a case before the Rabbinical Court in which the question arises whether he was married or whether he is somebody's heir—and the answers are to be found in the offices of the Rabbinate in Cairo—I should have thought that so long as there is no war between the two countries, the Chief Rabbi of Israel could legally apply to the Chief Rabbi of Cairo in order to obtain authoritative information required for the purposes of the case before the Rabbinical Court. I would even go so far as to say that intercourse of this character is permitted so long as the law does not forbid it. If the statement made by the second respondent is true—and no one has denied it in this case—that Israel authorizes the journeys undertaken by Monsignor Hakim from Israel to Lebanon in order to confer with the Melkite Patriarch, then you have here a licence on the part of the State and that, on all accounts, is sufficient to remove the prohibition on intercourse between the inhabitants of enemy States.

" Counsel for the petitioner desires to extend the English common law to unreasonable limits. In this connexion I would recall the words of Lord Simonds in *Hangkam Kwingtong Woo* v. *Lin Lan Fong alias Liu Ah Lan*, [1954] A.C. 707 at p. 720:

> ' The contentions of the appellant involve a grave extension of the common law, and that extension means not merely the application of old principles to new circumstances or their adjustment to fresh needs, but the rewriting of them in conditions in which their foundations are shaken.'

" The judges of the Religious Court perform their duties as independent judges and they do not have recourse to the Patriarch in connexion with cases which they are trying. It follows that when they give judgment after having heard the facts and the arguments of the litigants before them, their judgment cannot be attacked simply because there might arise some doubt whether the Patriarch who appointed them is to be considered as an enemy because he resides in a country which is itself alleged to be enemy territory.

" Mr. Koussa (Counsel for the second respondent) suggested another approach to the problem. He argued that although the Patriarch resides physically in the Lebanon, spiritually he is to be considered as residing in each one of the countries over which his religious authority extends. I am not ready to accept this submission as made, but a similar line of argument may be accepted. If the State recognizes the Court of a religious Community which possesses a well-known hierarchy outside the State's borders, then the State must allow that hierarchy to perform its functions in accordance with the laws and custom of that Community. If the State desires to prevent the Patriarch, who resides abroad, from dealing with the affairs of his Community in Israel, then it must enact appropriate legislation.

"Were there any substance in the arguments put forward by Counsel for the petitioner, we should have expected that the Attorney-General of the Government of Israel, who defends the interests of the State, would have come forward and given some support to those arguments. The representative of the Attorney-General was invited to appear in Court and, if he so desired, to oppose the execution of the judgment rendered by judges appointed by the Patriarch who is physically resident in Lebanon. The representative of the Attorney-General appeared before us on the return day and informed us that he had no interest in the case, and we acceded to his request that he might withdraw. We see, in the absence of any opposition on the part of the Attorney-General to the execution of the judgment, the agreement of the State to what has been done, in this case, by the Patriarch who resides abroad."

[Reports: *Piskei Din*, 9 (1955), p. 135; *Pesakim Elyonim*, 18 (1955), p. 12.]

United Nations—Charter of—Interpretation of—Article 18, paragraph 2, on Voting Procedure.

See p. 651 (*Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*).

C—SPECIALIZED AGENCIES OF THE UNITED NATIONS

International Organization—Specialized Agencies—Privileges and Immunities of—International Monetary Fund and International Bank for Reconstruction and Development—Meaning of " Treatment " in Relation to Official Communications—Authoritative Interpretation by International Monetary Fund and International Bank for Reconstruction and Development — Views of United States State Department—Supersession of Treaty by Subsequent Treaty.

IN THE MATTER OF INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT AND INTERNATIONAL MONETARY FUND *v.* ALL AMERICA CABLES & RADIO, INC., AND OTHER CABLE COMPANIES.

United States, Federal Communications Commission, Washington, D.C.
March 23, 1953.

THE FACTS.—In 1949, the defendants, United States cable companies, proposed to adopt revised tariffs of charges under which the International Monetary Fund and International Bank for Reconstruction and Development would be required to pay the same commercial rates for their official telecommunications messages as were payable by private persons. Previously, the Fund and the Bank had paid the same rates as applied to the messages of foreign Governments sent from the United States to their own countries, which rates were substantially lower than commercial rates. The Fund and the Bank filed a complaint with the Federal Communications Commission contending that the revised tariffs were unlawful on the ground that, so long as special governmental rates were in existence, the Fund and the Bank were entitled to the same standard of treatment. They relied upon provisions in their charters[1] and interpretations of them[1] under provisions enabling the institutions to interpret their charters.[2]

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[1] Article IX, Section 7, of the Charter of the International Monetary Fund provided as follows: " The official communications of the Fund shall be accorded by members the same treatment as the official communications of other members."

Article VII, Section 7, of the Charter of the International Bank for Reconstruction and Development provided: " The official communications of the Bank shall be accorded by each member the same treatment that it accords to the official communications of other members."

Held: that the question whether the word " treatment " in the provisions of the Charters of the International Monetary Fund and Bank for Reconstruction and Development on official communications applied to rates was conclusively determined by the interpretations of the two institutions. They were thus entitled to the standard of treatment for which they had contended, but this involved certain conditions of reciprocity accorded the United States Government and United States cable companies by other countries and their cable companies. The Commission ruled that the defendants must file revised tariffs based on governmental rates which would be effective where the conditions of reciprocity were satisfied.

The Commission said: " 1. . . . Should the term ' treatment ' apply to rates as complainants contend, . . . it is fairly clear that the United States Government is under an international obligation to accord to the official international telegrams of the Bank and the Fund the same rate treatment as that accorded the official international telegrams of foreign governments which are members of the Bank and Fund. This follows from the Bretton Woods Agreements Act [1945] (59 Stat. 512), which authorized the President of the United States to accept membership for the United States in the Bank and Fund in accordance with the Articles of the Agreement thereof and which specifically provided that the privilege with respect to communications, together with the other privileges and immunities contained in other sections of Article VII of the Bank's Articles and Article IX of the Fund's Articles ' shall have full force and effect in the United States and its Territories and possessions . . .' (Bretton Woods Agreements Act, Sec. 11). *Cf. United States* v. *Pink*, 315 U.S. 203 (1942),[1] *United States* v. *Belmont*, 301 U.S. 324 (1937).[2]

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[1] The material portion of the IMF interpretation is as follows:

" Question No. 1:
Does Section 7 of Article IX of the Articles of Agreement of the Fund apply to rates charged for official communications of the Fund?

" Decision on Question No. 1:
Yes. Section 7 of Article IX applies to rates charged for official communications of the Fund.

" Question No. 2:
If a member exercises regulatory powers over the rates charged for communications, is it relieved of the obligation of Section 7, Article IX, by reason of the fact that the facilities for transmitting communications are privately owned or operated or both?

" Decision on Question No. 2:
No. A member which exercises regulatory powers over the rates charged for communications is not relieved of its obligation under Section 7 of Article IX by reason of the fact that the facilities for transmitting such communications are privately owned or operated or both.

" Question No. 3:
Is the member's obligation under Section 7 of Article IX satisfied if official communications of the Fund may be sent only at rates which exceed the rates accorded the official communications of other members in comparable situations? For example, would the obligation of member 'a', under Section 7 of Article IX, be satisfied if the rate charged the Fund for its official communications from the territory of member 'a' to the territory of member 'b' exceeds the rate charged member 'b' for its official communications from the territory of 'a' to that of 'b'?

" Decision on Question No. 3:
No. The obligation of a member under Section 7 of Article IX is not satisfied if official communications of the Fund may be sent only at rates which exceed the rates accorded the official communications of other members in comparable situations. For example, the obligation of member 'a', under Section 7 of Article IX, would not be satisfied if the rate charged the Fund for its official communications from the territory of member 'a' to the territory of member 'b' exceeds the rate charged member 'b' for its official communications from the territory of 'a' to that of 'b'."

(IMF *Annual Report*, 1950, Appendix XI, pp. 118–19). For the similar IBRD interpretation, see IBRD, Decisions of Executive Directors under Article IX, etc. (July 12, 1954), pp. 14–15.

[2] Article XVIII (a) and (b) of the Charter of the Fund provides:
" (a) Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the

" 2. The basic question, therefore, which we must determine in this proceeding is whether the term ' treatment', as used in the Articles of the Bank and Fund, relates to rate matters as contended by the complainants or is confined to other matters such as priorities and freedom from censorship as contended by the defendants. . . .

" 3. We believe that the question as to the application of the term ' treatment ' in the Bank and Fund Articles to rates has been conclusively determined by the Bank and Fund Executive Directors' interpretation, by unanimous vote, that the language in question applies to rates charged for official communications of the Bank and the Fund. Under the terms of the Bank and Fund Articles of Agreement, this interpretation, in effect, is final. This procedure for issuing interpretations binding member governments does indeed appear novel; but it also appears to point the way toward speedy, uniform and final interpretations. This procedure is not only an integral part of the Bank and Fund Articles, which have been accepted by the United States, but its use was specifically invoked with respect to questions of interpretation by Sections 12 and 13 of the Bretton

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> Fund shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an executive director it shall be entitled to representation in accordance with Article XII, Section 3(j).
>
> " (b) In any case where the Executive Directors have given a decision under (a) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board the Fund may, so far as it deems necessary, act on the basis of the decision of the Executive Directors."

The provision of the Bank's Charter (Article IX (a) and (b)) is the same except for mention of the " Bank " instead of the " Fund ", and the reference in Article IX (a) to Article V, Section 4(h), instead of Article XII, Section 3(j).

[1] *Annual Digest*, 1941–1942, Case No. 13.]

[2] *Ibid.*, 1935–1937, Case No. 15.]

Woods Agreements Act;[1] and the United States Congress, by directing that an amendment of the Articles be sought if the requested interpretations were not satisfactory, appears to have recognized in these two Sections that the United States is bound by the results of the interpretations. The United States Government is therefore bound by the Executive Directors' interpretation of the term 'treatment' and is under an international obligation to act in conformity therewith.

"4. In opposing the adoption of the above conclusions, defendants have asserted . . . that the interpretations by the Executive Directors were ultra vires because the questions did not arise between members or between any member and the Bank or Fund but between private companies and the Bank and Fund, and finally, that the interpretations were not final. . . . it is clear that the question of the meaning of the term 'treatment', which was referred to the Executive Directors, was a question involving all of the members of the Bank and the Fund. As a matter of fact, . . . the request was made for the specific purpose of securing a uniformity of understanding among the members. The resultant certainty of the meaning of the term 'treatment' does have an effect upon the present litigation but this can in no way limit the interpretation procedure established by the Articles of the Bank and Fund. Finally, we are satisfied that the interpretations have the requisite degree of finality. They were adopted without a single dissenting vote in February, 1950 and member governments have been formally notified of the decisions of the Executive Directors. For the United States Government, the National Advisory Council has indicated that it has no intention of seeking an appeal and no other member government has taken any steps to appeal to the Boards of Governors of the Bank and the Fund.

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[1] Section 12 provides: "The governor and executive director of the Bank appointed by the United States are hereby directed to obtain promptly an official interpretation by the Bank as to its authority to make or guarantee loans for programs of economic reconstruction and the reconstruction of monetary systems, including long-term stabilization loans. If the Bank does not interpret its powers to include the making or guaranteeing of such loans, the governor of the Bank representing the United States is hereby directed to propose promptly and support an amendment to the Articles of Agreement for the purpose of explicitly authorizing the Bank, after consultation with the Fund, to make or guarantee such loans. The President is hereby authorized and directed to accept an amendment to that effect on behalf of the United States."

Section 13 provides: "(a) The governor and executive director of the Fund appointed by the United States are hereby directed to obtain promptly an official interpretation by the Fund as to whether its authority to use its resources extends beyond current monetary stabilization operations to afford temporary assistance to members in connection with seasonal, cyclical, and emergency fluctuations in the balance of payments of any member for current transactions, and whether it has authority to use its resources to provide facilities for relief, reconstruction, or armaments, or to meet a large or sustained outflow of capital on the part of any member. (b) If the interpretation by the Fund answers in the affirmative any of the questions stated in subsection (a), the governor of the Fund representing the United States is hereby directed to propose promptly and support an amendment to the Articles of Agreement for the purpose of expressly negativing such interpretation. The President is hereby authorized and directed to accept an amendment to that effect on behalf of the United States."

" 5. Moreover, assuming for purposes of argument, that if the interpretations of the term 'same treatment' by the Executive Directors of the Bank and Fund were so unreasonable, arbitrary or capricious as to constitute in fact an amendment of the Articles of Agreement rather than interpretations thereof we should not have to give effect to them, we think it clear that the interpretations made in this case cannot be so categorized. The language of the Articles of Agreement appears to be sufficiently broad and general to include rates, and nowhere is there any exclusion of the matter of rates, either expressed or implied, or any words of limitation. . . . Turning first to the legislative history of the Bank and Fund privileges for communications and the pertinent provisions of the Bretton Woods Agreements Act, we find it both meager and unilluminating. . . .

" 7. Both complainants and defendants maintain that their views as to the meaning of 'treatment' are supported by a consideration of the purposes to be served by the privilege for communications as set forth in the Bank and Fund Articles. Complainants argue that the purpose of affording international organizations the same privileges and immunities, in general, as foreign governments, is to protect the operation of these organizations from unreasonable interference (including protection against unreasonably high rates) by any one of the member governments or their nationals, and further, to recognize the essentially governmental status of the organizations. In support of their argument, complainants refer to House Report No. 2291, 80th Congress, Second Session, Page 15, which states with respect to the communications provisions in the United Nations Convention that they 'are self-evidently necessary for an organization of the character of the United Nations.' The inference drawn by complainants is that if rates not less favorable than those accorded other governments are self-evidently necessary for the United Nations, they are likewise self-evidently necessary for the Bank and the Fund. The defendants argue that a functional test should be applied and that only those privileges and immunities are required which are necessary to enable the organizations to fulfill their objectives and exercise their respective functions. They contend that there has been no showing that the Bank and Fund need lower-than-commercial rates to carry out their functions, refer to a statement by the Bank in one of its documents that the amount of money involved in this proceeding is not significant, and point to the profits of these billion dollar international organizations. While we are not persuaded that the payment of higher-than-government rates would impede the financial ability of these international organizations in exercising their functions, we can understand their interest in securing a standard of treatment equivalent to that of member governments, including rates for official communications. As the complainants have emphasized, they are not asking for special rates as such, but for a specific standard of treatment. They acknowledge that if and when special government rates are eliminated from the United States to a particular country, pursuant to the Commission's authorization in its Opinion and Order of January 27, 1950, that they will not be entitled thereafter to special rates for messages from the United States to that country.

" 8. Defendants further contend that the term ' treatment ' should be interpreted to mean the customary diplomatic immunities and privileges recognized in the law of nations or the usual diplomatic respect accorded governments and their communications, and that this respect and these diplomatic immunities and privileges do not include rates. They point out that the special rates which they have accorded the official international telegrams of foreign countries were not based upon custom or diplomatic respect or the law of nations and were not placed into effect by the United States Government but came about as a result of foreign administrations requiring reduced rates as a condition for granting the defendant carriers cable landing licences or as a result of contracts and arrangements entered into with foreign carriers and administrations. This argument, based upon the history of government rates as far as the United States carriers are concerned, is not persuasive with respect to the interpretation of an international agreement affecting 49 countries. In any event the privilege for communications of the Bank and Fund is not expressed in terms of the historical basis for government rates or the manner in which they are granted, but simply in terms of the rate treatment actually accorded. . . .

" 10. Our conclusion as to the obligation of the United States Government to act in conformity with the Executive Directors' interpretations was reached independently of the communications from the Department of State.[1] However, the view of the State Department that the United States is under an international obligation to act in conformity with the Executive Directors' interpretations is entitled to great weight and constitutes an additional basis for our conclusion.

" 11. The defendants have called our attention to what they characterize as a conflict between the International Telecommunictions Convention (signed at Atlantic City on October 2, 1947) and the Telegraph Regulations annexed thereto (Paris Revision, 1949), on the one hand, and the Convention on Privileges and Immunities of the Specialized Agencies (adopted by the General

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[1] The record included two letters from the Deputy Legal Adviser of the Department of State, the earlier of which, dated June 2, 1950, contained the following paragraph :

> " By virtue of its membership in the Fund and Bank, the United States is obliged to conform to the provisions of the respective Articles of Agreement,

Assembly of the United Nations on November 21, 1947) and the Articles of the Bank and Fund (1945) as interpreted by their Executive Directors, on the other hand. In Annex 2 of the Atlantic City Convention, Government telegrams are defined so as to include those originating with the Secretary-General of the United Nations, the Heads of the subsidiary organs of the United Nations, and the International Court of Justice at the Hague. No reference is made to the specialized agencies of the United Nations such as the Bank and the Fund among others. The Atlantic City Convention provides for a priority for Government telegrams, but contains no provisions with respect to rates. However, the Telegraph Regulations annexed thereto, in Article 83 thereof, restate the definition of Government telegrams and also provide as follows:

> ' Except in cases of special arrangements or regional agreements concluded by virtue of Articles 40 and 41 of the Convention, Government telegrams shall be charged as ordinary private telegrams, no matter whether priority has been requested or not.'

The defendants claim that the implication of these provisions of the Atlantic City Convention and the Telegraph Regulations annexed thereto is that the telegrams of the specialized agencies, including the Bank and the Fund, are to be charged as ordinary private telegrams. . . .

" 12. In this proceeding, we are not concerned with the effect of the aforementioned provisions of the Atlantic City Convention and Telegraph Regulations upon the communications privileges of the Specialized Agencies Convention, but only with the question of whether the privilege for communications in the Bank and Fund Articles, insofar as it is interpreted to entitle the Bank and Fund to reduced, government rates, has been abrogated by the aforementioned provisions of the Atlantic City Convention and Telegraph Regulations. The defendants contend that if the Articles are interpreted to entitle the Bank and Fund to government rates, they conflict with the definition of Government telegrams in the Telegraph Regulations, and that the latter international agreement must prevail since it was ratified by the United States subsequent to the adoption of the Articles of Agreement and the Bretton Woods Act. However, our attention has not been called to any indication of an intent to abrogate the Bank and Fund communications privileges and we have noted that the parties to the two sets of international agreements are not identical. Nor is the relevant language of the

including the provisions of the respective Articles relating to interpretation of the Articles. As a consequence, the United States is obliged to carry out the Articles of Agreement as interpreted in accordance with the provisions of the Articles. Since the United States does not intend to require that the interpretations under reference be referred to the respective Boards of Governors, the United States is under an international obligation to act in conformity with the interpretations issued by the respective Executive Directors of the Fund and Bank."

two sets of agreements clearly conflicting. The failure to include the telegrams of the Bank and Fund within the definition of government telegrams contained in the Atlantic City Convention is clearly compatible with an interpretation of the communications privileges of the Bank and Fund Articles to include rates. Under such an interpretation, the Bank and Fund are not entitled to government rates because they are a ' government ' or because their telegrams are ' government ' telegrams, but because they are entitled to the same standard of rate treatment as is accorded to their member governments. Furthermore, the Atlantic City Convention and the Telegraph Regulations annexed thereto do not prohibit the grant of reduced or government rates to messages of organizations not coming within the definition of government telegrams. Under these circumstances, the respective agreements should and can be read together to give effect to the provisions of all of them.

" 13. The Bank and Fund privilege for communications is enforceable without further legislative action. We do not have here the question which has been the subject of many court decisions and legal treaties, namely, whether an executive agreement or treaty is self-executing or requires domestic legislative implementation, since by the terms of the Bretton Woods Agreements Act the privilege for communications is specifically given full force and effect in the United States and its territories and possessions. It is immaterial that the Communications Act of 1934 was not expressly amended by the Bretton Woods Agreements Act. In this respect, the privilege for communications is not unique—through the Bretton Woods Act, numerous privileges and immunities are conferred upon the Bank and Fund as well as upon their officers and employees but no existing statutes are amended or clarified to implement these privileges and immunities. The Communications Act and the Bretton Woods Act can and should be read together. . . ."

[Report: Docket No. 9362.]

NOTE.—The above decision is discussed in International Monetary Fund *Staff Papers*, vol. II (1951–52), pp. 482–88; vol. III (1953–54), pp. 308–12; *The International and Comparative Law Quarterly*, 3 (1954), pp. 265–70; *Annales de Droit et de Sciences Politiques*, XIII (1953), pp. 366–73.

International Organization—Specialized Agencies—International Monetary Fund—Articles of Agreement of—Regulation of Currency and International Exchange—Recognition of Such Regulation by Other States—Treaty between Members of International Monetary Fund Establishing Capital Controls Permitted by Articles of Agreement of Fund—Recognition of Such Controls by Third Member.

CATZ AND LIPS *v.* S.A. UNION VERSICHERUNG.

Belgium, Civil Tribunal of Antwerp (Fifth Chamber). January 21, 1949.

THE FACTS.—In July 1934, the Union Company of Prague authorized the V. firm of Amsterdam to enter into certain insurance contracts in the Netherlands on its behalf. V. entered into such contracts, but claims of the insured under them were not paid because of the war and post-war financial controls. Some of the contracts had been made with the C. firm of Rotterdam as agents for the insured. C. gave credit notes to the insured for the amounts of their claims against U., and the insured assigned to C. their rights against U. V. executed an acknowledgment of the indebtedness of U. to C. V. had no funds of U. in their possession in the Netherlands, and thus C. attempted to attach some funds of U. held by an agent of U. in Antwerp.

Held: that the claim must fail. The assignment by the insured to C. and the acknowledgment by V. of U.'s indebtedness to C. were valid under Dutch law, the *lex loci contractus*, and it had not been argued that any principle of Belgian public policy had been offended. An Agreement of November 15, 1946, between Czechoslovakia and the Netherlands prohibited the transfer of funds from one country to the other in payment of debts incurred before December 20, 1945, which was the case with the claims of the insured against U. Czechoslovakia, Belgium and the Netherlands were all members of the International Monetary Fund.

The Court said: " The defendant . . . invokes the Monetary Agreement of Bretton Woods, an Agreement to which Czechoslovakia and Belgium have adhered; the defendant also invokes the Convention between Holland and Czechoslovakia, which prohibits the transfer of funds from one country to the other whenever the payment is due for debts incurred prior to December 20, 1945.

" In Article 6 of the Bretton Woods Agreement it is provided: ' Members may exercise such controls as are necessary to regulate international capital movements '.[1] This applies to all members, and is further extended, in the Agreement, with regard to countries which have been occupied by the enemy during the war.[1] However, neither in the Agreement, nor in the Convention concluded in execution of the Agreement, is it prohibited to attach funds belonging to a debtor and located in the country of a creditor because this attachment cannot entail a transfer from one country to another. The purpose of the Bretton Woods Agreement was not to prevent a debtor from paying his debts, but to recognize the possibility for countries to prohibit certain modes of payment, namely, the transfer of funds. In the present case, in application of the Convention between Holland and Czechoslovakia concluded in execution of the Bretton Woods Agreement, Union of Prague, which does not own funds in Holland, cannot pay its debts incurred prior to December 20, 1945, because it cannot transfer funds for this purpose. No blame can be attached to Union of Prague, but this cannot prevent the defendant from taking protective steps for the purpose of obtaining payment as soon as it becomes possible. Attachment, however, is not a protective step but a measure of execution by which the creditors seek to obtain indirectly what their national law (the Convention of November 5, 1946) prevents them from obtaining directly and prohibits their debtor from granting them. Thus a claim which seeks to obtain an order whereby sums which are held by a third party in Belgium, will be transferred to the plaintiff in Holland, has an object which is contrary to the laws of the three countries concerned; . . ."

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[1] Article VI, Section 3, of the Agreement provides: " *Control of Capital transfers.* Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3(b), and in Article XIV, Section 2."

[Report: *Jurisprudence du Port d'Anvers*, vols. 7–8 (1949), p. 321.]

NOTE.—The principle of public international law that a country may regulate its own currency seems to have carried with it a broad power on the part of other countries to refuse recognition to many of the measures adopted by a country in regulating its currency. This has perhaps been most marked in relation to the exchange control regulations which a country adopts for the protection of its economy and currency. A remarkable variety of techniques has been developed to refuse recognition to the exchange controls of other countries even where the country of the forum has similar controls for the protection of its own economy and currency.

The Articles of Agreement of the International Monetary Fund have brought about a radical change in this situation. The reason for this change is that exchange control regulations are now subject to the rules prescribed in a multilateral treaty and to the supervision of an international organization. The conditions in which a country may adopt exchange controls are more or less narrowly defined in the Articles, and the Fund has authority to approve or disapprove them or to require their removal.

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[1] Article XIV, Section 2: " *Exchange restrictions.*—In the post-war transitional period members may, notwithstanding the provisions of any other articles of this Agreement, maintain and adapt to changing circumstances (and, in the case of members whose territories have been occupied by the enemy, introduce where necessary) restrictions on payments and transfers for current international transactions. Members shall, however, have continuous regard in their foreign exchange policies to the purposes of the Fund; and, as soon as conditions permit, they shall take all possible measures to develop such commercial and financial arrangements with other members as will facilitate international payments and the maintenance of exchange stability. In particular, members shall withdraw restrictions maintained or imposed under this Section as soon as they are satisfied that they will be able, in the absence of such restrictions, to settle their balance of payments in a manner which will not unduly encumber their access to the resources of the Fund."

The cases interpreting or applying the Articles of Agreement of the Fund are based on three separate approaches to the view that among member countries of the Fund the exchange control regulations of one of them should be recognized by the others, provided, of course, that the regulations are consistent with the Articles. The first approach is the one adopted in the present case. It is based on the provision in the Articles (Article VI, Section 3) permitting member countries to control capital movements. The Court concluded from this that it must recognize the effect of a restriction on capital transfers established by a Treaty between the Netherlands and Czechoslovakia, because both these two countries and Belgium were members of the Fund. However, it should be noted that Article XIV, Section 2, to which further reference was made, deals with restrictions on payments and transfers for current international transactions and not with the control of capital movements. It is also of interest in connection with the *ratio decidendi* that there is a provision in the Articles of the Fund (Article VI, Section 1) empowering the Fund to require the imposition of capital controls in certain circumstances. For the two other methods see International Monetary Fund *Staff Papers*, vol. II (1951–52), pp. 492–94; *Annales de Droit et de Sciences Politiques*, XIII (1953), pp. 380–82; *Zeitschrift für ausländisches und internationales Privatrecht*, 19 (1954), pp. 633–35.

International Organization—Specialized Agencies—International Monetary Fund—Articles of Agreement of—Regulation of Currency and International Exchange—Recognition of Such Regulation by Other States—International Recognition of Exchange Control Regulations—Effect of Membership in International Monetary Fund—Laws of Member Country as Governing Law under Private International Law of the Forum.

PERUTZ *v.* BOHEMIAN DISCOUNT BANK IN LIQUIDATION.[1]

United States, Court of Appeals of New York. January 9, 1953.

THE FACTS.—The plaintiff was the administratrix of the estate of her deceased husband, who had been employed by a Czechoslovak banking corporation, the predecessor of the defendant, another Czechoslovak bank. He had been a citizen and resident of Czechoslovakia, and in 1938 had entered into a contract in Prague with his employer under which he was entitled to a certain pension payable monthly at the employer's Prague office. The husband left Czechoslovakia in November 1940 and became a citizen and resident of the United States, where he died in June 1949. He received his pension until the end of October 1942, but payment then ceased. Before his death, he obtained an attachment of the defendant's funds in New York, and brought this action to recover the dollar equivalent of the pension payable after November 1, 1942. At the date when the contract was made and at all times thereafter, Czechoslovak exchange control regulations prohibited payments to non-residents, in domestic or foreign currency, without a licence from the exchange control authorities. Czechoslovak currency had been deposited by the defendant in a blocked account in the husband's name in Czechoslovakia, but withdrawals could not be made without a licence, and no licence for withdrawals or for payment in any other form had ever been granted.

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[1] See Note at p. 714, *supra*.

On appeal to the Court of Appeals, the parties agreed that Czechoslovak law governed the contract under the private international law of New York. The defendant contended that it had performed the contract as permitted under that law, and that performance in any other form was prohibited by it. Since the New York action was for breach of contract, it failed because there was no breach. The public policy of New York did not require that the Czechoslovak exchange control regulations, which prescribed the form of performance and in accordance with which performance had been made, should be refused recognition by a New York court.

The plaintiff contended that the Czechoslovak exchange control regulations did not relate to the substance of the plaintiff's rights but only to the remedies for their enforcement. They should, therefore, be refused recognition under the rule of New York private international law by which remedial matters are governed by the law of the forum and not some foreign law. They should be ignored for the further reason that the regulations were penal and confiscatory. Moreover, the protection of the Czechoslovak economy was contrary to the public policy of the United States, and recognition of the regulations should be withheld on this ground also.

The Appellate Division had held that the plaintiff's claim must succeed and could be satisfied from the dollar funds of the defendant which had been attached. The Court of Appeals decided unanimously to reverse this judgment.

On further appeal to the Court of Appeals of New York,

Held: that the judgment of the Appellate Division must be reversed.

The Court said: "A contract made in a foreign country by citizens thereof and intended by them to be there performed is governed by the law of that country: *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 478–479, 14 N.E.2d 798, 799–800.[1] *Cf. Meyers* v. *Crédit Lyonnais*, 259 N.Y. 399, 182 N.E. 61, 83 A.L.R. 268;

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[1] *Annual Digest*, 1938–1940, Case No. 71.]

Salimoff & Co. v. *Standard Oil Co. of New York*, 262 N.Y. 220, 227, 186 N.E. 679, 682, 89 A.L.R. 345.[1] Our courts may, however, refuse to give effect to a foreign law that is contrary to our public policy: *Dougherty* v. *Equitable Life Assur. Soc. of the United States*, 266 N.Y. 71, 90, 193 N.E. 897, 903.[2] But the Czechoslovakian currency control laws in question cannot here be deemed to be offensive on that score, since our Federal Government and the Czechoslovakian Government are members of the International Monetary Fund established by the Bretton Woods Agreements Act. See U.S.C.A. tit. 22, § 286; *United States* v. *Pink*, 315 U.S. 203, 231, 62 S.Ct. 552, 86 L.Ed. 796.[3]

"In short, the defendant bank has been performing its pension obligation to Arthur Perutz and to the plaintiff as his administratrix in accordance with Czechoslovakian law and, since that law controlled the transaction in issue, our courts ought not to apply any different rule in this case. *Cf. Kahler* v. *Midland Bank*, [1950] A.C. 24; *Zivnostenska Banka Nat. Corp.* v. *Frankman*, [1950] A.C. 57."

[Reports: 304 N.Y. 533, 110 N.E. (2d) 6 (Court of Appeals); 279 App. Div. 386, 110 N.Y.S. (2d) 446 (Appellate Division, First Department).][4]

NOTE.—(1) This case is discussed in International Monetary Fund *Staff Papers*, vol. II (1951–52), pp. 490–92, vol. III (1953–54), pp. 303–308; *Annales de Droit et de Sciences Politiques*, XIII (1953), pp. 375–80; *Zeitschrift für ausländisches und internationales Privatrecht*, 19 (1954), pp. 628–633; *Journal du Droit International*, 80 (1953), pp. 797–809; *American Journal of Comparative Law*, 2 (1953), pp. 389–92.

(2) It has been noted that in the *Catz and Lips Case* (see *supra*, p. 713, the Court based its recognition of the exchange control regulations of other member countries of the International Monetary Fund on one of the capital control provisions in the Fund's Articles. The present case is an important one because it involves the protection of the dollar assets of other member countries, and this is one of the reasons why it has been often discussed. However, the legal basis for the recognition by the Court of the exchange control regulations of Czechoslovakia is not altogether clear. The decision can be understood to rest on a principle which can be stated as follows: where the law of another member country is the governing law under the private international law of the forum, membership in the International Monetary Fund of the country of the forum and the country of the governing law *ipso facto* requires recognition by the forum of the exchange control regulations of the governing law. Neither this principle nor the one adopted by the Antwerp Court is explicit in the Fund's Articles.

[1 *Annual Digest*, 1933–1934, Case No. 8.]

[2 *Ibid.*, Case No. 28.]

[3 *Ibid.*, 1941–1942, Case No. 13.]

[4] See *New York Law Journal*, February 5, 1951, for the proceedings in the Court of first instance.

International Organization—Specialized Agencies—International Monetary Fund—Articles of Agreement of—Regulation of Currency and International Exchange—Recognition of Such Regulation by Other States—International Recognition of Exchange Control Regulations—Effect of Membership in International Monetary Fund.

IN THE MATTER OF BRECHER-WOLFF.[1]

United States, Department of Justice, Office of Alien Property, Washington, D.C. (*Title Claim No.* 41688).
December 13, 1955.

THE FACTS.—The Attorney-General of the United States had found that certain shares in a Montana corporation belonged to E, a citizen and resident of Germany, whereupon the shares were vested in the Attorney-General under United States enemy property legislation. The claimant B, a United States citizen, contested this vesting on the ground that the shares had been sold to her by E in February 1941, at which time B too was resident in Germany. In resisting B's claim, it was contended that the sale was illegal under German exchange control legislation which had been adopted in 1931 and substantially re-enacted in 1932, 1935, 1938, 1946, and later. It was held that, under private international law, the transaction between E and B was governed by German law. B had argued that, notwithstanding this, German exchange control legislation should be ignored because it was confiscatory, penal, and against the public policy of the United States.

Held: that B's claim must fail. Since there was nothing offensive in exchange control as such, and since there was nothing to show that in this case it had been applied in a discriminatory or confiscatory way, its effect must be recognized.

The Director of the Office of Alien Property said: " International recognition of foreign currency control legislation was assured by the adoption of the International Monetary Fund Agreement in which more than 50 nations are now participants. By virtue of the Bretton Woods Agreements Act of 1945 (59 Stat. 512, 22 U.S.C. 286), the United States became a party and in 1952 West Germany became a member as well.

" An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, Section 2 (b), seeks to enforce such a contract, the tribunal of a member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement (International Monetary Fund Interpretation, issued July 14, 1949, 14 Fed. Reg. 5208).

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[1] See Note at p. 714, *supra*.

"This interpretation was upheld in *Perutz* v. *Bohemian Discount Bank*, 304 N.Y. 533, 110 NE 2d (1953),[1] where the Court held that the contract was governed by the law of Czechoslovakia where it had been made and was to be performed, and that because both the United States and Czechoslovakia were members of the Fund, it could not ignore Czechoslovakian law prohibiting payment to plaintiff in the absence of a license from the Czech government.

"The Claims Section contends that the Monetary Fund Agreement is controlling in the instant claim under the holding in the *Perutz* case, *supra*. Amicus disputes this contention on the ground that the Agreement is not retroactively applicable. It is not necessary to decide this question. It is sufficient to point out that by adherence to the Agreement, the United States has taken the position that foreign currency controls are not inherently penal or confiscatory and that recognition of such controls is not offensive to public policy."

[Report: Docket No. 1698.]

NOTE.—(1) The case is discussed in International Monetary Fund *Staff Papers*, vol. V (1956–57), pp. 293–94.

(2) This case appears to be based on the same principle of the recognition of the foreign exchange control regulations of other member countries of the International Monetary Fund as that referred to in the Note to the *Perutz* case (see *supra*, p. 717). In fact, this case can be regarded as an even clearer application of the principle. In dealing with the objection of retroactivity, the Director refused to decide whether any particular provision of the Fund's Articles applied, but held nevertheless that because of the membership of the United States, and presumably of Germany, in the International Monetary Fund, he must recognize the exchange control regulations of Germany, the governing law under private international law.

International Organization—Specialized Agencies—International Monetary Fund—Articles of Agreement of—Regulation of Currency and International Exchange—Recognition of Such Regulation by Other States—International Recognition of Exchange Control Regulations—Effect of Withdrawal from Membership in International Monetary Fund.

STEPHEN *v.* ZIVNOSTENSKA BANKA NATIONAL CORPORATION.[2]

United States, Supreme Court, Special Term, New York County, Part I. March 25, 1955.

This was a proceeding by creditors to throw the assets of the defendant into receivership on the ground that it was a foreign nationalized institution. The case had been assigned to a referee,

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[1 See *supra*, p. 715.]

[2] See Note at p. 714, *supra*.

and the Court affirmed his report on all but two points, on one of which the Court said:

" Regarding the second exception, that relating to the plaintiffs' standing as creditors, as influenced by the International Monetary Fund Agreement, the referee noted the membership of Czechoslovakia in the International Monetary Fund, and considered particularly that portion of Article VIII, section 2 (b), of the Fund Agreement [which ran as follows]:

> ' Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.'

He therefore concluded that the plaintiffs could not obtain relief in this Court: *Perutz* v. *Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 110 N.E.2d 6.[1]

" However, he did state, and with mindful foresight, that this phase could be reopened if Czechoslovakia ever withdrew, voluntarily or otherwise, from the fund organization. Such circumstance actually occurred on January 5, 1955, when the International Monetary Fund issued a release that Czechoslovakia was no longer a member. (See photostats; letter from Department of State, dated January 10, 1955; together with press release No. 230; and Resolution of International Monetary Fund, filed herewith.)

" No valid reason currently exists to frustrate our public policy, as expressed in the controlling statute, and thereby allow Czechoslovakia to take advantage of one of the privileges of fund membership when it is no longer a member. . . .

" Accordingly, the present status of Czechoslovakia in relation to the International Monetary Fund does not bar the plaintiffs in this action."

[Reports: Title Claim No. 41668, Docket No. 1698—140 N.Y.S. (2d) 323. Affirmed, 145 N.Y.S.(2d) 310.]

NOTE.—(1) The case is discussed in International Monetary Fund *Staff Papers*, vol. V (1956–57), pp. 292–93.

(2) In this case the New York Court concluded that the obligation to recognize the exchange control regulations of another Fund member country ceased with the withdrawal of that country from the Fund. It is not clear whether the obligation of recognition which thus ceases is the one based simply on membership in the International Monetary Fund (see the Notes to the *Perutz*, *Brecher-Wolff* and *Sik* cases, *supra*, pp. 715 and 718 and *infra*, p. 721) or the express obligation involved in Article VIII, Section 2(b), of the Articles of the Fund.

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[1] See *supra*, p. 715.]

International Organization—Specialized Agencies—International Monetary Fund—Articles of Agreement of—Regulation of Currency and International Exchange—Recognition of Such Regulation by Other States—International Recognition of Exchange Control Regulations—Effect of Membership in International Monetary Fund—Effect of Exchange Control Regulations of Another Member of Fund in Cases where that Law is not the Governing Law under Private International Law of the Forum.

In re SIK'S ESTATE.[1]

United States, Surrogate's Court, New York County, New York.
March 8, 1954.

THE FACTS.—D filed a claim in the administration of the estate of S based on an agreement which they had made in Yugoslavia during the German occupation. Under the agreement S promised to pay dollars in New York to D as soon as possible in return for advances in Yugoslav currency. The administrator had rejected D's claim on the ground that the agreement violated the exchange control laws of Yugoslavia. These laws provided that the consent of the Minister of Finance was required for an agreement of the kind in issue here, but the lawful authorities were in exile at the time the agreement was made, and no request had been made to the occupation authorities. The Court found that the basic question was the essential validity of the contract, and this was governed by New York law, under which the contract was valid. However, the Court went on to consider the effect of Yugoslav law.

Held: that the claim of the objectant was valid and enforceable and the objectant was entitled to payment in accordance with its terms.

The Court said: " It is argued that because the United States and Yugoslavia are members of the International Monetary Fund established by the Bretton Woods Agreements Act, we must recognize and uphold the foreign exchange regulations. See *Perutz* v. *Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 537, 110 N.E. 2d 6, 7.[2] It is a general rule of law that a bargain the performance of which involves a violation of the law of a friendly nation is illegal. (*Restatement of Contracts*, § 592; 6 *Williston on Contracts*, § 1749.) However, the contract made in Yugoslavia would violate the regulations only if it were made without the license from or permission of the Minister of Finance. Even if the regulations were still in effect, it was impossible to make the appropriate application because the authorities were not able to function. Under such circumstances, failure to obtain a license before making the contract does not render the contract unenforceable: *Meade* v. *Lamarche*, 150 App. Div. 42, 134 N.Y.S. 479. The objectant [D] is no longer a resident of Yugoslavia. The decedent [S] died during the persecution and his estate is under the supervision of this court. It is not necessary now to obtain permission of the foreign Government to pay the claim which is valid under our law."

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[1] See Note on p. 714, *supra.*

[[2] *Supra*, p. 715.]

[Reports: 205 Misc. 715, 129 N.Y.S. (2d) 134.]

NOTE.—(1) The case is discussed in *Cornell Law Quarterly*, 40 (1955), pp. 547–60; International Monetary Fund *Staff Papers*, vol. V (1956–57), pp. 289–92.

(2) This case proceeds on the same basis as the *Perutz* and *Brecher-Wolff* cases (see *supra*, pp. 715 and 718 respectively) in dealing with the recognition of the exchange control regulations of other member countries of the International Monetary Fund. That is to say, membership in the Fund of the country of the forum and the country of the governing law under the private international law of the forum requires this recognition, but in the present case Yugoslav law was not the governing law under New York law. There are two additional features of interest in this case. The first is that the Court appears to have been willing to go further and examine the effect of the Yugoslav exchange control regulations even though Yugoslav law was not the governing law. Secondly, the Court seems to have regarded the principle of the recognition of foreign exchange control regulations resulting from membership in the International Monetary Fund as related to, or an application of, the rule that a bargain which in its performance involves the violation of the law of a friendly nation is illegal.

International Organization—Specialized Agencies—International Monetary Fund—Articles of Agreement of—Regulation of Currency and International Exchange—Recognition of Such Regulation by Other States—International Recognition of Exchange Control Regulations—Article VIII, Section 2 (b), of Articles of International Monetary Fund.

EMEK *v.* BOSSERS & MOUTHAAN.[1]

Belgium, Commercial Tribunal of Courtrai. May 9, 1953.

THE FACTS.—This was an action for breach of contract. The Belgian plaintiffs had granted to the Dutch defendants the exclusive right in the Netherlands to exploit a patent for the manufacture of cork soles in return for the payment of three Belgian francs for each pair of soles. The defendants contended that, by virtue of the Dutch Foreign Exchange Decree of October 10, 1945, they could not bind themselves to effect payments to a foreign firm, unless they had previously assured themselves that the required licence had been obtained from the Dutch monetary authorities; since they had not obtained such a licence, the agreement, concluded in violation of these provisions, was void by virtue of Article 30 of the Decree.

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[1] See Note at p. 714, *supra*.

Held: that the plaintiffs must succeed.

The Court said: " The contract of May 10, 1951 is not governed by Dutch but by Belgian law because the contract was signed at Emelgem; it provided that disputes should be settled by the Belgian legal authorities; it stipulated that payment was to be in Belgian francs; and the negotiations were apparently conducted in Belgium, so that the parties intended their relationship to be regulated by Belgian law.

"According to the defendants, on the basis of applicable Belgian law the Foreign Exchange Control Decree governs the agreement in question by virtue of Article VIII, 2 (b),[1] of the Bretton Woods Agreement ratified in Belgium by the Law of December 27, 1945 and obliging the Court to take account of the foreign exchange control legislation of other countries which were parties to the aforesaid agreement. The burden of proof is on the defendants who claim that the agreement violates a legal provision relating to public policy.

" This case involves an international contract in the sense of a transfer of commodities or currency across national frontiers. The Dutch exchange control legislation, enacted for the purpose of bringing about equilibrium in the balance of payments, requires that no contracts in foreign currency be concluded without a previous administrative licence. According to one doctrine and line of cases, such a law is political, having a purely local character without effect abroad; according to other opinions such a law is in conflict with the public policy of other countries. In the majority of cases foreign tribunals have rejected such legislation and have considered it as being without effect.

" However, a contractual recognition of such legislation, such as defendants claim was effected by the Belgian ratification of the Bretton Woods Agreements containing the provision of Article VIII, sec. 2(b), constitutes a deviation from this almost general rule, so that contracts infringing these monetary laws which are based on public policy lack any legal validity.

" The following reasons, therefore, prevent the Court from accepting the absolute invalidity of the contract concluded in violation of the provisions of the Dutch Exchange Control Decree, 1945 (Article 30 of this Decree):

" (1) The Decree itself fails to carry out the sanction of absolute

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[[1] Article VIII, Section 2(b), provides as follows: " Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, co-operate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement."]

invalidity provided for by Article 30 (see Article 7 (5), according to which the Netherlands Bank may subsequently grant a licence for the conclusion of a contract; Article 8 (2) providing that the debtor and even the creditor may subsequently apply for a licence; and Article 9 requiring that no judicial decision be rendered without a prior licence).

"(2) Article VIII, 2(b), deals with foreign exchange contracts involving the currency of a member [of the Fund]; however, legal opinion is not unanimous in permitting the inclusion among such foreign exchange contracts involving currency of a normal international contract involving commodities and payable in money.

"(3) Article VIII, 2(b), establishes a rule with respect to foreign exchange control maintained or imposed in accordance with the Bretton Woods Agreements; however, the defendants have failed to prove that the International Monetary Fund has confirmed this foreign exchange decree.

"(4) Since the Belgian courts regard foreign law as a fact, the defendants must clearly prove that the law they invoke is the latest foreign legislation, which they have also failed to do.

"(5) The purpose of the Bretton Woods Agreements was to promote the stability of national currencies and their mutual exchange, to assure the free flow of capital, and to promote international trade; however, the Foreign Exchange Decree invoked conflicts squarely with this purpose in order to serve a unilateral interest; thus, the foreign exchange policy effected by the Dutch decree is not in harmony with the aforesaid Agreements and can only have legal validity after confirmation by the International Monetary Fund.

"(6) Finally, on the basis of this Dutch Foreign Exchange Decree, all international contracts concluded without prior administrative licence would be absolutely void and the Netherlands Bank, if subsequently requested to grant a licence, could at its sole discretion grant or refuse it according to whether the Dutch resident gains or loses by the contract; this is in violation of international public policy."

(The Court appointed an expert to take an accounting.)

[Report: Case No. 4535 of the General Docket—Unpublished.]

NOTE.—(1) The case is discussed in International Monetary Fund *Staff Papers*, vol. V (1956–57), pp. 294–97.

(2) This case involves yet another approach, based on the Articles of the International Monetary Fund, to the recognition of the exchange control regulations of other member countries. *Catz and Lips* v. *S.A. Union Versicherung* (*supra*, p. 713) derives an obligation to recognize capital controls from the provision in the Fund's Articles permitting member countries to regulate capital movements. Certain United States decisions (*Perutz* v. *Bohemian Discount Bank in Liquidation, Re Brecher-Wolff, Re Sik's Estate*, and *Stephen* v. *Zivnostenska Banka*—see *supra*,

pp. 715, 718, 721 and 719 respectively) base a general obligation to recognize exchange control regulations on the fact of membership in the Fund. The present case examines the obligation in Article VIII, Section 2(b), of the Articles of the Fund to recognize exchange control regulations that are consistent with the Articles, to the extent of treating as unenforceable certain contracts which are contrary to those regulations. The attitude of the Court of Courtrai to the interpretation of certain aspects of this provision was a restrictive one, and in the result the Dutch exchange control regulations were not given effect. (*Cf. Lessinger* v. *Mirau* (below), *Société Filature etc.* v. *Heynen-Bintner*, and the *Clearing Dollars Case—infra*, pp. 727 and 730.)

International Organization—Specialized Agencies—International Monetary Fund—Articles of Agreement of—Regulation of Currency and International Exchange—Recognition of Such Regulation by Other States—International Recognition of Exchange Control Regulations—Article VIII, Section 2(b), of Articles of the Fund.

LESSINGER *v.* MIRAU.[1]

German Federal Republic, Oberlandesgericht of Schleswig-Holstein.
April 1, 1954.

THE FACTS.—The parties were citizens and residents of Austria. On May 1, 1949, they concluded a contract in Vienna under which the plaintiff was to supply 30,000 Austrian schillings to the defendant and K. in order to permit them to try out a system of roulette at San Remo. The plaintiff was to receive 30 per cent. of the profits, and was guaranteed 9,000 schillings a month as a minimum without any deduction for losses. The plaintiff was given various securities, including a bank draft with which he was to pay himself at the due date but not later than 90 days after putting up the money. The capital and profits were to be paid by the defendants to the plaintiff or his representative in Vienna or at such place in Switzerland or Italy as the plaintiff might prescribe. The plaintiff gave the defendant and K. U.S. $1,000, the countervalue of 30,000 schillings. The defendant and K. made no payment to the plaintiff, who then brought this action in Germany, where the defendant had become resident, asking that the defendant be ordered to pay into a blocked account in the plaintiff's name the equivalent in German marks of U.S. $1,000.

Held: that the action must fail.

The Court said: "The loan contract is subject to Austrian law, for it is with this legal system that the relations between the parties have their most important contacts. . . . The applicable Austrian law includes Austrian exchange control regulations. However, the question whether in the case of the applicability of foreign law the foreign exchange control laws must also be applied, has not been agreed upon by all authors. It has been argued, in particular, that foreign exchange control is public law and, consequently, excluded from application abroad as a matter of principle . . . This opinion, however, is unsatisfactory. Foreign exchange law is by no means exclusively public law. The provisions concerning the effectiveness in private law of unlicensed transactions are part of private law. . . .

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[1] See Note at p. 714, *supra*.

"It is, moreover, alleged that foreign exchange laws are tied to the territory and thus excluded from application abroad. . . . This view must equally be rejected. The fact that the foreign exchange laws of a State are to be applied within its territory to the exclusion of all foreign laws does not mean at all that such law cannot be applied abroad. . . .

"Frequently, the refusal to apply foreign exchange control legislation has been based on the principle of public policy as expressed in Article 30 of the EGBGB.[1] It has been argued that foreign exchange laws enacted for the protection of a foreign currency would encroach upon creditors' vested rights and are thus incompatible with domestic legal concepts. . . . Since the war this view has gradually been replaced by the contrary opinion. Since nearly all States have introduced some form of regulation of their exchange resources, the opinion has gained strength that in the present state of the world economy restrictions on the use of exchange resources by individual States are inevitable. Accordingly, more than fifty States have gradually ratified the Bretton Woods Agreements of 1944. The Federal Republic of Germany and Austria have also joined the Fund—see the proclamation concerning the membership of the Federal Republic of Germany in the International Monetary Fund, August 26, 1952 (BGBl. II, 782, and Austrian BGBl. No. 109/1949). Article VIII, Section 2(b), first sentence, of this Agreement provides in the official German translation:

> 'Aus Devisenkontrakten, die die Währung eines Mitglieds berühren und die in Gegensatz stehen zu den von dem Mitglied in Ubereinstimmung mit diesem Abkommen aufrechterhaltenen oder eingeführten Devisenkontrollbestimmungen, kann in den Gebieten der Mitglieder nicht geklagt werden.'[2]

Accordingly, the members have obligated themselves under Article VIII, Section 2(b), second sentence, 'to co-operate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.' It is true that the courts have so far been reluctant to apply Article VIII of the Fund Agreement (see the decision of the Oberlandesgericht in Vienna of June 29, 1949: *Oesterreichische Juristenzeitung Ev. Bl.* No. 564/1949; Mann, 'Der Internationale Währungsfonds und das Internationale Privatrecht', in *J.Z.*, 1953, p. 386). Yet it is not clear why Article VIII of the Fund Agreement should not require German courts to apply Austrian foreign exchange law in such cases as the one under consideration. Undoubtedly, the contract of loan is a contract in the sense of Article VIII of the Bretton Woods Agreement. It is also an exchange contract within the meaning of this provision. For exchange contracts are contracts which, in whatever manner, prejudice the foreign exchange resources of a member (Mann, ' Der internationale Währungsfonds und das internationale Privatrecht ', in *J.Z.*, 1953, p. 444). This interpretation is the only one compatible with the purpose of the control of foreign exchange resources. In any event, however, in view of our own German foreign exchange laws, German public policy is no basis which would justify a rejection of the application of Austrian law in its entirety, *i.e.*, including the foreign exchange provisions concerning the effects of violations of exchange control regulations under civil law. Article 30 of the BGB [*Bürgerliches Gesetzbuch* (Civil Code)] applies only when the transaction in issue touches purely local German interests, which is not the case here.

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[1] [*I.e.*, Introductory Law to the Civil Code.]

[2] [For the English text see *supra*, p. 723, n. 1.]

" Thus, pursuant to the applicable paragraph 3, section 1, 22, of the Austrian foreign exchange law, a contract of loan aiming at the disposal of foreign means of payment is void and consequently not able to support a claim for repayment of the amount lent."

The Court also rejected a claim based by the plaintiff on unjustified enrichment.

[Report: *Jahrbuch für Internationales Recht*, V (1955), p. 113.]

NOTE.—This case was treated by the Court as obviously within the scope of Article VIII, Section 2(b), of the Articles of the Fund. (*Cf. Emek* v. *Bossers* (*supra*, p. 722), *Société Filature etc.* v. *Heynen-Bintner* (below) and the *Clearing Dollars case—infra*, p. 730.)

International Organization—Specialized Agencies—International Monetary Fund—Articles of Agreement of—Regulation of Currency and International Exchange—Recognition of Such Regulation by Other States—International Recognition of Exchange Control Regulations — Article VIII, Section 2(b), of Articles of Fund — Authoritative Interpretation by the Fund.

SOCIÉTÉ FILATURE ET TISSAGE X. JOURDAIN *v.* ÉPOUX. HEYNEN-BINTNER.[1]

Luxembourg, Tribunal d'Arrondissement de Luxembourg (*Civil*). *February* 1, 1956.

THE FACTS.—A contract was made in 1946 between the J. Company, a French firm, and S., a non-resident of France, by which the former sold to the latter a quantity of poplin for a stated price in French francs. The transaction was licensed by the French import and exchange control authorities. W., a resident of France, paid the contract price to the J. Co. on behalf of S. The J. Co.

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[1] See Note on p. 714, *supra*.

sued S. on the contract in a French Court, which decided that S. had not been discharged of his obligation by W.'s payment. The basis for this decision was that French exchange control regulations had not been observed in that payment in French francs from a non-resident to a resident of France must be made from a non-resident account. The J. Co. then petitioned the Luxembourg Court for an exequatur of the French judgment. S. argued that an exequatur should be denied, because the French judgment was based on French exchange control legislation which was contrary to Luxembourg public policy.

Held: that there was no basis on which an exequatur of the judgment of the French Court should be refused.

The Court said: " The contract between the Jourdain Company and Stangé constitutes an exchange contract within the meaning of Article VIII, Section 2(b), of the Articles of Agreement of the International Monetary Fund. Pursuant to this provision, exchange contracts which involve the currency of a member and which are contrary to the exchange control regulations of that member, maintained or imposed consistently with this Agreement, are unenforceable within the territories of other members.

" By virtue of the authority conferred by Article XVIII of the above Agreement the Fund has interpreted the meaning and purpose of Article VIII, Section 2(b), as follows: (1) The parties to an exchange contract involving the currency of another member of the Fund and contrary to the exchange control regulations of that member, which are maintained or introduced in accordance with the Fund Agreement, may not receive the assistance of the judicial or administrative authorities of other members in order to obtain the execution of such contracts . . . ; (2) In accepting the Articles of Agreement members undertook the obligation to incorporate the above-mentioned principles into their national law. An obvious result of this obligation is that if one party to an exchange contract of the category envisaged by Article VIII, Section 2(b), demands the execution of such a contract, the Tribunal of the member before which the action is brought may not, on the ground that these regulations are contrary to the public policy of the forum, refuse effect to the regulations of the other member which are maintained or introduced in accordance with the Fund Agreement.[1] (See Gold,

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[1] The International Monetary Fund's interpretation reads as follows:

" The Board of Executive Directors of the International Monetary Fund has interpreted, under Article XVIII of the Articles of Agreement, the first sentence of Article VIII, Section 2(b), which provision reads as follows:

> ' Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.'

The meaning and effect of this provision are as follows:

" 1. Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member

'L'application des Statuts du Fonds Monétaire par les tribunaux', in *Revue critique de droit international privé*, 1951, pp. 586 and 587.)

"Since by the Law of December 24, 1945, the Grand Duchy of Luxembourg approved the draft agreements contained in the Final Act of the Monetary and Financial Conference of the United Nations held at Bretton Woods from July 1 to 22nd, 1945, relating to the creation of the International Monetary Fund and the International Bank for Reconstruction and Development, the domestic courts are bound by the Fund Agreement and may not refuse to apply exchange control regulations of a member of the Fund which have been created or are being maintained in accordance with this Agreement, for the reason that they go against internal public policy. (See Goldmann, *Réglementation des changes en droit international privé*; report published in *Le contrôle des changes, ses répercussions sur les institutions juridiques*, by Hamel, Bertrand and Roblot, pp. 46 *et seq.*; Delaume, 'De l'élimination des conflits de lois en matière monétaire réalisée par les statuts du Fonds Monétaire International et de ses limites', in *Journal de Droit International*, 1954, pp. 332 *et seq.*; Decision in *Perutz* v. *Bohemian Discount Bank in Liquidation*, with note by Joseph Gold and G. R. Delaume in *Journal de Droit International*, 1953, pp. 796 *et seq.*)

"As France is a member of the International Monetary Fund and as Articles 10 and 11 of the French Decree of July 15, 1947, have not been introduced or maintained in violation of the Fund Agreement, these provisions may not be considered contrary to the public policy of Luxembourg. . . ."

[Report: *Pasicrisie Luxembourgeoise*, 1957, p. 35.]

NOTE.—In applying Article VIII, Section 2(b), of the Articles of

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which are maintained or imposed consistently with the Fund Agreement will not receive the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example by decreeing performance of the contracts or by awarding damages for their non-performance.

"2. By accepting the Fund Agreement members have undertaken to make the principle mentioned above effectively part of their national law. This applies to all members, whether or not they have availed themselves of the transitional arrangements of Article XIV, Section 2.

"An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, Section 2(b), seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (*ordre public*) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.

"The Fund will be pleased to lend its assistance in connection with any problem which may arise in relation to the foregoing interpretation or any other aspect of Article VIII, Section 2(b). In addition, the Fund is prepared to advise whether particular exchange control regulations are maintained or imposed consistently with the Fund Agreement."

Agreement of the International Monetary Fund in a case involving recognition of the foreign exchange control regulations of France (*cf. Emek* v. *Bossers* and *Lessinger* v. *Mirau—supra*, pp. 722 and 725, and the *Clearing Dollars Case*—below), the Court emphasized the Fund's formal interpretation of the provision under Article XVIII giving the Fund the power of authoritative interpretation of the Articles. On the question of the binding effect of such interpretations on courts in member countries, see *In the Matter of International Bank for Reconstruction and Development and International Monetary Fund* v. *All America Cables & Radio, Inc., and Other Cable Companies* (*supra*, p. 705). See also *International and Comparative Law Quarterly*, 3 (1954), pp. 265–273; *Österr. Zeitschrift für Öffentliches Recht*, 8 (1957), pp. 90–93. On the interpretation of multilateral charters, including those of international organizations, see *Harvard Law Review*, 63 (1949), pp. 78–98, and *American Journal of International Law*, 48 (1954), pp. 408–20; but note that Article XVIII of the Fund's Articles is not confined to interpretation for the settlement of " disputes".

International Organization—Specialized Agencies—International Monetary Fund—Articles of Agreement of—Regulation of Currency and International Exchange—Recognition of Such Regulation by Other States—International Recognition of Exchange Control Regulations—Article VIII, Section 2(b), of Articles of the Fund.

CLEARING DOLLARS CASE.

German Federal Republic, Landgericht of Hamburg (*Chamber* 12 *for Commercial Affairs*).

December 28, 1954.

THE FACTS.—The defendants, who were Belgian residents, entered into an agreement with the plaintiffs, a Hamburg firm, for the purchase from the latter of 500 tons of sulphate of ammonia at 46 U.S. Clearing Dollars per 1,000 kilograms, payment to be made under Belgian/West German Clearing. The contract provided that Hamburg was to be the place of performance of the plaintiffs' obligations and also the place of jurisdiction The defendants failed to obtain an import licence from the Belgian authorities, and the plaintiffs brought this action for damages because of the defendants' failure to take up the goods. There was also some question whether the grant of an import licence was a condition of the contract.

Held: that the action must fail; that the contract was unconditional; and that the contract was governed by German law.

The Court said: " Article VIII, Section 2(b), of the Bretton Woods Agreement (Agreement on the International Monetary Fund), to which Germany and Belgium are parties, precludes the enforcement of claims for positive damages (citing RGBl., 1952, II, pp. 637 *et seq.*, 659).

" The passage cited reads as follows:

> ' Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.'

The case at issue comes within the terms of this provision. The present purchase contract is one which, if it were fulfilled, would involve the foreign exchange holdings or the currency of a member country, *i.e.*, Belgium.

" As is apparent from the refusal to grant an import licence, the foreign exchange contract is in conflict with the foreign exchange control regulations of Belgium. It cannot be objected in this connection that payment was to have been effected through the German-Belgian Clearing, because the import licence was refused for the very purpose of preventing settlement under the German-Belgian Clearing, the object of which is the proper husbanding of the country's foreign exchange resources in accordance with the intention of Article VIII, Section 2(b).

" The Belgian foreign exchange control regulations have been maintained in conformity with the Bretton Woods Agreement. In this respect, it would be sufficient if their existence and their nature have been approved by the International Monetary Fund (Mann, ' Der Internationale Währungsfonds und das internationale Privatrecht,' in *J.Z.*, vol. 53, p. 444). In view of the fact that similar foreign exchange regulations exist in nearly all countries, the answer must be in the affirmative.

" Thus, since the facts come within Article VIII, Section 2(b), the purchase contract concluded between the parties is ineffective. This follows from the term ' unenforceable '. While in Anglo-American law this word has a specific significance and refers to contracts which are valid but with respect to which the debtor may plead that they have no binding force (Mann, *loc. cit.*, p. 445), such an interpretation cannot be placed on the word ' unenforceable' since more than 40 nations, which do not all come within the sphere of Anglo-American law, have adhered to the Agreement; moreover, it should not be left to the parties themselves to decide whether they wish to invoke exchange control regulations which exist in the public interest.

" Once it has been established that a claim to performance is excluded on the ground of Article VIII, Section 2(b), the same conclusion must apply to a claim for damages. In this case the foreign exchange position would be particularly adversely affected, since foreign exchange would have to be spent although the country in question would not even obtain the merchandise. Failure to apply Article VIII, Section 2(b), to such a claim for damages would give full latitude to all endeavours to circumvent this provision.

" There is no need to discuss the question whether the defendants could have resold the merchandise in transit trade, since the contract specifies payment under the Belgian/West German Clearing, thus involving Belgian foreign exchange reserves in any case."

[Report: Unpublished.]

NOTE.—(1) This case is discussed in *Der Betriebsberater*, July 10, 1955, p. 586; International Monetary Fund *Staff Papers*, vol. V (1956–57), pp. 297–301.

(2) In holding that pursuant to Article VIII, Section 2(b), of the Articles of the Fund a contract contrary to Belgian exchange control regulations could not be enforced, the Court adopted a view of the provision which is in marked contrast to the restrictive approach of the Court of Courtrai in *Emek* v. *Bossers* (see *supra*, p. 722). (See also *Lessinger* v. *Mirau* and *Société Filature etc.* v. *Heynen-Bintner—supra*, pp. 725 and 727, and *White* v. *Roberts—Annual Digest*, 1949, Case No. 15).

International Organization—Specialized Agencies—International Monetary Fund—Jurisdiction of States to Regulate their Currency—Limitation by International Agreement—Articles of Agreement of International Monetary Fund—Establishment of Par Value for Belgian Franc under Articles of Agreement of Fund—Internal Effect—Exchange Rates as a Matter of International Law.

SIMONAER *v.* COMMUNITY OF JETTE-SAINT-PIERRE.[1]

Belgium, Court of Appeals of Brussels. January 18, 1949.

THE FACTS.—Certain real property had been expropriated by legal process at the request of a municipal authority, and the indemnity had been fixed by the Court. The former owners appealed on the ground that the indemnity had been calculated as of June 23, 1942, the date as of which the expropriation formalities had been completed, so that it ignored the change in the gold value of the Belgian franc in 1944. According to the Law of April 29, 1935, changes in the gold parity could be taken into account where they affected the purchasing power of the franc in relation to real estate by the date of the final assessment of an indemnity. The defendant argued that there had been no change in the gold parity. Decree-Law No. 5 had abrogated the former gold parity and had authorized the King, after discussion in the Council of Ministers, to define a new gold parity. The Order of the Council of Ministers No. 6 of May 1, 1944, had not done this but had authorized the National Bank to establish buying and selling prices for gold and rates for foreign currencies.[2]

Held: that the former owners were entitled to a supplementary indemnity. There had been a change in the gold parity of the franc within the meaning of the Law of April 29, 1935. That law did not require the establishment of a new fixed parity where the old one was abrogated; the adoption of a flexible parity was sufficient. In any event, however, a new fixed parity had been established under the Articles of Agreement of the International Monetary Fund.

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[1] See Note at p. 714, *supra.*

[2] See *infra*, pp. 733 and 734.

The Court said: " The Law of December 26, 1945 (*Moniteur* of March 13, 1947) has approved the Agreement concerning the International Monetary Fund and . . . therefore this Agreement has the authority of a Belgian Law in the national territory . . . Article IV, Section 1, of this Agreement provides that ' the par value of the currency of each member shall be expressed in terms of gold as a common denominator or in terms of the U.S. dollar of the weight and fineness in effect on July 1, 1944.'

" . . . pursuant to Article XX, Section 4, relating to ' Initial determination of par values ', of the same Agreement, the International Monetary Fund accepted the parity of one kilogram of fine gold equalling 49,318·08222 Belgian francs communicated to it by the Belgian Government on September 17, 1946, which was the same as that used in January 1945 for the revaluation of the gold on hand of the National Bank of Belgium and which corresponds to 0·0202765 grams of fine gold per one franc . . ."

[Reports: *Journal des Tribunaux*, No. 3808 (May 1, 1949), p. 260; *Pasicrisie Belge*, 1949, II, p. 24.]

NOTE.—(1) This case is discussed in International Monetary Fund *Staff Papers*, vol. 1 (1950–51), pp. 322–23; *Revue Critique de droit international privé*, XL (1951), pp. 581–2; *Zeitschrift für ausländisches und internationales Privatrecht*, 19 (1954), pp. 641–42.

(2) It has become established in public international law that, subject to a few relatively minor exceptions, the control of a country's currency is within that country's sovereignty. The Permanent Court of International Justice has said: " It is indeed a generally accepted principle that a State is entitled to regulate its own currency " (*Serbian* and *Brazilian Loans Cases*: Series A, Nos. 20 and 21 (1929), at p. 44). This principle covered a country's power to determine unilaterally the gold or foreign exchange value of its currency or that it should fluctuate without any fixed value of this kind, even though an exchange rate necessarily involves at least two currencies. At various times, the exercise of this power has contributed to monetary and economic instability in the world. The Articles of Agreement of the International Monetary Fund have fundamentally altered the rule of public international law because member countries, of which there are now sixty-four, have agreed to be bound by a code of conduct in monetary matters. One of the major principles in this code is that exchange rates are matters of international concern. Thus, members must adopt suitable initial par values for their currencies in agreement with the Fund (Article XX, Section 4); and may change a par value only after consulting and, in most cases, obtaining the concurrence of the Fund (Article IV, Section 5). Exchange transactions within a member's territories involving its currency and another member currency must be within the margins around the par value laid down in the Articles (Article IV, Sections 3 and 4). Multiple rates, which represent temporary

deviations from these rules, must receive the prior approval of the Fund (Article VIII, Section 2, and International Monetary Fund *Annual Report*, 1948, pp. 65–72).

The present case involves the par value provisions of the Articles. Its significance is that the law approving the Articles was interpreted as giving domestic effect not only to the Articles themselves but also to action taken under the Articles, namely, the establishment of a par value for the Belgian franc, even though the other provisions of domestic law on establishing a fixed parity had not been followed.

International Organization—Specialized Agencies—International Monetary Fund—Jurisdiction of States to Regulate their Currency —Limitation by International Agreement—Articles of Agreement of International Monetary Fund—Gold Transactions—Price of Gold—Relation to Par Values of Currencies.

NATIONAL BANK OF BELGIUM *v.* BANK OF THE BELGIAN CONGO AND NATIONAL COMMITTEE OF THE KIVU.

Belgium, Court of Cassation (First Chamber). July 7, 1955.

The Order of the Council of Ministers No. 6 of May 1, 1944, enables the National Bank of Belgium to establish the prices at which it buys and sells gold. Article 1 of this Order provides:

> " The National Bank of Belgium is authorized to buy and sell foreign currencies at the rates fixed by parity, payments, exchange, or compensation agreements, taking into account the expenses incurred in the purchase and sale of these currencies. Taking into account these rates of exchange, the National Bank of Belgium fixes the prices at which it buys and on occasion sells gold in bars or in coins . . . The prices fixed by the National Bank of Belgium are submitted to the approval of the Minister of Finance."

On September 19, 1949, the National Bank's buying price was 49,145 francs per kilogram. This was based on the initial par value of 0·0202765 grams of fine gold per franc established by Belgium on December 18, 1946, under the Articles of Agreement of the International Monetary Fund, which is equivalent to 49,318·0822 francs per kilogram of gold. On September 18, 1949, the Fund concurred in the devaluation of sterling;[1] and on September 19,

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[1] Article IV, Section 5, of the Fund's Articles of Agreement provides:

" *Changes in par values.*—(a) A member shall not propose a change in the par value of its currency except to correct a fundamental disequilibrium.

" (b) A change in the par value of a member's currency may be made only on the proposal of the member and only after consultation with the Fund.

" (c) When a change is proposed, the Fund shall first take into account the changes, if any, which have already taken place in the initial par value of the member's currency as determined under Article XX, Section 4. If the proposed change, together with all previous changes, whether increases or decreases,

" (i) does not exceed ten per cent. of the initial par value, the Fund shall raise no objection;

" (ii) does not exceed a further ten per cent. of the initial par value, the Fund may either concur or object, but shall declare its attitude within seventy-two hours if the member so requests;

the quotation of exchange rates was suspended in Belgium. On September 21, the Fund concurred in a change of the par value of the Belgian franc to 0·0177734 grams of fine gold per franc, which is equivalent to 56,263·7994 francs per kilogram of gold.[1] On September 22, the quotation of exchange rates was resumed in Belgium, and on that day the National Bank, with the approval of the Minister of Finance, fixed a new buying price for gold of 56,065 francs per kilogram.

The National Committee of the Kivu, an association of miners in the Belgian Congo, was required by law to sell the gold it produced to the Bank of the Belgian Congo. The latter Bank delivered such gold to the National Bank of Belgium and, in accordance with a custom that had been accepted by them, any delivery was regarded as an offer of the sale of the gold to the National Bank at its buying price on the delivery day. The acceptance of the National Bank was established by the statement of account that it then sent to the Bank of the Belgian Congo.

The present case involved two bars of gold weighing 25 kilograms which were delivered to the National Bank on September 20, 1949. The National Bank's statement of account, sent to the Bank of the Belgian Congo on the same day, was based on the price of 49,145 francs per kilogram.

The Bank of the Belgian Congo and the National Committee of the Kivu, relying on a number of legal provisions, including the Order of May 1, 1944, and Article IV, Section 2, of the Articles of Agreement of the International Monetary Fund, argued that the delivery on September 20 had not resulted in a contract of sale because of the absence of a price. It had not been possible to establish a price because of the suspension of the quotation of exchange rates. This argument succeeded in the Brussels Court of Appeal.[2]

On appeal to the Court of Cassation,

Held: that the judgment of the Court of Appeal of Brussels must be reversed. There had been an official buying price for gold on September 20. The price established under the Order of May 1,

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" (iii) is not within (i) or (ii) above, the Fund may either concur or object, but shall be entitled to a longer period in which to declare its attitude.

" (d) Uniform changes in par values made under Section 7 of this Article shall not be taken into account in determining whether a proposed change falls within (i), (ii), or (iii) of (c) above.

" (e) A member may change the par value of its currency without the concurrence of the Fund if the change does not affect the international transactions of members of the Fund.

" (f) The Fund shall concur in a proposed change which is within the terms of (c) (ii) or (c) (iii) above if it is satisfied that the change is necessary to correct a fundamental disequilibrium. In particular, provided it is so satisfied, it shall not object to a proposed change because of the domestic social or political policies of the member proposing the change."

[1] See n. 1 on previous page.

[2] *Pasicrisie Belge*, 1955, II, p. 126 (April 24, July 10, 1954).

1944, remained applicable so long as a new one was not substituted for it. Article 1 of the Order provided that in fixing the price of gold the National Bank must take into account exchange rates for currencies as governed by international agreements. However, the draftsmen of the Order were only outlining the general principle on which the National Bank was to proceed in fixing the price of gold. They did not intend to establish so direct and necessary a relation between the price of gold and exchange rates that in the absence of the latter the former would cease to exist.

The Court went on to consider whether Article IV, Section 2, of the Articles of Agreement of the Fund established this direct and necessary relationship, and said: "*Gold purchases based on par values.*—The Fund shall prescribe a margin above and below par value for transactions in gold by members, and no member shall buy gold at a price above par value plus the prescribed margin, or sell gold at a price below par value minus the prescribed margin."[1] The Court concluded that the provision did not have this effect. What it did was to "impose only an upper limit for the buying price of gold; and such price, which can be fixed freely as long as it does not exceed the maximum prescribed, is not necessarily pegged to the par of currencies."

[Reports: *Journal des Tribunaux*, No. 4076 (October 2, 1955), p. 527; *Pasicrisie Belge*, 1955, I, p. 1214.]

NOTE.—(1) This case is discussed in International Monetary Fund *Staff Papers*, vol. V (1956–57), pp. 284–88.

(2) Under Article IV, Section 1, of the Articles of Agreement of the International Monetary Fund, the par value of the currency of a member country must be defined in terms of gold, directly or indirectly. It is thus important that member countries should not cast doubt on or undermine the par values by dealing in gold against currencies at prices that do not correspond to the par values for those currencies. Article IV, Section 2, establishes an obligation to avoid this by providing that members shall not buy gold for currencies at a premium in terms of par values, or sell it at a discount. In the present case, the Court of Cassation interpreted this

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[1] The margin is prescribed in Rule F-4 of the Fund's Rules and Regulations:

"*F-4.* For transactions in gold by a member the margin above and below par value shall be, at the option of the member, either:

"1. One quarter of one per cent plus the following charges:

(a) The actual or computed cost of converting the gold transferred into good delivery bars at the normal center for dealing in gold of either the buying member or the member whose currency is exchanged for the gold;

(b) The actual or computed cost of transporting the gold transferred to the normal center for dealing in gold of either the buying member or the member whose currency is exchanged for the gold;

(c) Any charges made by the custodian of the gold transferred for effecting the transfer; or

"2. One per cent, which one per cent shall be taken to include all of the charges set forth in 1 above."

provision as prescribing only a maximum price for gold in terms of par values, with power on the part of member countries to deal at lower prices unrelated to par values. This interpretation does not, perhaps, pay sufficient attention to the fact that although the provision has this effect in gold transactions between the monetary authorities of member countries and private parties, in transactions between the monetary authorities of any two member countries the price must correspond to par values. The provision prohibits purchases of gold at a premium and sales at a discount without expressly prohibiting sales at a premium and purchases at a discount. However, if the monetary authorities of one member attempt to sell gold at a premium to the monetary authorities of another member—an apparently permitted transaction—the latter will be purchasing at a premium in violation of the provision. Similarly, if there is a purchase by the monetary authorities of a member country at a discount—another apparently permitted transaction—this will also involve a sale at a discount by the monetary authorities of the other member country, a prohibited transaction. Thus, in the gold transactions between the monetary authorities of member countries, the transactions that are most important for the support of the par value system, there is no such discretion as to price as the Court of Cassation assumed.

D—OTHER INTERNATIONAL ORGANIZATIONS AND ORGANS OF INTERNATIONAL ADMINISTRATION

International Organizations—Powers of International Authorities —Abuse of Discretion—*Détournement de pouvoir*—Distinction between "Essential Objective" of an Administrative Act and "Motive for that Act"—The High Authority of the European Coal and Steel Community—Interpretation of Treaty—Meaning of the Words "price lists . . . shall be published".

GOVERNMENT OF THE ITALIAN REPUBLIC *v.* THE HIGH AUTHORITY.

Court of Justice of the European Coal and Steel Community.
December 21, 1954.

THE FACTS.—The main purposes of the European Coal and Steel Community are set out in the opening Articles of the Treaty of April 18, 1951, establishing the Community. Article 2 states as follows:

> "The mission of the European Coal and Steel Community is to contribute to the expansion of the economy, the development of employment and the improvement of the standard of living in the participating countries through the creation, in harmony with the general economy of the member States, of a common market as defined in Article 4 . . ."

Article 3 provides as follows:

> "Within the framework of their respective powers and responsibilities and in the common interest, the institutions of the Community shall:

> " (a) ensure that the common market is regularly supplied, while taking into account the needs of third countries;
>
> " (b) assure to all consumers in comparable positions within the common market equal access to the sources of production;
>
> " (c) seek the establishment of the lowest possible prices without involving any corresponding rise either in the prices charged by the same enterprises in other transactions or in the price-level as a whole in another period, while at the same time permitting necessary amortisation and providing the possibility of normal returns on invested capital; . . ."

Article 4 states as follows:

> " The following are recognised to be incompatible with the common market for coal and steel, and are, therefore, abolished and prohibited within the Community in the manner set forth in this Treaty: . . .
>
> " (b) measures or practices discriminating among producers, among buyers or among consumers, especially as concerns prices, delivery terms and transport rates, as well as measures or practices which hamper the buyer in the free choice of his supplier; . . ."

In Chapter V of the Treaty, which deals with prices, Article 60 states as follows:

> " 1. Pricing practices contrary to the provisions of Articles 2, 3 and 4 are prohibited, and in particular:
>
> —unfair competitive practices, in particular purely temporary or purely local price reductions the purpose of which is to acquire a monopoly within the common market;
>
> —discriminatory practices involving within the common market the application by a seller of unequal conditions to comparable transactions, especially according to the nationality of the buyer.
>
> " After consulting the Consultative Committee and the Council, the High Authority may define the practices covered by this prohibition.
>
> " 2. For the above purposes:
>
> " (a) the price-lists and conditions of sale applied by enterprises within the common market shall be published to the extent and in the form prescribed by the High Authority after consulting the Consultative Committee; if the High Authority finds that an enterprise has chosen an abnormal basing point for its price-lists, in particular one which makes it possible to evade the provisions of sub-paragraph (b) below, it shall address the appropriate recommendations to that enterprise.
>
> " (b) The methods of quotation applied must not have the effect of introducing into the prices practised by an enterprise on the common market, when reduced to their equivalent at the basing point chosen for the price-list:
>
> —increases over the price indicated by the price-list in question for a comparable transaction; or
>
> —reductions below this price whose amount exceeds:
>
> —either the margin making it possible to align the quotation with the

> price-list, based on another point, which procures the buyer the most advantageous conditions at the place of delivery;
> —or limits fixed by decisions of the High Authority for each category of products, after consulting the Consultative Committee, taking into account the origin and destination of such products."

Under its power to declare what constituted unfair competitive practices, under Article 60, para. 1, the High Authority in 1953 by Decision 30–53 named the practice of enterprises publishing a price-list and then deviating from it. That practice was therefore declared to be forbidden. Further, by Decision 31–53, in future all price-lists were to be submitted to the High Authority at least five days before they came into force, with the obvious purpose of preventing sudden alterations of prices.

Subsequently, following the end of the boom in industry occasioned by the hostilities in Korea, prices of steel in Europe began to fall. The producers, however, were reluctant to issue new price-lists incorporating these lower prices; they lowered the prices that they were actually charging while retaining their old price-lists.

The High Authority, instead of imposing penalties upon the producers for having infringed Decision 30–53, repealed that Decision and substituted for it Decision 1–54. The difference was that instead of all price deviations being prohibited, as in the past, a price deviation was henceforward to be permitted if it occurred in what was either a unique transaction or if the deviation was applied to all transactions that were comparable.

By Decision 2–54, the old system of prior publication of price-lists was ended, and instead producers of steel were allowed to vary their prices by 2·5 per cent above or below those in their price-lists without being required to issue new price-lists. Further, the five-day period for the advance submission of new price-lists was reduced to one day.

Finally, by Decision 3–54, producers were required to submit to the High Authority every two weeks a report of any price deviations that they had made.

The Italian Government sought the annulment of Decisions 1–54, 2–54 and 3–54 on the grounds, first, that the three Decisions violated the Treaty, and secondly, that the High Authority had committed a *détournement de pouvoir*. The Italian Government contended that Article 60, para. 2, of the Treaty was seeking to prohibit discriminations, whereas by Decision 1–54 discriminations were allowed in all cases except where the transactions were either unique or were comparable. As the only transactions that could really be held to be comparable were simultaneous transactions, virtually any deviations, it was contended, were allowed. It was also argued that Decisions 2–54 and 3–54 violated Article 60, para. 2, because that paragraph declared that price-lists were to be published. The term "price-lists" could only mean lists of the prices actually being charged, whereas these Decisions allowed price-lists to be published that did not state the prices that were actually being charged.

Further, Section 30.2 of the Convention containing Transitional Provisions stated that the prices charged by enterprises for sales of steel in the Italian market should not be lower than the price indicated in the price-list for comparable transactions except where this had been authorized by the High Authority in agreement with the Italian Government. As no such agreement had ever been reached, it was argued that the High Authority had therefore no power to authorize the lowering of prices in the Italian market.

The Italian Government also alleged that the three Decisions were invalid, first, because the Consultative Committee set up under Article 18 of the Treaty had not been consulted, and secondly, on the ground that the Decisions had not been adequately supported by reasons, as they are required to be by Article 15, because the dissenting opinions of certain members of the High Authority had not been set out.

Finally, the Italian Government quoted Article 64 of the Treaty which authorizes the High Authority to impose fines upon any enterprises which violate the Decisions made by the High Authority under Article 60. Rather, however, than take action under that Article against those enterprises that were deviating from their price-lists, it was argued that the High Authority was seeking by these Decisions to make legal these illegal deviations. This, it was alleged, constituted a *détournement de pouvoir*.

Held: that Decision 1–54 did not violate Article 60 because the Decision still required price-lists to be published. Moreover, whether a particular transaction was unique or was comparable to other transactions could always be objectively determined, so that, far from discriminations being permitted by this Decision, they would immediately become apparent.

The Court annulled Article 1 of Decision 2–54 on the ground that Article 60 required a prior publication of all price-lists, and that of necessity this must mean lists of the exact prices to be charged, whereas Decision 2–54 authorized the publication of lists of inexact prices. Further, it was accepted that because Section 30.2 of the Convention prohibits the reduction of prices below those stated in the price-lists without the permission of the Italian Government, in default of that permission the Decision was in violation of the Treaty.

The Court upheld the validity of Decision 3–54 on the ground that, although it formed part of the machinery for the carrying out of the annulled Decision 2–54, this of itself only rendered Decision 3–54 inoperative, as distinct from being void.

The contention that the High Authority had committed a *détournement de pouvoir* was rejected because there was no evidence before the Court that the High Authority had sought by means of these Decisions to legalize illegal actions.

Further, the Court found evidence that the Consultative Committee had been consulted, but it refused to consider the contention that the Decisions were not adequately supported with reasons as this had been alleged only towards the end of the exchange of written pleadings.

The Court said:

"*A.—The Ground of Violation of the Treaty*

"I. *As for Decision* 1–54

"(1) Decision 1–54 introduces a clear distinction between publication and discrimination, creating thus two kinds of infractions, namely the offense of discrimination, on one side, and the infraction of the regulations on the publication of prices on the other side. Yet, while the Court admits that there exists a connection of finality between the two paragraphs of Article 60, the Court sees no Violation of the Treaty in this distinction. Indeed, the Treaty does nowhere provide that every infraction of the regulations on the publication of prices constitutes at the same time one of the practices prohibited by Article 60, paragraph 1. Especially where the prohibition of discriminatory practices is concerned it is undeniable that the fact of deviating, to whatever extent, from the prices or conditions provided for by the price-list of an enterprise does not constitute a discrimination when it concerns a singular transaction or when the same deviation is applied to all comparable transactions. Decision 1–54 is thus consistent with the Treaty on this point . . .

"Also ill-founded is the reproach that the absence of any precise definition of singular transactions and of comparable transactions opens the way to discriminations, facilitates them instead of acting against them, and robs of its contents the notion of discriminatory practices. It is true that the old system of keeping strictly to the published prices seems to have aimed at the exclusion of every discrimination, except of course in the case of an enterprise deliberately violating its obligations; on the other hand, under the new system it is theoretically possible that an enterprise commits, in good faith, a discrimination when it erroneously supposes that a transaction is non-comparable or singular; indeed, the new system leaves it to the enterprise itself to appreciate the singular or non-comparable character of the transaction. However, Decision 1–54 lays the burden of proof upon the enterprises; if they can not prove the singular or non-comparable character of the transaction they will be held responsible for their error and be subject to the sanctions provided for in Article 64. Finally, it must be admitted that the notion of singular or non-comparable transactions does not easily lend itself to abstract definition. It is indeed possible that transactions concluded with an interval of only one day constitute non-comparable transactions, if in the meantime the market has undergone a complete change; on the other hand, it is possible that two transactions are comparable although concluded several weeks apart, if the market has remained stable during this time. Comparability can therefore only be appreciated in relation to the market situation; likewise, the singularity of a transaction can only be admitted on the ground of the circumstances which characterize the transaction. The two characters—comparability and singularity—can be objectively ascertained by the enterprises and by the High Authority, and therefore the system in question does not rob the notion of discrimination of its contents; on the contrary, it makes it possible to act against any discriminatory practice. From the above-mentioned it also follows that Plaintiff's argument that only simultaneous transactions are still submitted to the obligation of identical prices and conditions of sale does not rest on any ground.

"(2) Decision 1–54 does not abolish the obligation to publish the prices; on the contrary it expressly maintains it. The objection that the Decision violates the regulations on the publication of prices and eliminates the principle of publicity as a means of preventing prohibited practices, is therefore without ground. . . .

"(3) Decision 1–54 does by no means abolish the sanctions in case of discrimination. If comparable transactions are concluded at different prices and conditions of sale, the sanctions provided for in Article 64 are still applicable.

"(4) Finally, Plaintiff's argument that Decision 1–54 instead of giving a definition of prohibited practices legalizes certain practices that were illegal under the old system is ill-founded. It has been explained above that Decision 1–54 gives a new definition of prohibited practices by separating the regulations on non-discrimination from the regulations governing the publicity. If, under the new definition, practices that were prohibited before, namely the deviations from the published prices, are now admitted, it nevertheless prescribes that these deviations have to be uniformly applied to all comparable transactions, while an exception is made for singular transactions which can not yield a discrimination. The principle of the prohibition of all discriminatory practices is therefore strictly respected. Decision 1–54, while it abandons the previous automatic system, remains within the framework of defining prohibited practices.

"For these reasons, Decision 1–54 does not violate the Treaty; consequently the Appeal for annulment submitted against this Decision, inasmuch as it is based on the ground of Violation of the Treaty, must be rejected.

"II. *As for Decision* 2–54

"The Court is of the opinion that Article 1 of Decision 2–54 is not consistent with the Treaty in so far as it permits the enterprises to apply an average upward or downward deviation between the published prices and the prices actually applied, without previous publication of the modifications to the price-lists. This Violation of the Treaty results from what follows:

" (1) Before interpreting in detail paragraph 2 of Article 60 of the Treaty, it is necessary to examine the objectives which the High Authority has to pursue when it defines the discriminatory practices and when it regulates the publication of prices and conditions of sale.

> " (*a*) The Articles 2, 3 and 4 of the Treaty, referred to at the beginning of paragraph 1 of Article 60, constitute fundamental dispositions establishing the common market and the common objectives of the community. Their importance results clearly from Article 95. When giving the High Authority competence to define prohibited practices, the Treaty compels it to take into account all the objectives prescribed by the Articles 2, 3 and 4. This results from the explicit reference to these Articles made at the beginning of Article 60. When defining prohibited practices the High Authority has therefore not only the right but also the obligation to bear in mind the action against agreements among producers and the preoccupation to promote the establishment of the lowest possible prices under the conditions mentioned in Article 3 of the Treaty, and also the action against unfair competitive practices and discriminatory practices. For these reasons the Court can not accept Plaintiff's proposition that Article 60 refers only to actions against discriminations, whereas the action against agreements is only of the resort of Article 65 and the promotion of the lowest possible prices of the resort of Article 61. . . .
>
> " On the other hand, it follows from the words ' in particular ' (in the first paragraph of Article 60) that Article 60 chiefly refers to unfair competitive practices and discriminatory practices.
>
> " (*b*) Especially where the role is concerned which the Treaty assigns to the publication of the price-lists, the Court ascertains, in agreement with the Advocate General, that the compulsory publication is provided for in the Treaty in order to achieve the following three aims:
>
> " (1) prevent as much as possible the prohibited practices;
>
> " (2) give to the buyers the opportunity to acquaint themselves with the exact prices, and also to participate in the control of discriminations;
>
> " (3) give the enterprise the opportunity to know exactly the prices of their competitors in order to give them the possibility to align their prices.
>
> " Although publicity is required for the above-mentioned purposes, the Treaty does not consider it, however, sufficient to

guarantee the actual achievement of these aims; publicity is but one of the means provided for in the Treaty. . . .

" (2) In its first paragraph, Article 60 prohibits directly and imperatively certain practices; the High Authority is empowered to define them, but it can not infringe upon the principle of their prohibition.

" Paragraph 2 of Article 60 provides for the compulsory publication of price-lists ' for the above purposes '. These words clearly indicate the instrumental character of the following provisions concerning the publication of prices. This publication is imperatively provided for; it is considered as an appropriate means to achieve the ends enumerated in the first paragraph. Hence it is only a means that is concerned, but a means imperatively prescribed in the Treaty and not a means which could be replaced by any other means eventually susceptible to achieve the same results.

" This obligatory character of the publication of the price-lists follows also from the words ' shall be published '. The Court is therefore bound to interpret the obligation to publish the price-lists and conditions of sale in the sense of a strict legal rule upon which no infringement is permitted; the obligation is absolute and has to be obeyed integrally.

" The Court does not accept Defendant's opinion that the expression ' être rendu public ' is less strong than the expression ' être publié '. Indeed, in the last two paragraphs of Article 46, the Treaty uses those two expressions as equivalent. In any case, publication has to be made in such a way that all the participants in the market (eventual future buyers and competitors) are in a position to know the prices; such a publication alone is consistent with the objectives for which it was provided.

" (3) Paragraph 2 (*a*) does not expressly say at what moment the price-lists and conditions of sale are to be published. One has only to read paragraph 2 (*b*) concerning the methods of quotation to understand that the price-lists are previous to all sales taking place on the common market.

" Indeed, letter (*b*) of paragraph 2 of Article 60 specifies that the methods of quotation applied must not have the effect of introducing into the practised prices increases over the prices ' indicated by the price-list '—which confirms again that the price-lists contain a list of prices at which the products are offered which permits the exact calculation of all legal transactions; it confirms furthermore that those price-lists have to be published previous to their application.

" Moreover, paragraph 30 No. 2 of the Convention containing the Transitional Provisions stipulates that the prices charged by the enterprises for the sales of steel on the Italian market may not be lower than the prices indicated in the price-lists for comparable transactions. This position confirms that the price-list constitutes only a list of prices at which the products are offered for sale, price-list which is previous to any sales contract. . . .

" Furthermore, it results from the foregoing considerations that the words ' price-list ' always designate published price-lists. . . .

" (4) After having ascertained that the price-lists and conditions of sale have to be published previous to their application on the common market, it remains to be decided whether the Treaty requires the publication of the exact prices or whether it is sufficient to publish average or approximate prices. There is no doubt that the Treaty prescribes a publication of exact prices in the form of price-lists. This follows from the objective which the publication of prices should achieve: information given to buyers has only value for them if it informs them at what prices they can buy. Likewise publication must make alignment possible and this alignment should be done with the exact prices of the competitor. The alignment is a right granted to the enterprises by the Treaty, and not only a facility which can only be exercised if the enterprises are able through other less or more fortuitous means to acquaint themselves with the prices practised by their competitors.

" Since the Treaty imperatively prescribes, for the above-mentioned reasons, the previous publication of the exact prices, it follows that the competence granted to the High Authority to establish the extent and the form of the publication does not empower it to impair the principle of the compulsory publication of the exact prices.

" Having regard to the imperative character of paragraph 2 (*a*) of Article 60, and in the absence of any text to the contrary, the power granted to the High Authority by the parenthesis ' to the extent and in the form prescribed by the High Authority', can not be interpreted in a sense which would permit the High Authority not to publish the price-lists. The parenthesis should be understood to mean that the High Authority is empowered to determine the content of the price-lists. But this content should answer the public interest, so that the High Authority is only competent to prescribe minimum requirements for the outline of the price-lists.

" In other words, the expression ' to the extent and in the form prescribed by the High Authority,' does indeed empower the High Authority to prescribe the extent that is to say the scope of the publication insofar as it concerns the regulation of its modalities; the High Authority shall be allowed, for example, to prescribe, like it has done, the time-limit for the entering into force of the new price-lists, to establish that certain rebates—such as the rebate for second choice, etc.—have to be mentioned in the price-lists, to decide if the leading-costs have to be published or not. On the other hand, under the system imposed by the Treaty all that is indispensable for the knowledge of the exact price must necessarily be mentioned in the price-list. The fact that publication of price-lists has to take into account the objectives, which according to the Treaty this publication should pursue, does not allow the acceptance of the thesis of the High Authority that it has the competence to prescribe, at its own discretion, what is to be published and what not. . . .

" The Court is of the opinion that this argument sustains the ground of Violation of the Treaty, which ground has already been put forward in the Application and which can not be declared non-admissible. Furthermore, the above-mentioned argument is ill-founded, considering the obligation provided for in Decision 3–54 which prescribes the communication of bi-weekly reports.

" Furthermore, the Plaintiff has put forward the following grounds:

" (7) The ground that the Consultative Committee has not been consulted in accordance with the legal prescriptions:

" The Defendant asks the Court to declare this ground non-admissible because it is not listed in the Application. The Court is of the opinion that this ground has to be examined ex officio, because if it were well-founded an annulment ex officio for Violation of the Treaty and major violation of procedure would be justified.

" The minutes of the Consultative Committee which were handed to the Court following its Order of November 6, 1954, prove that the Consultative Committee has been regularly consulted, that it has given an opinion concerning certain modifications to the Decisions 30–53 and 31–53, proposed by the High Authority and that the only point on which the consultation did not reach a conclusion, namely the definition and the exclusion from the price-lists of long-term contracts and public allocations, does not enter into account for the examination of the legality of the Decisions in question.

" The minutes contain a series of views which the High Authority, in accordance with the Consultative Committee, could rightly consider as an opinion.

" On this point the Court agrees with the findings of the Advocate General.

" (8) The ground of insufficient motivation of the Decisions in question resulting from the omission of dissenting opinions.

" This ground based on a violation of procedure has only been put forward in the Reply. For this reason, as the Public Order does not necessitate an examination ex officio, the Court, in agreement with the Advocate General, declares this ground non-admissible, in accordance with Article 29, paragraph 3 of the Rules of the Court.

" (9) Furthermore, the Court has examined ex officio the question whether Article 1 of Decision 2–54 constitutes a major violation of procedure. According to its text this Article defines only the conditions under which the new price-lists have to be published.

However, when this Article is brought into connection with Decision 1–54, it can be asked if it does not directly complete the definition of prohibited practices. If this were the case, the Council should have been consulted in accordance with Article 60, paragraph 1. As such an official consultation has not taken place and can not be replaced by a simple information of the Council by the High Authority, Article 60, paragraph 1, might have been violated. However, the Court is of the opinion that Article 1 of Decision 2–54 does not contain a complement to the definition of discriminatory practices, nor an indirect definition, but is limited to regulating the system of publication of price-lists. . . .

" (11) Plaintiff demands annulment of Articles 1, 2 and 3 of Decision 2–54 for violation of paragraph 30 of the Convention containing the Transitional Provisions. . . . Where Article 1 of Decision 2–54 is concerned, Plaintiff's demand is justified on the following grounds:

" Even if one is of the opinion that paragraph 30 of the Transitional Provisions especially aims at prohibiting the alignment with the prices of the Italian enterprises, it does not necessarily follow that this article excluded a protection under different forms. To sustain the opposite would be a real petitio principii because in the absence of a clear and precise text it is also legitimate to admit that the Convention wanted to make the Italian enterprises benefit integrally, exceptionally and temporarily, [from] the protection which the Treaty provided for them. Its real purpose therefore is to prevent the non-Italian enterprises to compete with the Italian enterprises on the Italian market by applying prices inferior to their own price-lists.

" In the opinion of the Court, paragraph 30 of the Transitional Provisions prohibits all sales in Italy below the prices provided for in the price-lists. This prohibition has meaning only if in the other countries of the Community, sales below the prices of the price-lists are exceptionally allowed on the ground of special provisions. Such is the case for the right of alignment provided for in Article 60, paragraph 2 (*b*). On the other hand, the Decisions in question create a new regime—which can be applied to the entire common market—on which grounds sales below the prices of the price-lists are lawful. It must be admitted that this regime remains submitted to the prohibition of paragraph 30 and the more so now this paragraph does not expressly mention the alignment, but uses very general terms. Paragraph 30 must therefore be interpreted in the following sense; even if sales below the prices of the price-lists were by exception lawful, this could not be legal on the Italian market. In the present case, paragraph 30 prohibits to extend to the Italian market the system of deviations from the price-lists. Since Decision 2–54 has not taken this prohibition into account, it violates a legal rule concerning the application of the Treaty.

"III. *As for Decision* 3–54

"Decision 3–54, whose purpose it is to introduce a system of information and control, is based on Article 47 of the Treaty. This Article permits the High Authority to gather the necessary information for the accomplishment of its mission; Decision 3–54 is therefore consistent with the Treaty. The fact that the High Authority has combined this system of information with the control of the publicity-system, provided for in Article 60, does not justify any objection.

"If Decision 3–54 is apparently intended to complete the system of deviations, introduced by Article 1 of Decision 2–54 and declared above inconsistent with the Treaty, it is not, however, by itself in opposition with the Treaty; consequently, there are no grounds for its annulment, although it evidently becomes inoperative and without object, because of the annulment of the first Article of Decision 2–54.

"*B.—The Ground of Détournement de Pouvoir*

"In agreement with the findings of the Advocate General, to which it refers, the Court is of the opinion that the ground of détournement de pouvoir cannot be admitted against the Defendant on account of the Decisions in question.

"It has been said above that the High Authority, when it fulfils its duty to act primarily against the unfair competitive practices and against discriminatory practices, has the right and the obligation to take into account also the prohibitions resulting from the Articles 2, 3 and 4; one cannot blame it for having acted in that manner.

"Even if the Decisions in question have been partly inspired by the idea of introducing a regime that had greater chance to be respected by the enterprises than the previous one, one cannot conclude from this that the new regime was intended to legalize the previously committed infractions. In any case it is evident that the Decisions were especially directed towards the achievement of the objectives laid down by the Treaty. Even if an unjustified motive, such as the avoidance of the penalization of the guilty enterprises, had been among the motives justifying the action of the High Authority, these Decisions would not therefore be vitiated by Détournement de pouvoir, when they do not sacrifice the essential objective i.e. prohibition of unfair competitive practices and discriminatory practices. The Court is of the opinion, for the above mentioned reasons, that the Decisions do not sacrifice these objection. . . ."

[Report: *Official Gazette of the European Coal and Steel Community*, 4th Year, No. 1, 1955, pp. 23–43.]

NOTE.—The point of law decided by this case is small and fairly simple. Basically, the Court was called upon to interpret the words in Article 60 of the Treaty " price-lists shall be published ". It held, first, that " price-lists " means lists of exact prices and not approximate prices, and secondly, that the words " shall be published " mean " shall be published prior to being brought into operation ". When, therefore, Decision 2–54 no longer required lists of exact prices to be published prior to being brought into operation, that Decision was seen to be in violation of Article 60 and therefore void.

However, several incidental points are raised by this judgment.

(1) By Article 33 of the Treaty, States may challenge the validity of a Decision of the High Authority on the ground that that Authority has committed a *détournement de pouvoir*, that is to say, that it has exercised a power that has been granted to it by the Treaty but has exercised that power so as to achieve some purpose other than the one for which the power was given. The Italian Government therefore accepted that the High Authority had power to declare what practices amounted to discrimination under Article 60, but asserted that this power was given in order that discriminations might be forbidden, whereas the High Authority, they alleged, had exercised this power not so that discrimination might be forbidden but for the purpose of legalizing the practice of enterprises selling below their published price lists: this, they alleged, had been done so that the High Authority would not be required to punish those enterprises. It was argued, therefore, that the Decision had been taken for an improper reason so that a *détournement de pouvoir* had been committed.

The Court held that for a *détournement de pouvoir* to be established it must be shown that the major or dominant reason for taking a particular decision was improper, and that it was not enough that a merely incidental reason was improper. This provides a criterion that may well be difficult to apply in future cases.

(2) In this judgment the Court has shown that it does not regard itself as being bound to consider merely those grounds justifying the annulment of a decision that are alleged by the plaintiff, but rather that the Court of itself can consider grounds not pleaded. Thus, the Court, of itself, considered whether there had been a violation of a substantial procedural requirement by a failure to consider the views of the Consultative Committee although this ground had never been pleaded. Further, it considered of itself whether Decision 2–54 was also vitiated by there having been a violation of a substantial procedural requirement in that the Council of Ministers had not been consulted.

However, the Court refused to consider whether there had also been a breach of a substantial procedural requirement because the Decision had not set out sufficient reasons for its having been taken. The Court declared that it did not feel that it was required to do so " because Public Order does not necessitate it." This criterion of Public Order is nowhere to be found in the Treaty and is an invention of the Court, which did not go on to say what it meant by the phrase.

(3) As has been seen, the Court accepted that a failure on the part of the High Authority to consult the Council of Ministers or the Consultative Committee would amount to a violation of a substantial procedural requirement if the Treaty required such a consultation. When, however, section 30.1 of the Convention containing Transitional Provisions required the agreement of the Italian Government to be obtained, a failure to

obtain this agreement was held by the Court to amount not to a violation of a substantial procedural requirement but to a violation of the Treaty. However, probably there is no valid distinction between these two events; if consultation is regarded as a procedural step, *a fortiori* agreement following upon consultation must also be procedural.

International Organization—Powers of International Authorities —"*Détournement de pouvoir*"—High Authority of the European Coal and Steel Community—Fixing of Maximum Prices by the High Authority—Effect of Existence of Monopoly—Meaning of Words "patent misconstruction of the Treaty".

GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS *v.* THE HIGH AUTHORITY.

Court of Justice of the European Coal and Steel Community. March 18, 1955.

THE FACTS.[1]—By Article 61 of the Treaty establishing the European Coal and Steel Community, the High Authority is empowered by means of a Decision to fix the maximum prices of coal sold within the Community if it deems such a Decision necessary to achieve the objects specified in Article 3 of the Treaty, and especially the object set out in para. (c) of Article 3. This paragraph states that the High Authority is to seek the establishment of the lowest possible prices, provided that this does not lead to a counterbalancing rise in other prices charged by the enterprises in other transactions. At the same time, these prices as established must allow a proper return upon capital invested. The other paragraphs of Article 3 deal with rights of access to the sources of supply, standards of living and modernization, etc.

In March 1953, the High Authority in exercise of the power given to it by Article 61, fixed the maximum prices for the sale of coal from the various coal mines within the Community. These prices, however, were to be in force for one year only, and in March 1954 the whole question of coal production was reconsidered. It was then found that the coal mines of the Ruhr and of the Houillères du Nord and the Pas-de-Calais had established themselves in such a position that they were virtually able to dominate the market and prevent effective competition. As a result, the High Authority passed Decision 18–54 which ended all the existing maximum prices that had been imposed the year before, but to meet this situation Decisions 19–54 and 20–54 were passed by which new maximum prices were imposed for the sale of coal by the Ruhr and by the Houillères du Nord and the Pas-de-Calais.

The Government of the Netherlands challenged the validity of all three of these Decisions. They contended, first, that the power of the High Authority to establish maximum prices was, by Articles

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[1] See also the Facts in *Government of the Republic of Italy* v. *The High Authority, supra*, p. 737.

61 and 3 (c), expressly limited to fixing maximum prices to prevent prices rising further, whereas in the situation in 1954 there was a tendency for prices to fall and not to rise. The Government argued, further, that the Decisions had been passed in violation of the Treaty because, it was alleged, the reason why the Decisions had been passed was not to achieve any of the objects set out in Article 3 but simply because certain coal mines had acquired a virtual monopoly. As the existence of a monopoly was itself illegal under the Treaty, it could not be quoted as a ground for making a Decision. In fact, it was declared, no action could be taken against monopolies under Article 61 at all, but only under Articles 65 and 66.

Détournement de pouvoir was alleged, mainly on the ground that the purpose for which Decisions could be taken under Article 61 was to secure minimum prices, whereas the purpose in fact pursued by the High Authority was to restrict the influence of these three monopolies.

Held: that the action must be dismissed, mainly for two reasons. First, although Articles 65 and 66 of the Treaty set out the means by which monopolies were to be dealt with, this did not mean that, merely because a monopoly existed within the common market, the High Authority lost its power to fix maximum prices under Article 61. The argument that because prices were tending to fall in 1954, therefore the fixing of maximum prices tended to keep prices up, and not at their lowest level, could not be accepted because the plaintiffs were not able to establish that in fact prices were tending to fall and were unable to challenge the evidence produced by the High Authority that prices were still rising.

Secondly, again as a question of fact, the Court found that the High Authority had not passed these Decisions to achieve any purpose other than those authorized by the Treaty, so that the charge of *détournement de pouvoir* also must be rejected.

The Court said:

" D. *Violation of the Treaty*

" (*a*) The Court has further examined the question whether the provisions of Decision No. 18–54 violate paragraph 1 of Article 61 of the Treaty, under which the High Authority has the competence to fix maximum prices 'for one or more products subject to its jurisdiction'; the Court ascertains that this Decision has to be in accordance with Article 5 of the Treaty, which prescribes that the High Authority has to limit its intervention to the minimum; this requirement has been fulfilled in the present case. The Treaty makes it possible to fix maximum prices for the common market; this expression simply means that a distinction has to be made between the market of the Community and the export market and was not intended to prohibit measures which could only concern a part of the common market. Moreover, the whole common market is nevertheless influenced, although indirectly by the above mentioned decision.

" (*b*) In support of the ground of violation of the Treaty, Plaintiff puts forward that the High Authority, in the preamble of Decision No. 18–54 bases itself on a structure of the market which is illegal under the Treaty and that the High Authority motivates its Decision with the existence of agreements and concentrations which are expressly prohibited by the provision of Articles 65 and 66 of the Treaty.

" However, in the opinion of the Court this argument would only be valid if all legal consequences were to be denied on the ground of the Treaty, to the agreements and concentrations which are in opposition with said Articles. . . .

" In Plaintiff's opinion a structure of the market in violation of the Treaty follows from the fact that the coal-basin Nord and Pas-de-Calais exercises a dominating influence upon the French market; Plaintiff states that the High Authority can only act against such a situation on the ground of Article 66, paragraph 7 of the Treaty.

" However, the existence of a situation which can eventually justify the application of Article 66, paragraph 7, does not in itself prevent the High Authority from using the competence which is given it by Article 61, section a. From this it follows that the action of the High Authority cannot be criticized on the ground of the Treaty, when the High Authority uses the powers it has under Article 61 of the Treaty to act against certain consequences which are attached to the maintenance of agreements and concentrations, consequences regarding the level of the prices on the common market and also the fulfilment of the objectives described in Article 3. . . .

" (*d*) Plaintiff opposes Decision No. 18–54 on the ground that it is based on motives which are in fact inexact, because, in Plaintiff's opinion it was not necessary to fix maximum prices at a moment when the prices were already showing a tendency to fall because of the development of the market; furthermore such maximum prices could only cause in any case an immobilization of the prices, but not a fall in the prices; moreover, the production and the employment could only be endangered by a fall in prices and, if measures had to be taken to avoid this danger, this could only have been done by fixing minimum prices.

" Regarding these arguments a distinction has to be made between the ascertainment by the High Authority of the economic facts and circumstances which led to the Decision on one side, and the drawing of consequences from these facts by the evaluation of the general situation which results from these facts on the other side.

" In the Decision in question the High Authority has ascertained that the prices for coal, notwithstanding the existing tendency of the prices, would be fixed, because of the structure of the market, by the selling organizations of the Ruhr basin and by the ' Houillères du Nord et du Pas-de-Calais '; furthermore by means of documents submitted to the Court (– Division Market of the High Authority, of February 3rd and 15th, 1954, No. 728 and 6523–) and which contents were not questioned by Plaintiff, the High Authority has shown that there certainly did not exist, in the French and German coal-basins, a tendency towards a general price-fall and that the producers instead stated that they wanted to keep the prices at the existing levels. From these documents it also follows that more in particular the representatives of the mines in the Ruhr basin strongly opposed during and after the consultations the High Authority's propositions for a lowering of the prices, and that the representatives of the coal-basins Nord and Pas-de-Calais after having considered the possibility of a price-increase which however they rejected, declared that even in case of liberation of the prices they would apply the existing prices adapted to the proposed modifications; this declaration however was not of such binding nature that it made unnecessary every fixation of maximum prices.

" On the ground of the existing situation the High Authority has concluded that, in its opinion, it was necessary to fix maximum prices; this conclusion is opposed by Plaintiff who states that these measures could not, under the existing circumstances, create or provoke a lowering of the prices, but could only cause an immobilization of the prices; therefore Plaintiff opposes the grounds of the Decision.

" The Court cannot examine the evaluation of the situation, based on economic facts and circumstances which led to the Decisions unless the High Authority is alleged to have committed a ' détournement de pouvoir ' or to have obviously ignored the provisions of the Treaty. A study of the market situation which would include an evaluation of structural and conjunctural elements, would inevitably lead to such an examination.

" It is therefore necessary to examine the general implication of the two conditions which have to be fulfilled in order to make it possible to examine the economic grounds of the Decision; these conditions are obvious ignoring of the provisions of the Treaty and ' détournement de pouvoir '. The Court will have to examine if these conditions are fulfilled in the present case.

" E. *Obvious Ignoring of the Provisions of the Treaty*

" It should be pointed out that the argument that the Provisions of the Treaty have been obviously ignored has not been put forward by Plaintiff as a separate ground for annulment, but only to bring the Court to examine the appreciation of the situation in the present case; based on the economic facts and circumstances.

" Under Article 33 it is not required that the above mentioned argument should be fully proved before the Court can start such an examination, because if such a proof were given, annulment on the ground of violation of the Treaty would already have to be pronounced on this ground. On the other hand it is insufficient to simply state obvious ignoring of the provisions of the Treaty in order to give the Court the opportunity to submit also the evaluation of the economic facts and circumstances to its juridical control, because otherwise the provision of Article 33 would become meaningless. The Court is of the opinion that it is required, and also sufficient, that the argument be supported by indications from which it can follow that the argument is well-founded. In the present case such indications have been given; therefore it is necessary to investigate whether or not they constitute an obvious ignoring.

" The word ' obvious ' supposes that the provisions of the Treaty have been ignored to such an extent, that this ignoring seems to follow from an evaluation of the economic situation which led to the Decision and which evaluation is obviously wrong when seen in the light of the provisions of the Treaty. In the present case the existence of ' obvious ' ignoring can only be accepted if the Court ascertains that an economic situation exists, from which it follows, at first sight, that there was absolutely no necessity for taking the Decision in question for the achievement of the objectives described in Article 3 of the Treaty, more in particular under section c of that Article.

". . . The Court is of the opinion that Plaintiff's argument that maximum prices in reality become the minimum which stabilizes and immobilizes the prices, does not, prima facie, exclude all necessity for maximum prices; it is, therefore, not possible to conclude on the ground of this argument that there exists an obvious ignoring of the Treaty.

" Furthermore the Court has to examine whether it follows from the level of the prices fixed by the High Authority, that the Decision in question was not necessary. From the comparative price-list jointly established by the parties it appears that the new prices are certainly not equal to the previous ones; furthermore Defendant states that the liberated prices have increased in a certain way; this statement has not been opposed by Plaintiff. The Court is therefore of the opinion that it does not follow from the findings concerning the above mentioned subject that there obviously existed no necessity. . . .

" F. *' Détournement de Pouvoir '*

" Plaintiff puts forward that the High Authority, when it established maximum prices, by virtue of Article 61 of the Treaty, did not so much intend to attain the objectives which it mentions, i.e., a lowering of the prices, but that the High Authority rather intended to act against agreements and concentrations. Therefore the High Authority has used the competences which it has under Article 61 for another objective than the one for which those competences have been given.

" Proofs regarding the motives which led to the Decision can be found in the preparations preceding the Decision, among which are the deliberations of the Consultative Committee, and of the Council of Ministers, it could also be found in the fact that the new prices, because of their relation with the price-lists in force before April 1st, 1954, are in opposition with the objectives which follow from the Decision or which have been admitted by the High Authority. From the documents submitted by the parties, it does not follow, however, that the High Authority has pursued other non-published objectives. The argument founded on the statement that the new prices are equal or nearly equal to the previous prices has already been rejected by the Court when it examined the argument of obvious ignoring of the Treaty. Furthermore, the fixation of the prices at the existing level was not necessarily meaningless because the possibility of a price-increase remained inherent to the structure of the market. Moreover the High Authority bases itself on the existence of a situation which caused concern for the development of the price level. Therefore it is not possible to consider the Decision in question as a measure intended to pursue objectives in opposition with the aim for which the competence to fix maximum prices has been given to the High Authority.

" The Court is therefore of the opinion that the Decision in question is not vitiated by ' détournement de pouvoir '."

[Report: *Official Gazette of the European Coal and Steel Community*, 4th Year, No. 7, 1955, pp. 119–133.]

NOTE.—It would appear that when the Court is considering a Decision of the High Authority, it can only go behind that Decision and assess the facts and economic circumstances in the light of which that Decision was taken if it is alleged that the High Authority has either committed a *détournement de pouvoir* or has patently misconstrued the terms of the Treaty. It was necessary in this case for the Court to define for the first time what was meant by having committed a " patent misconstruction of the Treaty " (*d'avoir méconnu d'une manière patente les dispositions du Traité*), which the *Official Gazette* translates as an " obvious ignoring of the provisions of the Treaty ". The Court *held:* " The word ' obvious ' presupposes that the provisions of the Treaty have been ignored to such an extent that the ignoring seems to follow from an evaluation of the economic situation which led to the Decision and which evaluation is obviously wrong when seen in the light of the provisions of the Treaty ". This, however, is clearly not a definition of " obvious ignoring " but only a description of one of the means of proving its existence. " In the present case ", the Court continued, " the existence of ' obvious ' ignoring can only be accepted if the Court ascertains that an economic situation exists, from which it follows, at first sight, that there was absolutely no necessity for taking the Decision in question for the achievement of the objectives described in Article 3 of the Treaty, more in particular under section (c) of that Article." The Court was thus in effect holding that if the Treaty provides a particular remedy " A " for a particular situation " a ", and the Court finds that in fact the existing situation was not " a " but " b ", the Treaty will have been patently misconstrued if nevertheless the particular remedy " A " is applied to situation " b ". However, it is also possible to hold that to believe that situation " a " was situation " b " is not to misconstrue the Treaty, but to misread facts. On that view, a misconstruction of the Treaty would arise only if the remedy " A " that is prescribed by the Treaty was misread; such a misconstruction would be " patent " or " obvious " if it was clear at first sight that the remedy in the Treaty was " A " but the High Authority had been working on the assumption that it was something else.

International Organizations—Legal Personality of—North Atlantic Treaty Organization—Nature of—Exemption from Jurisdiction of Municipal Courts—Distinction between Private Law and Public Law Activities.

BRANNO *v.* MINISTRY OF WAR.

Italy, Court of Cassation (United Chambers). June 14, 1954.

THE FACTS.—This was a reference by the Tribunal of Naples to the Court of Cassation on the question whether the Italian courts had jurisdiction to hear an action for the enforcement of a commercial contract entered into by the North Atlantic Treaty Organization Headquarters for Southern Europe with a private individual. The contract in question was for the provision by the plaintiff in the action of canteen facilities for the staff of the Headquarters offices.

Held: that although the North Atlantic Treaty Organization was a subject of international law, its private law activities were subject to the jurisdiction of the Italian courts.

The Court said: " This Court finds that the dispute under consideration is subject to the jurisdiction of the Italian courts and, in particular, of the Tribunal of Naples.

" The North Atlantic Treaty Organization—which is a union of various States adhering to the North Atlantic Treaty, one organ of which is the General Headquarters for Southern Europe—was established by a Treaty signed in Washington on April 4, 1949, which was ratified and brought into operation in Italy by Law No. 465 of August 1, 1949. It is an international organization, its main purpose being the mutual defence of its members. The North Atlantic Treaty Organization is, therefore, a subject of international law, and it is autonomous with respect to each and all of the member countries. Therefore none of the members—one of which is Italy—may interfere with the activities of the North Atlantic Treaty Organization; the member States cannot exercise judicial functions with regard to any public law activity of the North Atlantic Treaty Organization connected with its organization or with regard to acts performed on the basis of its sovereignty [*sic*].

"The Italian courts will not exercise jurisdiction with respect to cases arising out of public law activities of a subject of international law possessing both *jus imperii* and a legal system of its own. But the North Atlantic Treaty Organization, like any foreign State, may expressly or implicitly renounce such an immunity whenever it makes clear that it does not wish to take advantage of the special status which it has as a subject of international law, and, instead, act *more privatorum*; it may thus enter into contracts with Italian nationals on a basis which excludes any idea of sovereignty. In such an event, the North Atlantic Treaty Organization would come under consideration as a subject of our internal legal system.

"Subjects of international law and public bodies alike, in order to achieve the purposes for which they were established, may not only perform acts of a public law nature, but when they do not take advantage of their special status they may perform acts of a private law nature, including entering into contracts which are regulated by rules of private law. In such a case, there is a waiver by the subject of international law of its jurisdictional immunity: when it enters into contracts with private individuals it thereby agrees to be subject to the laws of Italian civil law which regulate such contracts, and therefore, it agrees also to submit to the jurisdiction of the courts.

"In the present case, it appears from the documents produced that the contract out of which the dispute arises is not one in respect to which foreign States and other subjects of international law are exempted from Italian jurisdiction by the operation of particular rules of internal or international law (*e.g.*, the Rome Convention of May 29, 1933, limiting liability for surface damage done by aircraft, brought into operation in Italy by Law No. 993 of May 28, 1936). Moreover, the General Headquarters of the Armed Forces for Southern Europe, in providing canteen facilities for its staff in the building in Naples which it occupies, was not performing an act of sovereignty connected with its public law activity. In particular it was not, while granting the concession to the plaintiff, intending to reserve all rights in respect of its sovereignty; it intended rather to divest itself of that attribute. Therefore, it intended to contract as an individual, under a private law, and to create a true contract regulated by civil law and by the contractual will of the parties."

[Report: *Giurisprudenza Italiana*, 1954, I, 1, p. 904.]

International Organizations—Legal Personality of—North Atlantic Treaty Organization—Headquarters Established Under North Atlantic Treaty, 1949—Exemption from Jurisdiction of Municipal Courts.

MAZZANTI *v.* H.A.F.S.E. AND MINISTRY OF DEFENCE.

Italy, Tribunal of Florence. January 2, 1954.

THE FACTS.—Mazzanti, an Italian national, was employed by the Headquarters of Allied Forces, Southern Europe (H.A.F.S.E.), established under the North Atlantic Treaty. The plaintiff brought an action against H.A.F.S.E. arising out of a dispute as to the terms of his employment. He asserted that the Italian courts had jurisdiction to hear the action.

Held: that the plea must fail. The Court had no jurisdiction; one of the parties to the contract of employment, H.A.F.S.E., was an international juridical person, and, having entered into the contract in the exercise of its public law capacity, it was exempt from local jurisdiction.

" The Court said: " When the North Atlantic Treaty was signed in Washington on April 4, 1949, certain European and non-European nations, including Italy, decided to constitute a defensive alliance under the conditions fixed by the Treaty; under Article 9 of the Treaty, they decided to form a Council which would have the power to create subsidiary bodies and, in particular, a Defence Committee to implement the common needs of aid and defence. The Treaty was ratified and brought into operation in Italy by Law No. 465 of August 1, 1949; therefore, its provisions can be directly enforced by the courts within our internal legal system.

" The parties to the above mentioned Treaty also signed two other international agreements; an ' Agreement regarding the Status of the Forces of Parties to the North Atlantic Treaty ', signed in London on January 19, 1951; and a ' Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty ', signed in Paris on August 28, 1952. These Agreements, which we may call briefly the ' Status of Forces Agreement ' and the ' Protocol ', respectively, have not been ratified by, or brought into operation in, Italy, and therefore they are for an Italian court only a source of international law which cannot be applied within our own legal system without being expressly incorporated by municipal legislation.

" If, on the basis of these sources of international and municipal law, which to-day regulate the matter, we examine the problem of the legal personality of the entity sued by the plaintiff, and of similar Military Commands, we shall find at once that an analysis of those provisions of the North Atlantic Treaty which have force of law in our municipal system would be of little use in solving the problem, or in accepting the arguments of the defendant Headquarters and the intervening Government Department with regard to the existence as an international legal personality of the North Atlantic Treaty Organization and its dependent Headquarters.

" In fact, the said Treaty does not contain any provision which could lead us to presume the existence of an actual organization having legal personality in international law. The provisions seem only to create a military alliance, a coalition of powers similar to those which we find throughout history, formed with the purpose of preventing, or waging, a war. The undertakings to settle disputes between the parties by peaceful means (Article 1), to contribute towards the development of mutual political and economic relations with a view to reciprocal co-operation (Article 2), to develop individual and collective defence capacity (Article 3), to consult together whenever the integrity, security or independence of any of the parties is threatened (Article 4), and to lend immediate aid to a party who is the object of an armed attack (Article 5), the detailed description of the territory which is protected by the alliance (Article 6), the declaration that no party has any international obligations contrary to the Treaty and the undertaking not to assume for the future any such obligations (Article 8), the possibility of inviting other States to join in the alliance (Article 10), the provisions on ratifications, revision, denunciations, and the deposit of the Treaty (Articles 11 and 14), are usual clauses. They can generally be found in any Treaty of military alliance which creates a group of associated nations but does not create an autonomous and distinct entity whose will, even if formed by the wills of the parties corresponds to the sum of those wills but is distinct and different from the will of a separate entity.

" This conclusion is not weakened by reference to Article 5, para. 1, and Article 7, which constitute a link, or at least ensure unity of action, with the Security Council of the United Nations. There is no doubt that such a supra-national organization [as the Security Council] has its own legal personality in international law, but the slight link existing between it and the member States of N.A.T.O. through the above-mentioned provisions does not warrant the conclusion that the North Atlantic Treaty Organization is to be regarded as having a personality in the eyes of international law. It may nevertheless be, of course, that the relations between the Security Council and the North Atlantic Treaty Organization can be regarded as relations between the Council and the several nations of which it is composed.

" There remains to be considered Article 9 of the Treaty, under which the signatory Powers form a Council which in turn has the power to create subsidiary bodies and especially a Defence Committee. That Article could also be regarded as the basic law relating to the constitution of a legal *persona* created by the Treaty: in every legal system the existence of a constitution is one of the signs of the existence of a juridical person, which must, however, necessarily express itself through individuals which form and manifest the will of the entity. This particular clause of the Treaty does not make any decisive or definitive provision on the matter. On this point, the plaintiff rightly contends, in agreement with the most authoritative doctrine, that a union of States which forms a mere alliance binding together subjects of international law may not itself be a subject of international law; it may, however, establish one or more common organs which would not be at the same time organs of the union. In other words, these entities could express the will of the individual States, and not the will of the international *persona* which, although it is constituted by an agreement between the States, has nevertheless a distinct and autonomous will, which may be contrary to those of the individual member States of the union.

" Now, we cannot affirm definitely that the organs established under Article 9 of the North Atlantic Treaty are common organs of a union of States and that they are not international legal persons, because that Article is, on this point, uncertain and general; but this very reason prevents us from accepting the opposite thesis.

" At this point we must examine also the successive international conventions which, as we have said before, regulated the matter under examination, the Status of Forces Agreement of London of June 19, 1951 and the Headquarters Protocol of Paris of August 28, 1952. These successive Conventions regulated the status of the Allied Headquarters; their titles show that they were concluded for the very purpose of governing international and internal disputes of the kind which is now before us.

" The purpose of the Status of Forces Agreement is to regulate the status of the forces of one of the parties which are stationed in the territory of another party and it therefore takes into consideration the divergences and the difficulties which may arise—as a consequence of such a situation—between two of the signatory States—which are called in the Convention the ' sending State ' and ' receiving State ', respectively. Such a situation would be of only indirect interest in the present dispute. On the other hand, the Protocol contains provisions regarding the status of the International Allied Headquarters and therefore directly concerns the matter under discussion.

" At this point, the problem arises that those two international Agreements have not been ratified by Italy, and laws for bringing them into operation in Italy have not been passed. As has already been said, neither the Agreement of 1951 nor the Protocol have been ratified or brought into operation within its territory by Italy. . . .

" The Court, however, although it realises the seriousness of the results of rejecting the pleading that it has jurisdiction must affirm that, under our legal system, an Italian court may apply the rules of international law which regulate the legal status of the Allied Headquarters, even without the enactment of specific laws ratifying and bringing into force the relevant convention. One of the rules of our private international law, codified in the preliminary part of the Civil Code, can be applied to the case before the Court. Article 17, para. (1), enacts that the status and the legal capacity of persons are regulated by the law of the State to which they belong. With that provision in mind, the solution of our problem appears simpler. One may hesitate to attribute to the ' North Atlantic Treaty Organization ' or ' N.A.T.O.' (the name and the initials are not in fact found in any Treaty but have been created by custom) international juridical personality; one must accept the view that such an organization is nothing more than an alliance between States. But it is certain that such an alliance, whether it be a juridical person or not, has created certain subjects of international law, for example, the various Supreme Headquarters.

" Article 10 of the Protocol provides that ' Each Supreme Headquarters shall possess juridical personality; it shall have the capacity to conclude contracts and to acquire and dispose of property '. And to make the identity of the Supreme Headquarters quite clear, the Protocol, in accordance with the Anglo-Saxon legal usage, defines (in Article 1 (*a*)) what is meant by the expression ' Supreme Headquarters '. This expression is defined as meaning Supreme Headquarters Allied Powers in Europe, Headquarters of the Supreme Allied Commander Atlantic, and (besides the above mentioned Supreme Headquarters, which are included in the larger category of the Allied General Headquarters) any equivalent international military Headquarters set up pursuant to the North Atlantic Treaty. Such a Headquarters comes under the direct command of the Supreme General Headquarters.

" The terms of the provisions of the Protocol quoted are such as to leave no room for doubt; when Article 10 speaks of the juridical personality of the Supreme Headquarters it is clear that it does not include also Headquarters which are not ' supreme ' according to Article 1.

" It may, perhaps, be observed that the second part of Article 10—as also the provisions of paras. 1 and 2 of Article 8—in effect gives to the ' subordinate ' Headquarters the power to make special arrangements with the ' receiving State ' concerning the exercise of the capacity of those Headquarters.

" But it cannot be inferred from this observation that the subordinate Headquarters also have juridical personality, because Article 10 clearly states that the receiving State may make the special arrangements with those ' subordinate ' Headquarters only if they are ' acting on behalf of the Supreme Headquarters '; that is to say, not as autonomous juridical persons but as organs of a legal person which is represented by them. The present case is evidently one of organic representation, that is to say, of physical persons or of an ensemble of physical persons (an ' office ') through whom the will of the juridical person is expressed and is manifested, and not a case of legal representation, in which a person acts in the name and on behalf of another person, both being entities with juridical personality. An organ has not such a personality; it cannot act by itself in the legal field, and its activities must necessarily be attributed to the entity which it represents."

[Report: *Rivista di Diritto Internazionale,* 1955, p. 354.]

E—INTERNATIONAL OFFICIALS

International Organizations—Officials—International Institute of Intellectual Co-operation—Liquidation of—Termination Indemnity—Timeliness of Complaint—Depreciation of Currency—Absence of Effect on Sums Payable in a Given Currency.

NIESTLÉ *v.* INTERNATIONAL INSTITUTE OF INTELLECTUAL CO-OPERATION.

Administrative Tribunal of the International Labour Organisation (Acting in an Arbitral Capacity).

(Devèze, President; Scelle and van Rijckevorsel.)

April 25, 1955.

THE FACTS.—On April 14, 1926, the complainant was appointed as a clerk by the Director of the Institute. The appointment, which was accepted by the complainant on April 15, was temporary and provided for two months' notice in case of termination. On September 20, 1939, the complainant's appointment was terminated as a result of a reduction of staff due to the emergency circumstances. The complainant received a sum corresponding to two months' salary in lieu of notice and a certificate of service indicating that the complainant had been employed as a clerk. The letter of termination further stated that should the Institute resume its activities, the complainant would be offered her former post in preference to any other candidate. On September 24, 1939, the complainant acknowledged receipt of the letter of termination, the cheque and the certificate of service without protest except that she requested that the certificate be amended since she considered herself entitled to the title of Chief Clerk. On October 3, 1939, the Director replied that the complainant had never been promoted to the post of Chief Clerk, and in reply to a further protest stated that the certificate of the Head of the Administrative Services of February 17, 1937, on which the complainant relied, had been issued to accommodate her and could not be considered as constituting an appointment which had not in fact taken place. On February 27, 1940, the complainant reluctantly acquiesced, thus withdrawing the only reservation made in connection with the termination of her appointment.

In the course of 1940, the Ministry of Foreign Affairs of France, which undertook the administrative management of the Institute, allocated to all terminated officials an indemnity of 100 French francs for each year of service. The sum of 1,600 francs was placed to the credit of the complainant but was not remitted to her since she had left France for Switzerland without giving her address. At the end of the Second World War, an agreement concluded between the Director of the Institute and the Secretariat of the League of Nations transferred to the latter, for transmission to the United Nations and eventually to UNESCO, the assets of the Institute which, under the Regulations of the Institute, were to devolve upon the League of Nations should the Institute be dissolved. Another agreement between the Institute and UNESCO specified that the latter would give particular consideration to the candidature of former officials of the Institute with a view to appointment to the UNESCO staff. From 1945 to the end of 1946, when liquidation began, the Institute temporarily resumed some of its former activities. The complainant did not submit her candidature for reappointment, nor later for appointment to UNESCO.

In 1947, following an audit and on the basis of information received, the address of the complainant became known and the sum of 1,600 French francs standing to her credit was remitted. The complainant signed a receipt for the cheque on May 25, 1947, indicating that her acceptance was "without prejudice to such provision as might be made for the equitable indemnification of former officials in connection with the vote of the French Act which would effect the dissolution of the Institute", since the Institute had been created by French Act of Parliament to give effect to a Resolution of the League of Nations. The cheque, however, was actually paid in 1953, together with interest from 1947, since the bank account of the Institute had been blocked by a sequestration order secured by creditors of the Institute. The complainant protested both to the Liquidator of the Institute and to the Director-General, averring the contemptuous nature of the sum paid to her. The Liquidator replied that it was not within his powers to vary the amount of the indemnity, which had been fixed in 1940, and that his functions were limited to effecting payment of an uncashed cheque. The Director-General of UNESCO replied that he could not reconsider the conditions of termination which had been determined in 1939, without reservation on the part of the complainant, and that the sum of 1,600 francs represented only unpaid salary for 1940.

On December 3, 1954, the complainant instituted proceedings before the Administrative Tribunal, claiming indemnities on the following grounds:

(a) A termination indemnity proportionate to the length of the period of service was payable in case of termination in accordance with the provisions of the Staff Regulations adopted by the Governing Board of the Institute in 1931. The complainant received upon termination of her appointment only the two months' notice provided for in her original appointment, while as Chief Clerk she was entitled to the proportional indemnity, which should now be paid to her.

(b) The failure to re-appoint the complainant when the activities of the Institute were temporarily resumed in 1945 and 1946 had caused her a prejudice and entitled her to an indemnity.

(c) The failure to present the complainant's candidature for appointment to UNESCO at the time of the transfer of the Institute's activities to UNESCO had similarly caused her a prejudice for which she should be compensated.

In the course of the oral proceedings, the complainant also claimed that for the sum of 1,600 French francs should be substituted the sum of 1,600 Swiss francs, or alternatively, that the amount of this indemnity should be readjusted to take into account the depreciation of the French currency which had occurred since the indemnity had been awarded in 1940.

The defendant in the present case was the Liquidator appointed by the French Government to preside over the settlement of the financial affairs of the Institute and the transfer of its assets and records to UNESCO, since the Institute itself had ceased to exist.

It was contended on behalf of the Liquidator first, that he had no powers to vary the amount of indemnity awarded, since such a decision could only be taken by the competent authorities of the Institute which had ceased to exist. Furthermore, the assets of the Institute had been distributed among the creditors of the Institute, and even if it were established that a larger amount was owing to the complainant, the Liquidator would not be in a position to effect any payment other than that of debts actually incurred by the Institute and established at the time of liquidation, within the limits of the funds available. The Liquidator's task was limited to effecting the payment of the 1,600 French francs, and he had no other *locus standi* in the present instance.

On the merits, it was contended that the complaint was irreceivable for reason of tardiness. The provision of the Staff Regulations relied upon by the complainant should be construed in the light of related provisions, and the general structure of the Regulations excluded the payment of the proportional indemnity to officials below the rank of Chief Clerk. The complainant was therefore not entitled to the payment of this indemnity. There had been no obligation to reappoint the complainant, who had not indicated that she wished to be reappointed and whose whereabouts were unknown. Furthermore, the post which she formerly occupied had not been filled when the Institute temporarily resumed its activities. Finally, the sum of 1,600 French francs had been awarded in French francs, and the complainant's salary was payable in French francs. Not only was there no provision for the readjustment of the indemnity as a result of the depreciation of the French currency, but such readjustment would be contrary to public policy.

Held: (I) *On the grade of the complainant*: that the complainant had renounced her claim to the grade of Chief Clerk.

The Tribunal said: ". . . By acquiescing on February 27, 1940, in the reply given to her by the Director of the Institute (according to which reply the claim made by the complainant at the time of her termination that the termination certificate should state her grade as that of chief clerk was not well-founded), the complainant abandoned the only grievance which she claimed at the time against the Institute; in so doing she waived the means of appeal open to her under the Staff Regulations of the Institute."

(II) *On the failure to reappoint the complainant*: that the complainant suffered no injury, since her former post was never filled and she did not seek reappointment either to the Institute or to UNESCO.

The Tribunal said: ". . . The existence of the promise made to the complainant in 1947 is proven, under which promise it remained understood that her post would be offered to her in preference to any other candidature at such time as the activities of the Institute should permit it to reconstitute its existing services; this appointment was subject: (1) to the resumption by the Institute of its activities; [and] (2) to the re-establishment of the service to which the complainant belonged; if the Institute resumed its activities temporarily from 1945 to 1946, it has not been shown that the service to which the complainant belonged was re-established, the defendant denying this allegation and the complainant basing her arguments solely upon a declaration of the witness Weiss which is not in conclusive terms; if it is true that the Institute did not seek out its former collaborators in 1945 it is besides demonstrated that in not notifying to the Institute her changes of address the complainant failed to show a continuing desire to take advantage of the promise of favourable treatment made to her at the time of her termination, this failure compromising the realization of such promise; it is shown that it was by chance, in 1947 only, that the Institute was tardily informed of the address of the complainant;

even at that time the complainant did not present the claims which she now submits concerning her employment, and limited herself to making reservations as to the amount of the indemnity; even in 1952, when it became known to her through a notice in the press that a Liquidator appointed by UNESCO invited any persons who considered that they were so entitled, to present their claims within as short a period as possible, she took certain steps—but again limiting herself to raising the question of the small amount of the sum granted to her as an indemnity, without mentioning her alleged right to re-employment; the complainant does not, at any moment, appear to have thought of putting her candidature to the Institute on her own initiative, at the time that the latter temporarily resumed its functions, nor later to UNESCO; therefore the request for an indemnity on the grounds of failure to re-employ her is not [well] founded."

(III) *On the readjustment of the indemnity as a result of currency depreciation*: that debts should be paid in the currency and amount in which they were incurred, irrespective of the depreciation of the currency itself.

The Tribunal said: ". . . As regards the indemnity of 1,600 francs accorded to the complainant in French francs, the salary of the complainant whilst in the Institute's service was equally fixed in French francs and was regularly paid to her in that currency; there can therefore be no question of substituting Swiss francs for French francs as was submitted during the hearing, the complainant invoking her Swiss nationality and the fact that she had transferred her domicile to Switzerland; on this point, the submission of the complainant, as presented today, is entirely without basis; besides, the devaluation of currency is a state of things to which all are subject and remains subject, in law, to the principle that in the absence of a revalorisation clause—such a clause . . . being considered in many countries as contrary to public policy and therefore invalid —the currency agreed upon or adopted remains such, 'le franc reste le franc' (see Judgment No. 19 of the Administrative Tribunal of the League [of Nations]); besides, the delay incurred in the disposal of the small sum due to the complainant results from the fact that her address was not known to the Institute for a reason engaging the responsibility of the complainant herself."

(IV) *On the entitlement to the proportional indemnity*: that the claim to such indemnity was well-founded but irreceivable as tardy.

The Tribunal said: ". . . Finally, the complainant now submits that she had a right to the application of Article 35 of the Staff Regulations of the Institute, which reads as follows:

> 'An official whose contract of service is terminated under Article 30 or Article 31 of the present Regulations shall be allowed compensation calculated on the basis of two months' salary per year's service, but

> the said compensation shall not be less than three months' salary or more than a year's salary.
>
> ' The provisions of this article shall not affect the application of the Regulations regarding the granting of pensions or retired pay provided for in Article 26 of the present Regulations.'

She cannot seriously claim to have ignored the existence of these Regulations up to the time that she brought her complaint before the Tribunal; in general, the Regulations were applicable to all officials of the Institute from the time of their adoption by the Governing Body of the latter, in 1931; in her statement, the complainant, claiming the grade of chief clerk, states in error that in this capacity the Regulations gave to her the right to termination with an indemnity proportional to the duration of her services calculated on the basis of Article 35 quoted above; the Regulations apply to officials of all grades; in strict law, the complainant was entitled to receive the indemnity provided for in the said Article 35; but her complaint submitted today is clearly out of time; the Tribunal expresses however the wish that, respecting equity, the Institute accord to the complainant the indemnity provided for in Article 35." The Tribunal thereupon dismissed the complaint.

[Report: Judgment No. 16 of the Administrative Tribunal of the International Labour Organization; to be published in the *Official Bulletin* of the International Labour Office.]

NOTE.—(1) On the Constitution of the International Institute of Intellectual Co-operation, the jurisdiction of the Tribunal over disputes between officials and the Institute, and the sequestration of the Institute's funds, see *Weiss* v. *International Institute of Intellectual Co-operation* (I.L.O., *Official Bulletin*, vol. XXX, No. 5, p. 395; *International Law Reports*, 1951, Case No. 144 and Note).

(2) On the re-adjustment of indemnity as a result of currency depreciation, the Tribunal has never varied its practice of rejecting all such claims. The leading case is *Desplanques* v. *Administrative Board of the Staff Pension Fund of the League of Nations*, decided on May 6, 1938 (Judgment No. 19 of the Administrative Tribunal of the League of Nations: see *International Law Reports*, 1951, p. 460). See also the *Weiss Case* (cited *supra*) and *Hickel* v. *International Institute of Intellectual Co-operation* (I.L.O., *Official Bulletin*, vol. XXX, No. 5, p. 397; *International Law Reports*, 1951, Case No. 145).

International Organizations—Officials—Dismissal of—Fixed-Term Appointments—Non-renewal of—Inquiries by National Authorities into Alleged Subversive Activities—Independence of International Civil Servants—Duty to Dispel Suspicion—Interests of the Organization—Integrity.

DUBERG *v.* UNESCO.

Administrative Tribunal of the International Labour Organization.

(Devèze, President; Scelle and van Rijckevorsel.)

April 26, 1955.

THE FACTS.—By Executive Order No. 10.422 of January 9, 1953, the President of the United States of America established machinery and procedures for the investigation of possible subversive activities against the United States by United States citizens employed or being considered for employment by the United Nations and the communication of the results of such investigations to the Secretary-General of the United Nations. The provisions of this Order, which sets forth the methods to be followed, the standards to be applied and the safeguards to be afforded for the purposes of such investigations, were made applicable to the United Nations Educational, Scientific and Cultural Organization under Part III of the Order. On February 4, 1953, a staff circular issued by the Head of the Bureau of Personnel on behalf of the Acting Director-General of UNESCO and distributed to the staff announced the investigation provided for in the Executive Order. The circular indicated that United States citizens would be requested to complete forms prepared for the purpose of this investigation by the United States Government and added:

" . . . .

" (b) It is appreciated that members of the staff are aware of their obligations and privileges as international civil servants, as defined in the Staff Regulations. United States nationals are, however, reminded that the status of UNESCO officials does not relieve them of any national obligation which may be incumbent upon them in respect of the completion of the forms. In particular, this status does not entitle UNESCO officials to any immunity as regards their private activities or their activities prior to their appointment by UNESCO.

" (c) Any information which the Government of the United States may make available to the Acting Director-General as a result of the investigation will be carefully studied in the light of the Constitution of UNESCO and of all other relevant provisions and policies which have been or may be laid down by the appropriate organs of UNESCO."

On February 6, 1953, the United States representative to the defendant Organization addressed to all American officials of that Organization a questionnaire to be completed and returned to him before February 13, 1953.

On March 2, 1953, a further staff circular recalled the terms of the circular of February 4, 1953, and added:

> ". . . The Acting Director-General wishes to recall to United States citizens the text of the circular PEM/Memo/A2750 and in particular the paragraph in which he reminded them that the status of UNESCO officials does not relieve them of any national obligation which may be incumbent upon them in respect of the completion of the forms prepared for the purpose of its investigation by the United States Government.
>
> " The Acting Director-General is of the opinion that the failure on the part of United States citizens employed by UNESCO to complete the forms may prejudice their reputation and cause embarassment and damage to the organisation.
>
> " The Acting Director-General earnestly hopes that all United States citizens employed by UNESCO who have still to complete and return the forms will bear in mind the solemn obligation they assumed to regulate their conduct with the interests of UNESCO only in view."

The complainant, who was a citizen of the United States, did not complete this questionnaire.

In February 1954, the complainant received an interrogatory from the International Organizations Employees Loyalty Board of the United States Civil Service Commission, established by Executive Order No. 10.459 of June 2, 1953 (amending Executive Order No. 10.422) to carry out the investigations formerly entrusted to the Regional Loyalty Board and United States Civil Service Commission and the Loyalty Review Board of the Commission. According to the Board's rules, interrogatories, sent if the preliminary investigation had not resulted in a favourable finding, were to " state the nature of evidence against [the official concerned], setting forth with particularity the facts and circumstances involved in as much detail as security conditions permitted, in order to enable him to submit his answer, defense or explanation. . . ." The complainant did not reply to this interrogatory.

On May 14, 1954, in order to answer questions put to him with respect to the attitude officials should take regarding questions put to those officials, the Director-General of the defendant Organization circulated a memorandum in which, after stressing that officials were not relieved of their obligations towards their own country by virtue of their employment, that officials were strictly forbidden to engage in subversive activities against the Government of any Member State and that Member States were entitled to investigate alleged subversive activities on the part of their nationals, it was stated that:

> ". . . it is for each member of the Secretariat to decide whether or not he should reply to questions put to him by authorities of his country with respect to his personal activities or opinions. Any member of the Secretariat who refuses to answer such questions must consider the consequences which such refusal might entail for him.

> " Any member of the Secretariat who decides to answer the questions put to him by authorities of his country is expected to do so to the best of his knowledge and memory. He could not do otherwise without lacking in integrity."

The memorandum further recalled that officials were not to answer questions relating to their official duties or to other officials of the Organization.

On June 18, 1954, the Chairman of the International Organizations Employees Loyalty Board invited the complainant to appear before the Board on July 15 at the United States Embassy in Paris, there to be given " the opportunity of a personal hearing . . . to explain or refute any derogatory information which the investigation had disclosed." The complainant was given the right to be represented by counsel, to testify himself and to present witnesses and other evidence in his behalf and to cross-examine witnesses. The Chairman added that he wished to emphasize most strongly that the question of whether or not the complainant wished to avail himself of this opportunity for a hearing before the Board was entirely a matter for a voluntary decision on his part. Executive Order No. 10.422 gave the Board no power to require him to appear before it, nor would the complainant's failure to appear, of itself, affect in any way the Board's decision in his case. However, in reaching his decision as to whether or not he wished to take advantage of this opportunity, the Chairman believed that the complainant should take fully into account the fact that should he decide not to appear, the Board would have no alternative but to proceed to a final determination on the basis of the information already obtained and without the benefit of having heard the complainant's side of the case.

On July 6, 1954, a further circular was issued by the Director-General to clarify, at the request of the Staff Association, his previous memorandum of May 14, 1954. This circular, after stating that references to " loyalty ", " integrity " and " subversive activities " in the previous memorandum in no way affected the standards of conduct applicable to officials, added that

> " . . . the Director-General could not advise a staff member as to whether or how he should answer certain questions concerning his activities or personal opinions. All he could say to the staff member concerned was that if he decided to reply, he should not be untruthful, as this would be lacking in integrity. It was not possible for the Director-General to foresee the consequences which the decision to reply or not to reply might entail in any particular case."

On July 13, 1954, the complainant addressed a letter to the Director-General in which he indicated that in his view the investigation appeared contrary to the principles and best interests of UNESCO and that both as an official of UNESCO and as an American citizen it was against his conscience to participate in the investigation. The complainant did not appear before the Board on July 15, 1954, or at any subsequent date.

On July 6, 1954, an administrative memorandum issued on behalf of the Director-General indicated that while the grant of permanent appointments to the majority of the staff was contemplated, such a decision could not be taken until the General Conference of UNESCO had had an opportunity of discussing the implications of such a policy. However, it had been decided to renew for one year the appointment of all officials of the professional category whose appointment expired between July 6, 1954, and June 30, 1955, and who met the required standards of competence, efficiency and integrity, provided that their services were needed.

The complainant, who entered the service of the defendant Organization on June 2, 1949, held, at the material time, a fixed-term contract of one year's duration expiring on December 31, 1954. On August 13, 1954, the Director-General informed the complainant that he would not offer him a new contract on the expiry of the contract then in force. The Director-General's letter stated, *inter alia*, that

> " . . . in the light of what I believe to be your duty to the organisation, I have considered very carefully your reasons for not appearing before the International Organisations Employees Loyalty Board where you would have had an opportunity of dispelling suspicions and disproving allegations which may exist regarding you. It is with a deep sense of my responsibilities that I have come to the conclusion that I cannot accept your conduct as being consistent with the high standards of integrity which are required of those employed by the organisation.
>
> " I have, therefore, to my regret, to inform you that I shall not offer you a further appointment when your present appointment expires . . ."

On August 23, 1954, the complainant requested the Director-General to reconsider his decision and was informed on August 30, 1954, of the Director-General's refusal to do so.

On September 10, 1954, the report of the Loyalty Board was communicated to the Director-General. The report stated that

> " . . . it has been determined on all evidence that there is a reasonable doubt as to the loyalty of Norwood Peter Duberg to the Government of the United States . . . this determination, together with the reasons therefor, in as much detail as security considerations permit, are submitted for your use in exercising your rights and duties with respect to the integrity of the personnel employed by the United Nations Educational, Scientific and Cultural Organisation."

The complainant was himself informed of the conclusions of the Loyalty Board by a letter from the Chairman of the Board dated September 10, 1954, and was also informed of the fact that the report of the Loyalty Board had been transmitted to the Director-General of the defendant Organization.

On September 23, 1954, the complainant submitted an appeal to the UNESCO Appeals Board against the Director-General's decision not to renew his appointment. On November 2, 1954, the Appeals Board, by a majority opinion, expressed the view that the Director-General's decision should be rescinded, and on November 25, 1954, the Director-General informed the Chairman of the Appeals Board that he could not act in accordance with this opinion.

Before the Appeals Board formulated its opinion, the Director-General, on September 28, 1954, set up a special Advisory Board consisting of members of the staff, whose task was to "examine the cases of certain staff members on the basis of certain information which has been brought to the knowledge of the Director-General, and in the light of the standards of employment and conduct prescribed by the Constitution and Staff Regulations." The complainant appeared before the Special Advisory Board and explained his position. However, in a letter to the Director-General dated October 4, 1954, the complainant expressed certain reservations concerning the procedure followed and asked for any measures affecting him which might result from this procedure to be cancelled. By letter of October 11, 1954, this request was rejected. On February 5, 1955, the complainant instituted proceedings before the Administrative Tribunal.

The following main arguments were advanced on behalf of the complainant:[1]

(1) The Tribunal was competent to hear the complaint.

(a) In view of the fact that the circular of July 6 provided for the renewal of fixed-term contracts of all officials who satisfied the requirements set forth in that circular, the complainant had a clear right to the renewal of his contract, and the dispute arose in connection with the application and interpretation of those requirements, over which the Tribunal had jurisdiction.

(b) The Director-General was required to state the reasons for his decision not to renew the complainant's contract, and such reasons had in fact been adduced. The Tribunal was competent to pass upon their validity.

(c) While the Director-General claimed the right to evaluate subjectively the integrity of the complainant, the requirement of integrity of the staff was included in the Staff Regulations and its interpretation by the Director-General was subject to review by the Tribunal. The Director-General furthermore alleged a lack of integrity in connection with the complainant's refusal to appear before the Loyalty Board. This was not a matter of subjective judgment but of the application of Staff Regulations to an objective fact and as such subject to the jurisdiction of the Tribunal.

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[1] The summary of the argument, as given in the text above, has been abstracted from the written and oral pleadings of the parties. Although it does not appear in the body of the judgment, it has been thought useful to reproduce it in the statement of the Facts in order to make clearer the purport of the judgment.

(2) The decision complained of violated the Staff Regulations and the Constitution of UNESCO and should therefore be rescinded.

(a) The complainant had not lacked in integrity in refusing to appear before the Loyalty Board.

(i) The term " integrity ", in its plain and natural meaning, referred to moral qualities such as honesty, truthfulness and good faith, no lack of which was involved in refusal to appear before the Loyalty Board. On the contrary, it was for reasons of conscience that the complainant refused to participate in an investigation which did violence to his personal convictions, in that it involved an examination of unsubstantiated allegations concerning his opinions and associations and those of third parties, without benefit of judicial guarantees such as production of evidence and witnesses, but under the threat of severe penalties since in testifying with respect to those allegations—the particulars of which were not disclosed—the complainant would be liable to prosecution for perjury. In the course of the oral proceedings, it was disclosed that the interrogatory addressed to the complainant included the following:

> " Information has been received by the Board alleging that you are closely associated with a small group in the Mass Communications Division of United Nations Educational, Scientific and Cultural Organisation who are suspected of being Communist sympathisers; and that you were one of the prime movers in getting the Staff Association's endorsement of Communist line political issues.
>
> " Please state your comment or explanation regarding the above information. Indicate whether you know or have reason to believe any of your associates at United Nations Educational, Scientific and Cultural Organisation are or have been members of the Communist Party or sympathetic to the Communist cause. If so, please state the names of these individuals and the nature and extent of your association."

It was further disclosed that the complainant had sought the guidance of the Staff Association in determining his attitude towards these questions, that the Staff Association had in turn consulted the Director-General, and that the circulars of May 14 and July 6, 1954, were issued as a result of those consultations.

(ii) The term integrity had no political connotations and could not be interpreted as co-extensive with loyalty to a Government, doubts about which could not be construed as lack of integrity involving unfitness for employment by an international organization.

(iii) The complainant could not be regarded as lacking in integrity as a result of a breach of the law of his country, since appearance before the Loyalty Board was voluntary and refusal to appear involved no legal penalty.

(iv) The complainant could not be regarded as lacking in integrity as an official of the defendant Organization since the circulars of May 14 and July 6, 1954, left it to the conscience of officials to decide whether or not to answer questions put to them by the Loyalty Board.

(b) In refusing to appear before the Loyalty Board, the complainant had not acted in a manner adversely affecting the interests of the defendant Organization.

(i) The circulars of May 14 and July 6, 1954, made no reference to the interests of the Organization in connection with the Loyalty Board's investigation, which could therefore not affect the issue.

(ii) The circular of July 6, 1954, indicated that it was not possible for the Director-General to foresee the consequences which the decision to reply or not to reply to questions of the Loyalty Board might entail in particular cases. Since individual cases only were referred to, no question of principle was involved and the interests of the Organization could not be affected.

(iii) The decision of the Executive Board of UNESCO, at its 33rd session, that the refusal to reply to questions should not involve disciplinary action, which in effect cancelled the circular of March 2, 1953, proved conclusively that the refusal to reply could not prejudice the interests of the Organization.

(iv) No proof had been adduced that the refusal of the complainant had in fact prejudiced the interests of the Organization.

(3) The complainant asked that the Tribunal be pleased to rescind the decision not to renew his contract and to enjoin the Director-General to renew the contract, to pay the complainant the sum of one franc in respect of damages, and legal costs. Alternatively, if the Director-General refused to renew his contract, the complainant claimed damages in the amount of U.S. dollars 69.300.

The following main arguments were advanced on behalf of the defendant Organization:

(1) The Tribunal was not competent to hear the complainant, since there had been no violation of the stipulations of the contract of employment of the complainant or of the provisions of the Staff Regulations.

(a) While permanent appointments could be terminated only for a limited number of specific reasons, fixed-term appointments automatically expired at the stated time, without notice or indemnity. No decision had been taken to terminate the appointment of the complainant which had come to an end in accordance with the terms provided for therein.

(b) The renewal of a fixed-term appointment was a matter within the discretionary powers of the Director-General, and tantamount to a new appointment. The fact that the Director-General had not seen fit to renew the appointment of the complainant did not constitute a decision for which reasons should be given or over which the Tribunal had jurisdiction.

(2) Alternatively, should the Tribunal consider itself competent:

(a) The reasons for which the Director-General decided to renew or not to renew a fixed-term appointment were left entirely to his discretion and were not subject to review by the Tribunal. There had been no undertaking on the part of the Director-General to renew all fixed-term appointments. The purpose of the Administrative memorandum of July 6, 1954, had been to explain to the staff the reasons why the Director-General was unable, at that time, to exercise the option between granting to holders of fixed-term appointments a permanent appointment or dispensing with their services upon the expiry of their contracts, and the complainant therefore had no right to the renewal of his contract. Furthermore, in announcing in general terms the transitional measure of renewing fixed-term appointments for one year, the Director-General had reserved the right not to renew the contract of those officials who did not possess the required qualities of efficiency and integrity or whose services would no longer be required. In determining whether officials satisfied these requirements, the Director-General had acted within the discretionary powers he enjoyed and therefore had not infringed the rights of the complainant.

(b) The decision not to renew the complainant's contract was justified by the fact that the complainant's behaviour had demonstrated a lack of the fundamental qualities of integrity, tact and discretion required of an international civil servant.

(i) The status of international civil servants placed certain limitations upon the freedom of an official and involved a voluntary renunciation of certain rights enjoyed by private citizens. An international official should not only refrain from breaking the law of his country, but should also inspire full confidence and be above suspicion. The complainant had deliberately refused to dispel the doubts which had been expressed and had adopted a defiant attitude not in keeping with his status. It was disclosed, in the course of the oral proceedings, that the derogatory information produced by the Loyalty Board, which was laid before the Tribunal sitting *in camera*, had been examined by a committee appointed by the Director-General and found insufficiently substantiated to justify disciplinary measures. The conclusion that the complainant did not meet the required standard of integrity was founded only on his refusal to appear before the Loyalty Board.

(ii) The complainant had disregarded the circulars of February 4 and March 2, 1953, which had not been cancelled by the decision of the Executive Board of April 17, 1953, on which the complainant wrongly relied. The Executive Board had decided that refusal to reply to certain questions did not *per se* call for disciplinary action:

this did not affect the present issue. The circulars of February 4 and March 2, 1953, had subsequently been brought to the attention of the General Conference, which had not contested their validity.

(iii) When the complainant was invited to appear before the Loyalty Board, it was no longer in connection with a general enquiry but in order to disprove serious and specific allegations concerning him. The Director-General had recognized the right of Member States to investigate alleged subversive activities on the part of their nationals and emphasized that officials were strictly forbidden to engage in subversive activities against any State. It was therefore essential that the complainant should answer concrete allegations concerning subversive activities.

(iv) The circulars of May 14 and July 6, 1954, gave no general instructions to officials because the attitude they should adopt depended on the precise questions put to them, which varied according to individual cases and were unknown to the Director-General, and because the reply might involve action by administrative and judicial authorities which went beyond the scope of the relations between officials and the Organization and for the consequences of which officials alone could assume responsibility. The circulars nevertheless emphasized the seriousness of a refusal to reply to questions and did not justify the attitude of the complainant.

(v) It had never been left to the conscience of officials to decide whether or not they should appear before the Loyalty Board. All circulars issued by the Director-General referred to written questions and not to personal appearance before the Loyalty Board, on which the complainant had never consulted the Director-General either directly or through the Staff Association. The invitation to appear had been issued on June 18, 1954, and the complainant had written to the Director-General concerning his appearance on July 13, 1954, two days before the time fixed for the hearing, when the Director-General was attending a meeting away from Headquarters and the following day was a public holiday. The complainant had thus given the Director-General no opportunity to advise him and had virtually placed the Director-General before a *fait accompli*.

(vi) The complainant had not merely refused to answer specific questions, but refused, as a matter of principle, to co-operate in the investigation, although the circular of May 14, 1954, explicitly recognized the right of Member States to carry out such investigations, thereby contradicting the official position taken by the Director-General.

(vii) In his letter of July 13, 1954, the complainant had taken the view that the investigation was contrary to the principles and interests of the Organization and constituted an attack against it. The Director-General had repeatedly recognized the right of Member States to carry out such investigations, and the agreement concerning the transmission of information by the United States and its examination, as well as the entire policy followed by the Director-General, had been endorsed by the General Conference at its second extraordinary session. The complainant had, therefore, substituted his own judgment for the decisions of the supreme authority of the Organization pertaining to its own interests.

(3) The complainant had suffered no prejudice since there had been no violation of the terms of his contract of employment or of the Staff Regulations.

Held: (1) *On the question of competence*: that the Director-General having decided to renew the fixed-term contracts of all officials meeting the required standards, an exception had been made in the case of the complainant; that the latter alleged that the grounds on which the exception was made did not justify the view that he was lacking in integrity; that the dispute thus concerned the interpretation and application of the Staff Regulations and Rules of the defendant Organization; and that the Tribunal was competent to hear such a dispute.

(2) *On the merits:* that the attitude of the complainant did not lack in integrity; that the exception made in the case of the complainant was not justified, but that the Tribunal had no power to order the renewal of a fixed-term contract.

(3) *On prejudice:* that the decision of the Director-General constituted a wrongful exercise of powers and an abuse of rights and that compensation should be awarded for the prejudice resulting therefrom.

The Tribunal said: I. " *On Competence.*—The character of a fixed-term appointment is in no way that of a probationary appointment, that is to say, of a trial appointment While it is the case that UNESCO Staff Rule 104.6 issued in application of the Staff Regulations stipulates that 'A fixed-term appointment shall expire, without notice or indemnity, upon completion of the fixed term . . .', this text only deals with the duration of the appointment and in no way bars the Tribunal from being seized of a complaint requesting the examination of the validity of the positive or negative decision taken regarding the renewal of the said appointment. It is established in the case that the Director-General, by a general measure of which the whole staff was informed on 6 July 1954, ' decided that all professional staff members whose contracts expire between now and 30 June 1955 (inclusive) and who have achieved the required standards of efficiency, competence and integrity and whose services are needed, will be offered one-year renewals of their appointments '. The complainant, having been made the object of an exception to this general measure, holds that the Director-General could not legitimately thus make an exception of him on the sole ground which he invoked against him as justification for the view that he did not possess the quality of integrity recognised in those of his colleagues whose contracts had been renewed, and in the absence of any contestation of his qualities of competence and efficiency. The complainant requests that this decision be rescinded and, alternatively, that an indemnity be granted.

" The question is thus a dispute concerning the interpretation and application of the Staff Regulations and Rules of the defendant Organisation. By virtue of Article II, paragraph 1, of its Statute, the Tribunal is competent to hear the said dispute.

II. " *On the Substance*

"A. The defendant Organisation holds that the renewal or the non-renewal of a fixed-term appointment depends entirely on the personal and sovereign discretion of the Director-General who is not even required to give his reason therefor. If this were to be so, any unmotivated decision would not be subject to the general legal review which is vested in the Tribunal, and would be liable to become arbitrary; in fact, it may be conceived that this might exceptionally be the case when, for example, it is a matter of assessing the technical suitability of the person concerned for carrying out his duties. However, in this matter the question does not affect the issue inasmuch as the Director-General has not only given the reason for the decision taken by him but has also made it public in a communiqué issued to the press. This reason is based solely on the refusal of the complainant to co-operate in the measures of investigation provided in respect of certain of its nationals by the Government of the State of which he is a citizen, and in particular on his refusal to appear before a commission invested by that Government with the power to investigate his loyalty to that State. The Director-General declares that he concludes from this that he can no longer retain his confidence in the complainant and offer him a new appointment, his attitude being incompatible with the high standards of integrity required of those who are employed by the Organisation and being, furthermore, capable of harming the interests of the Organisation.

" . . . [In] relation hereto it is necessary expressly to reject all uncertainty and confusion as to the meaning of the expression ' loyalty towards a State ', which is entirely different from the idea of ' integrity ' as embodied in the Staff Regulations and Rules; . . . this is evident and requires no further proof.

" B. If the Director-General is granted authority not to renew a fixed-term appointment and so to do without notice or indemnity, this is clearly subject to the implied condition that this authority must be exercised only for the good of the service and in the interest of the Organisation. It is in the light of this principle that the facts in this case should be examined.

"Article 1.4 of the Staff Regulations of the defendant Organisation, as it stood at the moment when the decision complained of was taken, was as follows:

> 'Members of the Secretariat shall conduct themselves at all times in a manner consonant with the good repute and high purposes of the Organization and their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties. They shall avoid any action, and in particular any kind of public pronouncement, which would adversely reflect upon their status. While they are not expected to give up religious or political convictions or national sentiments, they shall at all times exercise the reserve and tact incumbent upon them by reason of their international responsibilities.'

In thus clearly establishing the entire freedom of conscience recognised to international officials in respect of both their philosophical convictions and their political opinions, the Regulations impose on them the duty to abstain from all acts capable of being interpreted as associating them with propaganda or militant proselytism in any sense whatever. This abstention is rigorously imposed on them by the overriding interest of the international organisation to which they owe their loyalty and devotion.

" C. When consulted by the Staff Association of the defendant Organisation on the obligation incumbent on members of the staff to reply to questionnaires issued by authorities of their respective countries, the Director-General declared that the answer must depend only on the conscience of the individual, except that he should not lie and should have regard to the consequences which the refusal to reply might have for him. However, in respect of the invitation to appear before the Loyalty Board, it is established that the complainant approached the Director-General only at a late date, so that the latter would not have been able to give him advice in sufficient time. It is desirable to determine whether the attitude adopted by the complainant in this respect may be considered as justifying the loss of confidence alleged by the Director-General.

" D. It is undoubtedly true that if the Director-General has been informed that a member of his staff has acted in a manner prohibited by Article 1.4 of the Staff Regulations, the Director-General has a duty to check the accuracy of such information either himself or through persons appointed by him from within his Organisation, in order that he may take decisions or even sanctions, if necessary, in the full knowledge of the facts. In this light the enquiry procedure within the Secretariat to which the Director-General resorted in the present case in full exercise of his authority can in no sense be subject to criticism; . . . it is in accordance with the undertaking made with the State Member concerned under arrangements approved by the Executive Board and General Conference of the defendant Organisation; . . . this was solely an undertaking that any information which the Government of the State concerned might desire to submit to the Director-General would ' be studied with care ' and that he would ' certainly give every consideration to it, in the light of the Constitution of UNESCO and all other relevant provisions and policies which may have been or may be laid down by the appropriate organs of UNESCO '. The objection raised in this regard by the complainant is totally unfounded.

" E. It is quite different when the ground for complaint of the Director-General is based solely on the refusal of the official to participate in measures of verbal or written enquiry to which his national government considers it necessary to subject him. The Director-General of an international organisation cannot associate himself with the execution of the policy of the government authorities of any State Member without disregarding the obligations imposed on all international officials without distinction and, in consequence, without misusing the authority which has been conferred on him solely for the purpose of directing that organisation towards the achievement of its own, exclusively international, objectives. This duty of the Director-General is governed by Article VI, paragraph 5, of the Constitution of the defendant Organisation, in the following terms:

> ' The responsibilities of the Director-General and of the staff shall be exclusively international in character. In the discharge of their duties they shall not seek or receive instructions from any Government or from any authority external to the Organization. They shall refrain from any action which might prejudice their position as international officials. Each State member of the Organization undertakes to respect the international character of the responsibilities of the Director-General and the staff, and not to seek to influence them in the discharge of their duties.'

" The fact that in this case the matter involved is an accusation of disloyalty brought by a Government which enjoys in all respects the highest prestige, must be without any influence upon the consideration of the facts in the case and the determination of the principles whose respect the Tribunal must ensure. It will suffice to realise that if any one of the seventy-two States and Governments involved in the defendant Organisation brought against an official, one of its citizens, an accusation of disloyalty and claimed to subject him to an enquiry in similar or analogous conditions, the attitude adopted by the Director-General would constitute a precedent obliging him to lend his assistance to such enquiry and, moreover, to invoke the same disciplinary or statutory consequences, the same withdrawal of confidence, on the basis of any opposal by the person concerned to the action of his national Government.

If this were to be the case there would result for all international officials, in matters touching on conscience, a state of uncertainty and insecurity prejudicial to the performance of their duties and liable to provoke disturbances in the international administration such as cannot be imagined to have been in the intention of those who drew up the Constitution of the defendant Organisation. Therefore the only ground for complaint adduced by the Director-General to justify the application to the complainant of an exception to the general rule of renewal of appointments, that is to say, his opposal to the investigations of his own Government, is entirely unjustified.

" It is in vain that it is alleged that the terms of renewal set forth in the Director-General's circular of 6 July 1954, after enumeration of the standards required, provide that the service of the person concerned must be needed; this expression cannot mean that the person concerned must be irreplaceable, in that no successor can be found; . . . it means only that the requirements of the service to which the person concerned is assigned must be permanent and that the said person must give full satisfaction therein and otherwise in all manner in the performance of his duties; on this last point the appreciations contained in the annual reports of the complainant are entirely laudatory. It results therefrom that the decision taken must be rescinded; but nevertheless the Tribunal does not have power to order the renewal of a fixed-term appointment, which requires a positive act of the Director-General over whom the Tribunal has no hierarchical authority. In the absence of such a power and unless the Director-General should consider himself in a position to reconsider his decision in this manner, the Tribunal is none the less competent to order equitable reparation of the damage suffered by the complainant by reason of the discriminatory treatment of which he was the object.

" F. It results from the documents produced by the parties during the hearing that the enquiry made by order of the Director-General himself within the defendant Organisation, the legitimate and regular character of which has been shown above, did not bring any evidence to show that the complainant failed in his duties, as defined in Article 1.4 of the Regulations, during the period that he was an official of the defendant Organisation.

" [The] Special Board considered that it could find no evidence either in the reports of the Loyalty Board or as a result of its own enquiries that the complainant, during his employment in the Secretariat of the defendant Organisation, had engaged in or was engaging in activities that could be shown to constitute misconduct under the terms of the Staff Regulations and Rules. It is irrelevant to seek whether or not the complainant was engaged in militant political activities before being appointed to the international service and at a time when he was not bound by the obligations involved in joining this service, unless it has been proved that he had been guilty of dishonourable or criminal acts (actes déshonorants ou criminels). Any accusation of this nature could only be admitted if drawn up both in due form and with all the precision required to ensure respect for the right of the accused person to defend himself. It is not so in this case.

" It has been shown above that the attitude of the complainant towards the Loyalty Board in no way justifies the existence of serious doubts as to his integrity, judgment and loyalty towards the defendant Organisation. It does not, therefore, appear that the complainant placed his own interests above the true interest of the Organisation, which interest consists above all in safeguarding *erga omnes* its independence and impartiality.

III. " *On Prejudice.*—An official who combines all the necessary qualities has a legitimate expectancy of being offered a new appointment in the position which he occupied, and this expectancy was fulfilled for all the persons concerned, with the exception of a certain number, [one] of whom [was] the complainant. Not only is such an almost absolute *quod plerumque fit* but also in thus acting the Administration of the defendant Organisation has as its objective to create a permanent body of officials experienced in their duties, who are destined to follow a career in the Organisation concerned.

" The decision not to renew the appointment is one which should not only be rescinded in the present case, but also constitutes a wrongful exercise of powers and an abuse of rights which consequently involves the obligation to make good the prejudice resulting therefrom; . . . this prejudice was aggravated by the publicity given to the withdrawal of confidence as being due to lack of integrity, this ground having been given in a press communiqué issued by the defendant Organisation, without it being possible seriously to maintain the view that there could have existed the slightest doubt as to the identity of the persons to which the said communiqué referred. It is to no purpose that they have been reproached with having communicated the measures of which they were the object to the Staff Association recognised by the defendant Organisation, as the upshot of a procedure to which the said Association was a party with the knowledge and consent of the Director-General himself. Redress will be ensured *ex aequo et bono* by the granting to the complainant of the sum set forth below.

" On the one hand, there should be granted to the complainant the amount of the salary which he would have received had he not been subject to the measure of exception of which he complains, that is to say one year's basic salary. On the other hand, there should be granted to him a second year's basic salary in order to compensate for the moral prejudice and in particular the difficulties which he will encounter in seeking new means of subsistence. In this calculation, there should be added to the salary the statutory amount of children's allowance.

" [Accordingly, the Tribunal] orders the decision taken to be rescinded and declares in law that it constitutes an abuse of rights causing prejudice to the complainant.

" In consequence, should the defendant not reconsider the decision taken and renew the complainant's appointment, [the Tribunal] orders the said defendant to pay to the complainant the sum of $15,500, plus children's allowance for two years, the whole together with interest at 4 per centum from 1 January 1955; [and] orders the defendant Organisation to pay to the complainant the sum of $300 by way of participation in the costs of his defence."

[Report: Judgment No. 17 of the Administrative Tribunal of the International Labour Organization; to be printed in the *Official Bulletin* of the International Labour Office.]

NOTE.–(1) Similar decisions were reached by the Tribunal in three other cases: *Wilcox* and *Leff* (April 26, 1955) and *Bernstein* (October 29, 1955). The only difference in circumstances was that in the *Leff Case* the conclusions of the Loyalty Board were communicated to the defendant Organization prior to the decision not to renew the contract of the complainant; and in the *Wilcox Case* that the complainant informed the Director-General of her decision not to appear before the Loyalty Board after the date set for the hearing. However, these facts did not affect the point at issue before the Tribunal, since the decisions complained of were taken on the same grounds as in the case reported above, and the Tribunal came to the same conclusion in decisions which were identical except for the particulars noted above and the amount of the damages which, although calculated in the same manner as in the *Duberg* case, varied according to the salary of the complainants.

(2) In all four cases, Mr. Pierre Henquet, Chairman of the Staff Association, intervened in his own name, in accordance with para. 6 (b) of Article II of the Statute of the Tribunal which provides that " the Tribunal shall be open to . . . any person who can show that he is entitled to some right . . . under provisions of the Staff Regulations on which the official [who submitted the complaint] could reply ". The defendant Organization challenged the admissibility of the intervention on the grounds (a) that the Staff Association was not entitled to intervene and that the intervenor was acting on behalf of the Staff Association rather than in an individual capacity, and (b) that the intervenor, who held a permanent appointment, had no cause to intervene in the case of an official holding a fixed-term appointment, since his rights under the Staff Regulations were not those relied upon by the complainant. In the course of the oral proceedings, the Tribunal reaffirmed its constant jurisprudence refusing access to the Tribunal to Staff Associations and Unions (President's *obiter dictum*) and ascertained that the intervenor was acting in an individual capacity. Upon receiving verbal assurances to that effect, the Tribunal set aside the first objection and emphasized in the judgment that " such intervention was receivable in so far as it was made by M. Henquet in his own name ". In its decision, the Tribunal dismissed the second objection in the following terms: " . . . [In] this instance the fact that the intervenor holds an indeterminate [permanent] appointment and

not a fixed-term appointment does not prevent the present dispute from bearing on principles applicable to the legal position of the whole staff", and declared the intervention well-founded.

(3) By letter of November 30, 1955, the Director-General of the United Nations Educational, Scientific and Cultural Organisation informed the International Court of Justice that, by resolution of November 18, 1955, the Executive Board of UNESCO, acting in accordance with Article XII of the Statute of the Tribunal, had decided to challenge the decisions rendered by the Tribunal in the *Leff*, *Duberg*, *Wilcox* and *Bernstein* cases and to request the Court to give an advisory opinion on the following questions, which, in accordance with paragraph 2 of Article XII of the Statute, would be binding:

> "I. Was the Administrative Tribunal competent, under Article II of its Statute, to hear the complaints introduced against the United Nations Educational, Scientific and Cultural Organisation on 5 February 1955 by Messrs Duberg and Leff and Mrs. Wilcox, and on 28 June 1955 by Mrs. Bernstein?
>
> "II. In the case of an affirmative answer to question I:
>
> (a) Was the Administrative Tribunal competent to determine whether the power of the Director-General not to renew fixed-term appointments has been exercised for the good of the service and in the interest of the organization?
>
> (b) Was the Administrative Tribunal competent to pronounce on the attitude which the Director-General, under the terms of the Constitution of the United Nations Educational, Scientific and Cultural Organisation, ought to maintain in his relations with a Member State, particularly as regards the execution of the policy of the Government authorities of that Member State?
>
> "III. In any case, what is the validity of the decisions given by the Administrative Tribunal in its judgments No. 17, 18, 19 and 21?

On October 23, 1956, the International Court of Justice delivered its Advisory Opinion, in which it was *held* that the Tribunal was competent, that the second question did not call for an answer by the Court, and that the validity of the decisions was no longer open to challenge: *I.C.J. Reports*, 1956, p. 77.

International Organizations—Officials—Dismissal of—Competence of—Integrity of—War-time Activities and Loyalty to State—Undisclosed Allegations—Absence of Due Process.

BERTRAND *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. September 9, 1955.

(Lord Crook, Acting President; Petrén, Lashly.)

THE FACTS.—The complainant first entered the service of the United Nations on March 12, 1948, under a temporary-indefinite contract as a clerk-typist in the Secretariat of the Economic Commission for Europe, in Geneva. On November 7, 1948, she was transferred to the World Health Organisation where she had been offered a two year appointment as an auxiliary editor. In 1950, the complainant passed a qualifying examination for appointment as translator/précis-writer, and on July 1, 1950, was transferred back to the European office of the United Nations as a translator on short-term contract, on the understanding that she would be offered more permanent work at Headquarters in New York if her services proved satisfactory. The complainant subsequently decided not to accept a transfer to New York and left the service of the United Nations on the expiry of her appointment on January 31, 1951. On March 19, 1951, the complainant was offered, and accepted, a short-term appointment for the duration of a conference, and as a result of successive extensions of her contract, remained in service until November 30, 1951. On December 1, 1951, the complainant was granted a temporary-indefinite appointment. In 1954, a special Committee, presided over by an independent chairman chosen from outside the staff of the United Nations, was appointed by the Secretary-General to consider the suitability of officials for permanent appointment, with a view to increasing the number of permanent appointments, subject to certain safeguards. The task of this Review Board was to examine the situation of temporary officials and to recommend to the Secretary-General in each case the granting of a permanent appointment, the granting of one additional year of probation, or termination of appointment. On or about October 4, 1954, the complainant appeared before the Review Board which, in addition to considering the competence of the complainant to discharge her functions, also interrogated her on her activities during the Second World War in connection with information received from French official quarters which appeared to reveal that the complainant's attitude during that period had been lacking in loyalty to France. Neither the source nor the precise nature of these allegations were disclosed to the complainant, who was questioned in general terms. On October 11, 1954, the Board submitted to the Secretary-General its report on the complainant and recommended that her appointment be terminated on the grounds that she was not competent to discharge her duties and that there were grave doubts as to her integrity. In the meantime, the complainant secured and submitted to the Secretary-General official communications from French authorities which indicated that the charges of disloyalty which had been implied during her interview with the Review Board had no foundation in fact. In the light of a communication from the French Ministry of Foreign Affairs, which amounted to a retraction of the charges made in the document which had led the Review Board to question the complainant on her war-time activities, the Secretary-General asked the Chairman of the Board, on December 7, 1954, to reconsider informally the complainant's case. On December 15, 1954, the Chairman, who had consulted three of the four other members of the Board, replied that " in order to avoid any possibility of misunderstanding, our final recommendation should consist only of the original first paragraph (which dealt with the complainant's competence) and that the second paragraph (dealing with integrity) should be omitted entirely ". On January 3, 1955, the Director of the European Office of the United Nations notified the complainant of the Secretary-General's decision to terminate her temporary appointment with effect from February 28, 1955. On January 5, 1955, the Personnel Division of the European Office of the United Nations communicated to the complainant the first paragraph of the recommendation of the Review Board. On January 24, 1955, the complainant lodged with the Joint Appeals Board an appeal against the decision to terminate her appointment. On February 26, 1955, the Appeals Board recommended that:

" . . . all the particulars relating to Mrs. Bertrand should be re-submitted to the Review Board for consideration and, until these have been so considered and until the Secretary-General can give his decision on the basis of this further consideration, the termination which was to become effective on 28 February, should be inoperative and Mrs. Bertrand should be retained in her post.

By letter of March 7, 1955, the Director of the European Office of the United Nations notified the complainant that the Secretary-General had decided to maintain the decision to terminate her appointment, and on June 6, 1955, she instituted proceedings before the Tribunal.

The following main contentions were advanced by the complainant:

(a) The termination of the complainant's appointment was based on the statement of the Review Board that the complainant lacked the necessary professional qualifications, although her efficiency had been unanimously recognized by her superior officers. The decision complained of, which was not supported by the inadequacy of the complainant, was evidently based on reasons unrelated to those advanced to justify the termination, and thus constituted an abuse of authority.

(b) The Review Board's unfavourable recommendation was incompatible with the high opinions expressed by the complainant's superior officers, and the Board's failure to state the specific reasons for its recommendation vitiated the application of the Staff Regulations and made it impossible for the complainant to conduct an effective defence of her case.

(c) The professional competence of the complainant was never truly at issue in the assessment of her suitability for permanent employment, since the quality of her work had been praised by her chiefs, and the Board had questioned her at length on matters unrelated to her technical ability. It was clear from the way in which the hearings were conducted and the recommendation drafted in its two different versions that the recommendation was inspired by prejudice against the complainant.

(d) The complainant's rights were violated by the use made by the Review Board of a secret file containing matters against which the complainant, who was ignorant of its contents, had no means of defence.

The following main contentions were advanced on behalf of the defendant Organization:

(a) In terminating the complainant's temporary-indefinite appointment, the Secretary-General made use of his power under Staff Regulation 9.1(c) to terminate any such appointment if, in his opinion, such action would be in the interest of the United Nations. The more specific reason why the Secretary-General found the termination of the complainant's appointment to be in the interest of the United Nations was that her technical professional capacity was not sufficiently high to meet the requirements for permanent appointment.

(b) The Tribunal would not wish to substitute its own judgment for that of the Secretary-General but would wish to consider only the question whether the decision complained of was based on an improper motive, and whether the reasons were arbitrary, capricious or untruthful. The fact that the complainant's superior officers considered her qualified for employment would be irrelevant in any attempt to prove that the decision was not proper.

(c) The Review Board's recommendation for termination on the ground that the complainant's "performance and efficiency are not up to the high standard required for permanent appointment" had not been shown to be unreasonable, as demonstrated by such of the Board's evidence as was before the Tribunal.

(d) The defendant Organization denied any improper motives for the decision complained of. In its original report, the Review Board submitted two separate adverse conclusions: the first based on the complainant's performance and efficiency, and the second on her integrity. The second conclusion was founded solely upon the complainant's statements and demeanour when questioned about certain allegations which had been made against her. These allegations were subsequently withdrawn and, in order to avoid any impression that the Board arrived at its second conclusion upon a finding concerning those allegations, the Board eventually decided to eliminate its second conclusion from its report. These allegations had no bearing on the case.

Held: that while the Tribunal did not reach the conclusion that the final decision of the Secretary-General was taken in bad faith, the complainant had not been accorded due process; that the case be remanded for consideration *de novo*; and that compensation in the amount of three months' salary be paid to the complainant for loss caused by the procedural delay.

The Tribunal said: "The Applicant's claim is based upon a notice of termination given by the Secretary-General to her on 3 January 1955, effective 28 February 1955. The action is not the ordinary one under Staff Regulation 9.1(c), for the termination of a temporary-indefinite appointment, but arises under Staff Regulation 4.5(b), by which the Secretary-General is to decide which staff members are suitable for permanent appointment or must be terminated. The Applicant, from 1 July 1950, except for a short period in 1951, was a member of the staff (Languages Division) continuously until the separation [termination of employment] order from which she has appealed.

"In 1954 some new and very important machinery had been established by the General Assembly at the recommendation of the Secretary-General, to aid in carrying out plans for reorganization of the service, it having been declared to be the policy to increase the number of permanent career appointments, or terminate those staff members holding temporary appointments who did not warrant permanent appointment. One significant body established for these purposes was the Review Board (Staff Rule 104.13 (III)). Carefully chosen, its functions were described as follows:

> '(b) The function of the Review Board shall be:
>
> (i) To consider the suitability of staff members for Permanent Appointment . . . and to recommend to the Secretary-General in each case the granting of a Permanent Appointment, the granting of one additional year of probation or separation from service.'

In reporting these preparations for progressive changes in the service affecting the personnel to the General Assembly on 7 December 1953 (*Official Records*, Annex (VIII) 51), the Secretary-General said (pp. 7 and 8), among other things:

> 'There is a special obligation on the part of the Secretary-General to apply them (the new measures) with restraint, as any decisions which are not based solidly on firm principles and a correct evaluation of facts would impair the necessary confidence in the Administration and would vitiate the basic purposes of the proposals.'

On 6 July, 1954, the Secretary-General issued an informational and instructional circular to the staff entitled 'Principles guiding the Review of Staff' (see ST/ADM/SER.A/267) in which he set out with great particularity the duties and scope of the Review Board, saying, among other things of similar import:

> 'The quality of the United Nations staff will depend on the extent to which strict evaluations are made by the Board. In making their

recommendations, the members of the Board will have in mind only the over-riding interests of the Organization.'

There is no room for doubt that the Secretary-General intended to place important and pivotal powers and responsibilities in the hands of the Review Board.

" The Applicant was summoned to appear before the Review Board in the course of carrying out this programme. The record reveals that the Review Board met in Geneva on or about 4 October 1954, had certain documents before it, and the applicant as well as some of her supervisors appeared for oral interviews. The inquiries addressed to her at her interview were of such a nature as to lead her to believe that her loyalty to her country during the war and occupation were being drawn under scrutiny. [Being] without any very clear idea of what the charges were, so far as the record discloses, the Applicant requested the Board by letter of 4 October to ' postpone its decision until the question is definitely settled with the French Administration '. At her instance, the Office of the Minister of National Education in Paris wrote to the Deputy Chief of Personnel, European Office of the United Nations, Geneva, on 7 October 1954, and certain other letters and statements were secured and sent to or were made available to the Review Board, all of which tended to refute any insinuation or charge that the Applicant had been engaged in activities during the war and occupation, which reflected upon her loyalty. The receipt of these documents was formally acknowledged by an interoffice memorandum delivered to the Applicant at Geneva on 11 October 1954. On the same day the Report of the Review Board was filed. It follows:

' After examining the file, hearing supervisors and interviewing Mrs. Bertrand the Board came to the unanimous conclusion that her performance and efficiency are not up to the high standard required for permanent appointment. The Board therefore recommends termination.

' It should be mentioned that during her interview the Board made certain enquiries about matters concerning Mrs. Bertrand's employment and activities before her entry into the Secretariat. Her statements and demeanour during this interview convinced the Board that Mrs. Bertrand does not reach the high standard of integrity required for a career appointment in the United Nations Secretariat.'

" After the unfavourable Report of the Review Board, a Minister Plentipotentiary for the Minister for Foreign Affairs of France, at the instance of the Applicant, addressed a letter dated 30 October 1954 to the Secretary-General which further tended to exonerate the Applicant from any suspicion of disloyalty to her country during the war and occupation. Following receipt of this document, the Secretary-General on 7 December 1954 requested the Review Board to informally reconsider the case of the Applicant. On 15 December 1954, the Chairman of the Review Board sent forward his report of the results of the reconsideration of the case at the request of the Secretary-General ' in the light of the letter dated 30 October 1954 from Mr. Broustra of the French Foreign Office '. The meeting of the Board at which the matter was taken up for reconsideration was held in New York. Three of the five members of the Board who had participated in the original hearing were present. One member was absent on home leave. Both were communicated with by mail for the purpose of securing their approval of the negative result reached by the three members present. One portion of the report of the Chairman of the Board following the New York meeting seems significant:

> ' All three of us remember very well that in Geneva we decided formally to base the recommendation for termination solely and exclusively on Mme Bertrand's lack of competence and efficiency (first paragraph of the recommendation).'

When the Chairman communicated the views of the three members attending the meeting to the two absent members, one only replied and his reply also seems important. It is in part as follows:

> ' My own view is certainly that Mr. Broustra's letter to the Secretary-General does not change the facts upon which the Board's recommendation was based. I should however be unwilling to change the Board's recommendation so as to leave only a recommendation based on bad work. As regards that second part, my opinion had nothing to do with the question of Madame Bertrand's loyalty, nor with the question whether she was connected with Fascism. It was based on the conviction that she had concealed certain facts in the application form and continued to try to conceal them in front of the Board.'

" The Applicant in due course was notified on 3 January 1955 that the Secretary-General, after considering carefully the report and all factors pertaining to her retention, had decided that he was unable to offer her a career appointment and therefore terminated her temporary appointment effective 28 February 1955.

" The Applicant contends that the decision of the Secretary-General to terminate her employment was not arrived at in good faith, as that term is understood in reference to procedural validity, upon the part of the Secretary-General; that in reality it was taken as a result of extraneous considerations having no relation to any valid or lawful reason for her termination; that the real or true motive which prompted her termination was the effect of secret information concerning her past war record, which was never fully disclosed to her, either at the interview with the Review Board or at the hearing before the Tribunal, and which in consequence she has never been given an opportunity to meet; that in view of the fact that her superiors commended her abilities and performance with only slight reservations, and in one instance at least, expressed definite disagreement with the conclusions of the Review Board upon the basis of her efficiency; and that her qualifications for advancement having been so generally supported by her superiors, the inference is clear that the termination in reality was based upon some other, undisclosed, grounds.

" The Respondent in his presentation by Counsel before the Tribunal stated that: (i) the charge of disloyalty ' could not possibly furnish the basis for any adverse action; (ii) that ' even though the Applicant's denials were eventually proved true, still those denials may have been made with such evasiveness and lack of candour as to reflect on her integrity, and the Board apparently decided that this was the case '; (iii) that the letter of 7 October 1954, received from the Office of the Minister of National Education of France, ' amounted to a withdrawal of the allegations which had led to the investigation by the Review Board, but in no way affected the Board's impressions of the Applicant's statements and demeanour during the investigation, nor its right to report that impression to the Secretary-General '; (iv) that nevertheless the only reason for the decision to terminate the Applicant's appointment was that her technical professional capacity was not sufficiently high to meet the requirements for permanent appointment.

" The Tribunal appreciates the fact that the Secretary-General cannot himself attend to all of the preliminary duties in the process of selection, hence the Review Board was set up to perform a very important function at a sensitive point in that process. In examining the case of a staff member whose suitability for a permanent appointment is in issue, the greatest care and sympathetic consideration would be required, and the results of its studies, upon which the action of the Secretary-General must be determined in large part, would be expected to be reported with the seriousness and gravity which the material and human values involved would merit.

" The report of the Review Board gives evidence that the members found the Applicant's answers to their questions unsatisfactory and evasive. She seems not to have expected or been prepared for questions of the nature put to her concerning a period of her life remote from her present work. The unfavourable impression which she made was so profound that one member upon the report of reconsideration, stated it as his ' conviction that she had concealed certain facts in her application form and had continued to try to conceal them in front of the Board '. This view he held so strongly that he stated that he would ' be unwilling to change the Board's recommendation so as to leave only a recommendation based on bad work '. It is to be noted that although the first report of the Review Board consisted of the two elements in two paragraphs, the three members reconsidering the matter in New York recorded: 'All three of us remember very well that in Geneva we decided formally to base the recommendation for termination solely and exclusively on Mme Bertrand's lack of competence and efficiency '.

" It was noted that in the letter dated 7 October 1954 (Annex

No. 19) there is a reference to an earlier letter dated 25 May 1954 from the Director of Education for the Department of Seine, which may have contained the material from which the suspicions of the Review Board were aroused and about which they sought to question her. The letter was not introduced at the hearing before the Tribunal and quite evidently was not shown to the Applicant by the Review Board. If, as the Tribunal is permitted to infer, the document contained statements which, if not refuted or explained, imputed conduct to the Applicant which seriously reflected upon her character and integrity, the substance of it could have been explained to her considerately and time afforded her to take such action as she may have been advised, to investigate the charges and to vindicate herself and her good name before the Board. Doubtless the document was privileged, but obviously, it would have been possible to inform her of its contents without revealing its author. Moreover, the evidence does not indicate that any effort was made to secure consent from the official agency from which it emanated, which would have removed it from the privileged category.

" When later the matter came before the Joint Appeals Board, it was pointed out by that body that in its view the action of the Review Board had been below the level of procedure which ought to be expected, and the Appeals Board recommended that the entire matter be resubmitted to the Review Board in order that it might collect all the facts and make a full and faithful report to the Secretary-General for his further action.

" While the Tribunal does not reach the conclusion that the final action of the Secretary-General was taken in bad faith, nevertheless it is convinced that, upon the whole record made, the Applicant has not been accorded due process, and that the case should be returned to the Review Board, as: (a) the Board was not itself clear as to the reason and content of its original report; (b) the Board which sat in the first instance did not sit as a whole to reconsider the matter.

" The Tribunal has received the special request of the Secretary-General, according to the terms of Article 9.2 of its Statute:

> ' Should the Tribunal find that the procedure prescribed in the Staff Regulations or Staff Rules has not been observed, it may, at the request of the Secretary-General and prior to the determination of the merits, order the case remanded for institution or correction of the required procedure. Where a case is remanded the Tribunal may order the payment of compensation, not to exceed the equivalent of three months' net base salary, to the applicant for such loss as may have been caused by the procedural delay.'

Accordingly, the Tribunal must decide either on the basis of Article 9.1 or on the basis of Article 9.2. The choice between these alternatives is not to be motivated by purely legal considerations; but the practical possibility and the eventual effect of the correction of the procedure required must be taken into account.

" In this instance it appears that the case should be returned to the Review Board for complete proceedings *de novo*, in order that the rules and directives promulgated by the Secretary-General may be carried out completely and effectively in the interests of the United Nations. Without determining the ultimate merits of this case, the Tribunal orders the entire file and all documents appertaining thereto remanded to the Review Board for reconsideration and further action in accordance with the views herein expressed.

" Even if the Applicant should find employment, the delay in the final settlement of her case will have caused her some prejudice. The Tribunal was informed during the hearing that, since her termination, she has been employed only for a limited term on a temporary basis. Consequently, the provision for indemnity for prejudice sustained as a result of lack of procedure should be applied.

" The Tribunal, without deciding the merits of the case, decides that: (a) the case should be remanded to the Review Board for reconsideration and further action; (b) the Applicant is ordered payment of compensation equivalent to three months' net base salary for loss caused by the procedural delay."

[Report: Judgment No. 69 of the Administrative Tribunal of the United Nations, U.N. Document No. AT/DEC/69.]

NOTE.—With respect to the use by administrative authorities of information not disclosed to the official concerned, and the legal consequences thereof, see *McIntire* v. *Food and Agriculture Organization* (see *International Law Reports*, 1954, p. 356) which established an important precedent in the matter. The principles laid down in that case were also applied in *Froma* v. *United Nations Educational, Scientific and Cultural Organization* (Judgment No. 22 of the Administrative Tribunal of the I.L.O.): see *infra*, p. 798.

International Organizations—Officials—Termination of Appointment for Health Reasons—Impossibility of Reassignment—Appeals—Time Limit for—Representation of Complainants through Counsel.

HARTMANN *v.* WORLD HEALTH ORGANIZATION.

Administrative Tribunal of the International Labour Organization.

(Devèze, President; van Rijckevorsel, Stavropoulos.)

October 24, 1955.

THE FACTS.—The complainant was offered by the World Health Organization, and accepted, a two years' appointment, beginning on February 9, 1952, as " Medical Specialist " and was assigned to field work in Rotterdam. Following upon an illness, the complainant submitted to a medical examination carried out at Headquarters in Geneva on November 10, 1952, as a result of which she was declared by the Medical Adviser to be unfit to carry out her duties. The complainant challenged this opinion and submitted to a further medical examination by a medical board comprising three practitioners, one of whom was appointed by the complainant, one by the defendant Organization and the third by the first two members. The board came to the conclusion that the complainant was incapable of performing her duties satisfactorily and recommended that she be assigned to office work of a medical and scientific character, which she was capable of performing, for a period of six months, at the end of which period her fitness to take up the duties set forth in her contract should be reconsidered. On November 14, 1952, the defendant Organization officially notified the complainant that her appointment would be terminated on December 31, 1952, but that efforts would be made to find her suitable employment within the Organization. The defendant Organization succeeded in finding such employment and transferred the complainant to a post in Geneva, which she held from January 1 to February 28, 1953, at which date her employment came to an end since she was considered unfit to resume the duties for which she had originally been appointed and there was no further possibility of employing her at Headquarters. The complainant asserted that the Medical Adviser of the defendant Organization agreed that the new medical examination referred to in the opinion of the medical appeal board could be carried out in Copenhagen, where the complainant resided, by the member of the board appointed by the complainant who also resided in Copenhagen and by a psychiatric specialist of Danish nationality. Such an examination was performed and the results communicated to the defendant Organization, in June 1953. After a further exchange of correspondence, the defendant Organization, in a letter dated September 1, 1953, confirmed to the complainant that her original appointment had been terminated on December 31, 1952, since she was unfit to carry out the duties for which she had been appointed, and that her employment had come to an end on February 28, 1953, since at that time there was no possibility of reassigning her to her original duties, and there was no further possibility of employing her in another capacity. A year later, on November 1, 1954, the complainant appealed to the Board of Inquiry and Appeal. In view of the considerable delay, the Director-General notified the complainant that he would request the Board to meet in order to consider the receivability of the appeal, as the Staff Rules provided that a Staff member wishing to appeal against a final action by the administration must do so in writing fifteen days after he had been notified thereof. The Board of Inquiry and Appeal was unable to decide as to the receivability of the complainant's appeal from a procedural standpoint, but " with a view, however, of avoiding in case of doubt any attitude that might be interpreted as unfair to the appelant owing to a vice of procedure, the Board unanimously recommended that the Director-General instruct the Board to ignore any time-limits laid down that might be applicable in the case of Dr. Hartmann and proceed to hear the appeal." On March 17, 1955, the Director-General informed the complainant that he found himself unable to accept that recommendation, since it was not based upon a finding that there were any circumstances clearly justifying an appeal two years after the decision appealed against. To accept the recommendation of the Board would be tantamount to abolishing the time-limit for appeals, and while he was desirous of taking into maximum account the interests of the staff, he must ensure that the administration of the Secretariat was governed by sound and stable rules, particularly in cases where decisions of the administration were to be impugned within specific time-limits; if it were not so, the uncertainty created would render sound administration extremely difficult, if not impossible.

The complainant instituted proceedings before the Tribunal on May 20, 1955, and asked the Tribunal to follow the recommendation of the Board of Inquiry and Appeal and to permit her to appeal as to the substance against the decision to terminate her appointment.

The defendant Organization asked the Tribunal to declare that the appeal brought by the complainant before the Board of Inquiry and Appeal was not receivable as being out of time, to declare that the complainant did not show due cause for rescinding the decision by which her contract was terminated, which decision was duly notified to her and confirmed, and to pronounce that the complaint was not receivable and not well-founded and must be dismissed.

Held: that the complaint must be dismissed.

The Tribunal said: " . . . Rule 532.3 of the Staff Rules of the defendant organization in force at the time when the said organization gave notice of termination to the complainant—which Rule corresponds in substance to the present Rule 1030.8 (b)—was in the following terms:

> ' A Staff member wishing to appeal against such an action [a final action taken by the administration] must do so in writing within fifteen days after he has been notified thereof. Insofar as practicable the Board [the Board of Inquiry and Appeal of the defendant organization] will open its proceedings within ten days after receipt of the appeal.'

The complainant had already been notified on 14 November 1952 that her appointment was terminated for health reasons with effect from 31 December 1952. Whatever the circumstances might be, the complainant could not plead ignorance at that time of the Staff Regulations and Rules which were applicable to her, especially as a copy of these documents had been handed to her at the time of her appointment and her attention drawn thereto; if, as the complainant submitted, she had believed that she had the right to claim that she undergo a new medical examination at the term of a six-month period running from the date of the medical examination in November 1952, she should in any event have brought her recourse at that time in the event of a new examination not being accorded; the termination of her appointment was confirmed in subsequent correspondence by a letter from the defendant organization dated 1 September 1953 in the following terms:

> ' To make the matter more clear, may I remind you that:
>
> 1) The Medical report of 10 November 1952 placed a limitation on your work except for office employment for a period of 6 months and subject to review thereafter;
>
> 2) A serious attempt was made by the organisation to find suitable work for you within this limitation but was successful for only part of the period. You will recall that this office kept you on its payroll until end December and that you were then transferred to Headquarters as from 1 January 1953 for a period of 2 months;
>
> 3) *Your contract was terminated because it was not feasible for you to return to the post for which you had been engaged and no other suitable assignment was available.*'

The complainant herself in a letter of 11 December 1952 had already admitted that she knew that her appointment has been terminated since she expressly stated therein: ' the state of my health is the official reason for my termination '; it is to no purpose that the complainant relies upon certain correspondence—in particular the correspondence exchanged by her with the administration, and the correspondence which was exchanged between the complainant's medical adviser who had participated at the medical examination of November 1952 on the one hand, and one of his colleagues who participated at this same examination on the other hand, as well as the administration of the defendant organisation—to show that the decisions which had been notified to her were not of a final nature as required by the Staff Rules; the said correspondence does not show more than efforts brought to attempt to persuade the administration to reconsider its decision, efforts which have nothing in common with the proceedings for rescission which the complainant was entitled to bring and of which she did not take advantage; the decision taken by the Director-General of the defendant organisation was preceded by a referral to the Board of Inquiry and Appeal competent to advise the Director-General; the opinion given by the said Board in no way binds the Director-General and even if the Board had the right to modify certain time-limits no complaints can be laid against the Board for not having exercised such option; it was for the Director-General to appreciate whether the opinion as formulated sufficed as a basis for his decision; the complainant takes issue with the administration for not having drawn her particular attention to the period for submitting an appeal to which she was subject; it would indeed have been desirable for the administration to have so acted, but . . . no provision of the regulations or rules imposed such a requirement."

[Report: Judgment No. 20 of the Administrative Tribunal of the International Labour Organization; to be published in the *Official Bulletin* of the International Labour Office.]

Note.—(1) This decision adds a further precedent to the body of jurisprudence upholding the respect of statutory time-limits for the introduction of appeals: see, in particular, *Perasse* v. *Secretary-General of the League of Nations* (Judgment No. 3, February 26, 1947); *Mange* v. *World Health Organization* (I.L.O. *Official Bulletin*, vol. XXXIV, No. 3, p. 260; *International Law Reports*, 1953, Case No. 149); and *Woollett* v. *World Meteorological Organisation*, decided on July 12, 1957 (Judgment No. 26). This decision also clarifies the notion of final decision as *terminus a quo* for the introduction of appeals, on which see the *Mange Case*.

(2) In connection with the above case, the Tribunal clarified, in a preliminary decision of October 17, 1955, the rules governing the representation of complainants before the Tribunal. The only provision of the Rules of Court applicable to the question required that the complaint should be signed by the complainant or a member of the regular Bar of a State Member of the International Labour Organization. At the beginning of the oral proceedings a member of the Paris Bar appeared on behalf of the complainant, but requested the Tribunal to allow one of his former colleagues, who was no longer a member of the Bar but who had undertaken to defend the interests of the complainant, to conduct the case. The President then stated that the practice of the Tribunal was " . . . that only counsel being regular members of a Bar and staff members duly authorized by the President are permitted to plead." The Tribunal then gave the following decision:

" Considering that Me Mercier, a member of the Paris Bar, is acting as Counsel for the claimant;

" Considering that Me Mercier requests the Tribunal that Mr. Meyer-Morton be permitted to comment before the Bar in the name of his client, for which comments Me Mercier takes responsibility;

" Considering that as an exceptional measure and by reason of the special circumstances in the case, the Tribunal is of opinion that this request should be taken in consideration;

" On the grounds as aforesaid, the Tribunal permits Mr. Meyer-Morton to give a statement before the Bar in the presence and with the assistance of Me Mercier."

International Organizations—Officials—Dismissal of—Permanent Appointments—Inquiries by National Authorities into Alleged Subversive Activities—Independence of International Civil Servants—Duties and Conduct—Interests of the Organization.

FROMA *v.* UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION.

Administrative Tribunal of the International Labour Organization.

(Devèze, President; van Rijckevorsel, Stavropoulos.)

October 29, 1955.

THE FACTS.—On September 2, 1949, the complainant was appointed as an official of the Secretariat of the United Nations Educational, Scientific and Cultural Organization and held, at the time of the decision complained of, an indeterminate appointment, subject to a five-year review on October 1, 1957. As a citizen of the United States of America, the complainant was subject to the investigation of alleged subversive activities provided for in Executive Order No. 10422 and carried out by the International Organizations Employees Loyalty Board of the United States Civil Service Commission in the manner described in the report of *Duberg* v. *UNESCO* (see *supra*, p. 768). The complainant completed the questionnaire issued by the United States authorities but did not reply to the interrogatory of the Loyalty Board, and refused to appear before the Board on July 15, 1954, in circumstances identical with those of the *Duberg Case*. On August 26, 1954, the Chairman of the Loyalty Board communicated to the Director-General of the defendant Organization the report of the Board ("Advisory determination ") stating that " . . . the Board concludes that on all the evidence there is a reasonable doubt as to the loyalty of Ruth Froma to the Government of the United States." The complainant was herself informed by a letter of the Chairman of the Board dated September 10, 1954, of the conclusions of the Loyalty Board and of the fact that these conclusions had been transmitted to the Director-General of the defendant Organization.

On September 28, 1954, the Director-General set up an *ad hoc* advisory body composed of members of the staff to " examine the cases of certain staff members on the basis of certain information which has been brought to the knowledge of the Director-General and in the light of the standards of employment and conduct prescribed by the Constitution and the Staff Regulations ". The complainant appeared and explained her position before this advisory body, which came to the conclusion that it could find no evidence either in the reports of the Loyalty Board or as a result of its own enquiries that the complainant, during her employment in the Secretariat of the defendant Organization, had engaged in or was engaging in activities that could be shown to constitute misconduct under the terms of the Staff Regulations and Rules. However, the attitude adopted by the complainant as well as the reasons given for her attitude gave rise to serious doubts about the degree of confidence that could be placed in her integrity, judgment and loyalty to the Organization. This view was justified by the fact that, in a situation which, in the advisory body's opinion, was clearly harmful to the Organization, the complainant had maintained that adherence to her own personal views was more important than the interests of the Organization.

On December 10, 1954, the complainant was suspended, with pay, until further notice. She requested the Director-General on December 16, 1954, to reconsider his decision and, the request having been rejected, appealed to the Appeals Board on February 10, 1955. On June 27, 1955, the Appeals Board unanimously expressed the opinion that the decision of the Director-General to suspend the complainant should be rescinded.

In the meantime, the General Conference of UNESCO adopted on December 8, 1954, a new provision of the Staff Regulations (9.1.1.) granting the Director-General authority to terminate the appointment of staff members (a) if the conduct of a staff member indicated that he did not meet the highest standards required by Article VI of the Constitution of UNESCO and by Chapter I of the Staff Regulations, which set forth the duties and obligations of officials; and (b) if facts anterior to the appointment of the staff member and relevant to his suitability or which reflected on his present integrity came to light, which, if they had been known at the time of his appointment should, under the standards established in the Constitution, have precluded his appointment. No termination under this provision was, however, to take effect until the matter had been considered and reported on by a special advisory board appointed for that purpose by the Director-General.

The Special Advisory Board was appointed and placed under the Chairmanship of Mr. Edward Phelan, a former Director-General of the International Labour Office. The Board heard the complainant in March 1955 and duly reported to the Director-General.

On June 20, 1955, the Director-General informed the complainant that her appointment was terminated with immediate effect. The Director-General stated in his letter that

> " The Special Advisory Board which I appointed in accordance with Staff Regulation 9.1.1. has submitted its report to me on the matter concerning you.
>
> " I have studied this report very carefully.
>
> " I regret to inform you that I have come to the conclusion that your conduct indicated that you do not meet the highest standards required by Article VI of the Constitution and by Chapter I of the Staff Regulations.

"I have come to this conclusion because of the attitude you have adopted to the investigation undertaken by the United States Government under Executive Order 10422, as amended by Executive Order No. 10459, which found its principal expression in your refusal to respond to the invitation to appear, in July 1954, before the International Organisations Employees Loyalty Board of the United States Civil Service Commission, and because, at no time up to this date, have you taken any steps or shown any desire to repair, or at least to mitigate, the harm done to the organisation by your refusal to appear before the Board.

"You could not have failed to realize that the attitude you have adopted gravely prejudiced the interests of the organisation.

"I have indicated, and in particular, at the Eighth Session of the General Conference, the seriousness of the consequences of such an attitude.

"In adopting and maintaining such an attitude, you have shown that you are not willing to regulate your conduct with the interests of the organisation only in view.

"I am therefore obliged to terminate your appointment with effect from the end of the day, 20 June 1955, under the provisions of Staff Regulation 9.1.1."

The letter also made provision for the payment of a termination indemnity, cash compensation in lieu of notice, and other sums due in accordance with the Staff Regulations.

On June 24, 1955, the complainant requested the Director-General to reconsider his decision, and this request having been refused on June 27, the complainant, with the agreement of the Director-General, waived her right to appeal to the Appeals Board and instituted proceedings before the Administrative Tribunal.

The complainant contended that her conduct did not justify the view that she did not meet the standards required of an official of UNESCO. She had not violated the law of the country of which she was a citizen, it was not alleged that she had engaged in subversive activities, and her competence was not questioned. Consequently, she maintained, the decision to terminate her appointment was unjustified. The arguments advanced by the complainant to show that her attitude to the investigation carried out by the Loyalty Board was not incompatible with her status as an international civil servant and was not contrary to the interests of the Organization were substantially the same as those advanced in the *Duberg* case (see *supra*, p. 768). However, it was further pleaded that the provisions of the Staff Regulations adopted on December 8, 1954 (Rule 9.1.1.) were not applicable to her case since the facts allegedly justifying the decision complained of took place before the adoption of these Regulations.

The arguments advanced on behalf of the defendant Organization in respect of the conduct of the complainant and the interests of the Organization were substantially the same as those advanced in the *Duberg* case (*supra*). However, it was also pleaded, first, that the provisions concerning termination had been adopted by the

General Conference after a full debate on the attitude of officials who had refused to appear before the Loyalty Board and the measures to be taken in respect of such officials, and that it was the intent of the legislator in adopting Regulation 9.1.1. to grant the Director-General the authority required to terminate the appointment of such officials. In the light of this construction of Regulation 9.1.1., the Tribunal could not deny the Director-General the power to terminate the appointment of the officials concerned on the grounds that they did not meet the required standard. Second, the evaluation of an official's conduct, in the light of the standards required by the Constitution and the Staff Regulations, came within the exclusive competence of the Director-General and was not subject to review by the Tribunal.

In the course of the oral proceedings, the Tribunal requested the defendant Organization to produce the report made by the Special Advisory Board to the Director-General. It was indicated, however, that in view of the rules governing the procedure of the Board, its report, which was confidential, could not be produced. The Tribunal then heard the Chairman of the Board, who indicated in his testimony that the Board regarded its report as addressed to the Director-General, who alone could decide whether to produce it or not. While the Board as such did not object to the production of the report, both authority and responsibility for its production rested with the Director-General. It was pleaded on behalf of the defendant Organization that, in view of the highly confidential nature of the report, it would be contrary to the rules guaranteeing the secrecy of the proceedings of the Board to produce it, and the report was not produced.

Held: that the appeal must succeed. The decision to terminate the complainant's appointment was unfounded; the decision must be rescinded; and should the Director-General not reinstate the complainant, damages amounting to two years' salary should be awarded.

The Tribunal said:

I. "*On the substance*

"A. . . . The decision of 20 June 1955 terminating the appointment of the complainant was taken in application of Regulation 9.1.1 of the Staff Regulations, as adopted by the UNESCO General Conference in Montevideo on 8 December 1954, this Regulation being in the following terms:

> 'The Director-General may also, giving his reasons therefor, terminate the appointment of a staff member:
>
> (a) If the conduct of the staff member indicates that the staff member does not meet the highest standards required by Article VI of the Constitution and by Chapter I of the Staff Regulations;

(b) If facts anterior to the appointment of the staff member and relevant to his suitability or which reflect on his present integrity come to light, which, if they had been known at the time of his appointment should, under the standards established in the Constitution, have precluded his appointment.

No termination under the provisions of this Regulation shall take effect until the matter has been considered and reported on by a special advisory board appointed for that purpose by the Director-General.'

". . . Where the Director-General acts within the provisions of Regulation 9.1.1 he has only the statutory powers conferred on him by the General Conference; in a particular case the Tribunal's appreciation and review of the exercise of this power consists in examining whether in fact the circumstances of the case are such as to justify the application thereof; if this were not to be the case the application of this power would be at the Director-General's sole pleasure. Regulation 9.1.1 expressly provides that reasons must be given for taking the measures set forth therein and that the matter be first reported on by a Special Advisory Board appointed for that purpose by the Director-General;

" B. . . . In this case the decision is expressly motivated by the attitude taken by the complainant with respect to the measures of investigation provided by the Government of the United States in application of Executive Orders No. 10422 and 10459, this attitude consisting principally in the refusal of the complainant to accede to the invitation to appear before the Loyalty Board in July 1954, and by the fact that after that date the complainant took no steps nor showed any wish to repair or mitigate the harm which was deemed to have been suffered by the Organization as a result of her refusal to appear, when she could not ignore the gravity of such harm. The submissions of the defendant oblige the Tribunal, in order to carry out its functions under the provisions of Article II of its Statute, to seek in what manner and to what extent the interests of the Organization may have been prejudiced. The difficulties having arisen within the defendant Organization are that one Member State, in default of obtaining the removal of those of its citizens being officials finding themselves in a situation similar to that of the complainant, appeared to be considering withdrawing its participation and support from the Organization; in particular an express statement in this sense was made before the Sub-Committee on Appropriations of the House of Representatives of this State by one of the members of the delegation of the said State at the Montevideo Conference. It is significant that the Director-General, on 10 December 1954, that is to say on the date following that on which the Staff Regulations conferred upon him the new power, invoked such power against the three parties concerned, in order to suspend them from their duties and to take those procedural measures against them arising out of which the decisions to terminate them, now before the Tribunal, were taken. Besides, there is no indication that there was any other reason for considering that the interests of the Organization were imperilled. The safeguarding *erga omnes* of the independence and impartiality of the Organization is also vital and must not be lost sight of;

" C. . . . The complainant could, in conscience, be persuaded that she was within her rights, besides, it has never been alleged that the complainant had been the object of legal proceedings in her own country by reason of the attitude complained against, since a purely administrative procedure was involved; exception could not be taken against her, for having failed in her employment to determine precisely the gravity and imminence of the danger which may have imperilled certain interests of the Organization. No exception can be taken against her on such grounds nor could she be reproached with having abstained from taking steps for which no particulars were given and in addition never requested of her, in order to repair or mitigate the difficulties to which the Organization was subject. The Director-General adduces, however, from the complainant's attitude and from the maintenance of this attitude that the complainant showed that she did not wish to regulate her conduct with the interests of the Organization only in view. In consequence, on 20 June 1955 the Director-General terminated the complainant's appointment with immedate effect (at the same time according to her those indemnities to which she was entitled under Regulation 9.3 of the Staff Regulations and Rule 104.7 e) of the Staff Rules), after having consulted the Special Advisory Board set up in Regulation 9.1.1 of the Staff Regulations and after carefully studying, as he states, the report of this Board.

" D. . . . It must be observed that the decision taken is based solely on paragraph (a) of Regulation 9.1.1 of the Staff Regulations which gives to the Director-General the power to terminate an official's appointment ' if the conduct of the staff member indicates that the staff member does not meet the highest standards required by Article VI of the Constitution and by Chapter I of the Staff Regulations '. On the basis of this wording, the clear distinction between the notions respectively of integrity and loyalty is henceforward not in issue; . . . the grounds adduced are based on the duty of officials ' to conduct themselves at all times in a manner befitting their status as international civil servants ', ' to bear in mind the reserve and tact incumbent upon them by reason of their international status ' and at no time to lose sight of the interests of the international organization for which they serve. Paragraph (b) of Regulation 9.1.1 deals only with facts anterior to appointment or facts which, if they had been known at the time of the appointment should have precluded the appointment, such facts not having been demonstrated and not being in issue in this case.

"E. . . . There is no other motive in the case which can be invoked in justification of termination. The Special Advisory Board which had been voluntarily set up by the Director-General within the defendant Organization, as early as September 1954, expressly stated that it could find no evidence either in the reports of the Loyalty Board or as a result of its own enquiries that the complainant, during her employment in the Secretariat of the defendant Organization, had engaged in or was engaging in activities that could be shown to constitute misconduct under the terms of the Staff Regulations and Rules. It results from the complainant's performance reports that she has never been the subject of any reproach; on the contrary the appreciations contained therein were entirely laudatory as regards her work and performance and she was promoted. The Director-General was therefore entirely correct in not invoking against her any misconduct, breach of professional duty or unsatisfactory service; on the contrary the representative of the defendant Organization has pointed out on several occasions that termination for disciplinary reasons was not in issue and that the sole issue was the termination of an appointment, with payment of indemnities, under the new Regulations on which the Director-General relies.

"F. . . . The defendant Organization objects to the production of the report of the Special Advisory Board which was set up in 1955 on the basis of the amended Regulations adopted by the General Conference. This objection is motivated by a text inserted by the Director-General himself in the rules which he drew up in order to give effect to the new provisions of the Staff Regulations by virtue of the powers conferred on him under the said Regulations; this text stipulates (Staff Rule 109.10) that the proceedings and reports of the Board shall be secret and confidential. If this provision made by the Director-General in application of the regulations adopted by the General Conference were to be considered as lawful, it would have as its effect to remove from the Special Advisory Board its principal object; in reporting to the Administrative Commission of the General Conference (document 8C/ADM/14, paragraph 11), the author of the text declared himself on the subject of this Advisory Board as follows: 'This is one way in which it is considered that staff members may be protected from the possibility of arbitrary decisions'; where the opinion given is confidential to the Director-General alone, such additional guarantee promised against arbitrary decisions is unavailing. Where the competent jurisdiction for reviewing the decision of the Director-General is not able, any more than the complainant, to have cognizance of the opinion of the Special Advisory Board, and where, besides, the Director-General is entirely free not to take account of such opinion and is thereby not subject to any outside review, it would have sufficed to permit the Director-General to be counseled accordingly thereon by such adviser as he thought fit; this cannot be imagined to have been the impression which led to the vote in the General Conference, the Conference being manifestly desirous to effectively protect staff members whose appointments would be terminated under Staff Regulation 9.1.1, from arbitrary decisions. The deposition made under oath by Mr. Phelan, Chairman of the said Board, cited as a witness, shows that the members of the Board did not, in accepting to serve, impose a condition of secrecy; they questioned the Director-General on his intentions in this regard, which was proper, but did not have as a legal result to deprive the Director-General from disposing of the report as he thought fit. Objection to the production of the report of the Board which was available to the Director-General removes an element from the appreciation of the Tribunal competent to pronounce on the regularity of the decision taken; the regulations having been observed in the letter the Tribunal may not order thereon, but in any event it was unable in its consultations to take into account this unknown element;

" G. . . . The complainant submits that the provisions of the new Regulations adopted in December 1954 are not applicable in her case since the facts set up against her took place prior to such adoption. This submission is unfounded, the Director-General having been accorded the power to review the conduct of a staff member, the appointment of whom is to be terminated, solely with regard to the high standards required of an international official, and he is free in this respect to take into account those elements on which he considers his decision may be based. Without doubt, the granting of such a power opens the door to a great extent to arbitrary decisions; if fully justifies the preoccupations of those desirous of providing at the same time sure and effective guarantees; the Administrative Tribunal must watch over the jurisdictional review which it exercises; but the texts exclude the submission based on their retroactive application.

" H. . . . Where the Director-General has the power to terminate an indeterminate appointment, this is clearly subject to the implied condition that this authority must be exercised only for the good of the service and in the interest of the Organization. It is in the light of this principle that the facts in this case should be examined. Regulation 1.4 of the Staff Regulations of the defendant Organization is as follows:

> ' Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Organization. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status. While they are not expected to give up their national sentiments, or their

> political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status '.

In thus clearly establishing the entire freedom of conscience recognized to international officials in respect of both their philosophical convictions and their political opinions, the Regulations impose on them the duty to abstain from all acts capable of being interpreted as associating them with propaganda or militant proselytism in any sense whatever. This abstention is rigorously imposed on them by the overriding interest of the international organization to which they owe their loyalty and devotion.

" I. . . . When consulted by the Staff Association of the defendant Organization on the obligation incumbent on members of the staff to reply to questionnaires issued by authorities of their respective countries, the Director-General declared that the answer must depend only on the conscience of the individual, except that he should not lie and should have regard to the consequences which the refusal to reply might have for him. However, in respect of the invitation to appear before the Loyalty Board it is established that the complainant approached the Director-General only at a late date, so that the latter would not have been able to give her advice in sufficient time.

" J. . . . In order to review all factors, it is necessary to enquire whether the acts or omissions of the complainant could be considered as justifying the application of paragraph (a) of Regulation 9.1.1 of the Staff Regulations, on the grounds that in themselves they caused doubt to exist as to whether she fulfilled the highest standards required of an international official. The complainant does not challenge the legitimate character of the enquiry made within the staff by the Special Advisory Board set up by the Director-General on 28 September 1954, following the submission to the Director-General of the report made against her by the Loyalty Board in default of her appearance. This measure is in accordance with the undertaking made with the State member concerned under arrangements approved by the Executive Board and General Conference of the defendant Organization; this was solely an undertaking that any information which the Government of the State concerned might desire to submit to the Director-General would ' be studied with care ' and that he would ' certainly give every consideration to it, in the light of the Constitution of UNESCO and all other relevant provisions and policies which may have been or may be laid down by the appropriate organs of UNESCO '. The Special Advisory Board set up on 28 September 1954 expressed the opinion, as referred to above, that it could find no evidence that the complainant had engaged or was engaging in activities during her employment, that could be shown to be misconduct under the Staff Regulations and Staff Rules; the Board concluding however that the attitude adopted by the complainant as well as the reasons given for her attitude gave rise to serious doubts about the degree of confidence that could be placed in her integrity, judgment and loyalty to the Organization; the Board found justification for this opinion in stating that in a situation which, in its opinion, was clearly harmful to the Organization, the complainant maintained that adherence to her own personal views was more important than the interests of the Organization. This opinion restates in different terms the reasons invoked for the decision taken;

"K. . . . When requested to give an opinion on the decision itself, the Appeals Board, presided over by an eminent magistrate enjoying the confidence of all parties and composed jointly of members appointed by the Director-General and members appointed by the Staff Association, came unanimously to a diametrically opposed conclusion; after a full hearing and a thorough study of all the facts in the case, it unanimously concluded that the complainants had not failed in the high standards required of members of the Secretariat, had not committed acts incompatible with the integrity required of them and had not disregarded the true interest of the Organization; as a consequence, the decisions to terminate them had no basis in law and the said complainants had shown cause for requesting reinstatement; the Tribunal fully agrees with this particularly authoritative opinion. The Court must besides take into consideration the due care required of it in appreciating the validity of the decision taken, by reason of the striking and indefensible disproportion between the alleged attitude of the complainant and the measure taken against her, putting an end to the career on which she based her future, when no complaint regarding her work had been alleged; from this standpoint it is of no moment that the termination was not a disciplinary action in the formal sense of the Regulations and that certain indemnities were accorded, when the fundamental result is to deprive the party concerned of her employment by exposing her to all the risks and distress of an uncertain future.

"L. . . . It is thus established that the ground for complaint of the Director-General is based solely on the refusal of the official to participate in measures of verbal or written enquiry to which his national Government considers it necessary to subject him. The Director-General of an international organization cannot associate himself with the execution of the policy of the Government authorities of any State member without disregarding the obligations imposed on all international officials without distinction and, in consequence, without misusing the authority which has been conferred on him solely for the purpose of directing that Organization towards the achievement of its own, exclusively international objectives. This duty of the Director-General is governed by Article

VI, paragraph 5, of the Constitution of the defendant Organization in the following terms:

> ' The responsibilities of the Director-General and of the staff shall be exclusively international in character. In the discharge of their duties they shall not seek or receive instructions from any Government or from any authority external to the Organization. They shall refrain from any action which might prejudice their position as international officials. Each State Member of the Organization undertakes to respect the international character of the responsibilities of the Director-General and the staff, and not to seek to influence them in the discharge of their duties.'

" . . . The doubts raised as to the loyalty of the complainant to her own Government brought by a Government which enjoys in all respects the highest prestige, must be without any influence upon the consideration of the facts in the case and the determination of the principles whose respect the Tribunal must ensure. It will suffice to realize that if any one of the seventy-four States and Governments involved in the defendant Organization brought against an official, one of its citizens, an accusation of disloyalty and claimed to subject him to an enquiry in similar or analogous conditions, the attitude adopted by the Director-General would constitute a precedent obliging him to lend his assistance to such enquiry and, moreover, to invoke the same disciplinary or statutory consequences, the same withdrawal of confidence and the same application of Regulation 9.1.1 of the Staff Regulations, on the basis of any opposal by the person concerned to the action of his national Government. If this were to be the case there would result for all international officials, in matters touching on conscience, a state of uncertainty and insecurity prejudicial to the performance of their duties and liable to provoke disturbances in the international administration such as cannot be imagined to have been in the intention of those who drew up the Constitution of the defendant Organization.

" M. . . . It has been shown above that the attitude of the complainant towards the Loyalty Board in no way justifies the existence of serious doubts as to the high standards required of an international official. Neither does it appear that the complainant placed her own interests above the true interest of the Organization, as defined above. Therefore the only ground for complaint adduced by the Director-General to justify the application to the complainant of Regulation 9.1.1 of the Staff Regulations, that is to say her opposal to the investigations of her own Government, is entirely unfounded.

" N. . . . It results therefrom that the decision taken must be rescinded, the said decision not resting on any provision of the Staff Regulations; that nevertheless the Tribunal does not have the power to order reinstatement, which requires a positive act of the

Director-General, over whom the Tribunal has no hierarchical authority. In the absence of such a power and unless the Director-General should consider himself in a position to reconsider his decision in this manner, the Tribunal is none the less competent to order equitable reparation of the damage suffered by the complainant by reason of the measure of which she was the object.

II. "*On prejudice.*—Should the complainant not be reinstated with full rights, she should be compensated for the material and moral prejudice which she has suffered by reason of the decision taken. Such prejudice may be assessed *ex aequo et bono* at two years' base salary, . . .

"[The Tribunal accordingly] orders the decision taken to be rescinded and declares in law that a legal basis therefor cannot be found in the Staff Regulations. In consequence, should the defendant not reconsider the decision taken and reinstate the complainant, [the Tribunal] orders the said defendant to pay to the complainant an amount equal to two years' base salary, . . ."

[Report: Judgment No. 22 of the Administrative Tribunal of the International Labour Organization, to be printed in the *Official Bulletin* of the International Labour Office.]

NOTE.—(1) Similar decisions were given by the same Tribunal on the same date in the cases of *Pankey* v. *UNESCO* (Judgment No. 23) and *Van Gelder* v. *UNESCO* (Judgment No. 24).

(2) With respect to investigations into alleged subversive activities of international officials see *Duberg* v. *UNESCO*, *supra*, p. 768.

International Organizations — Officials — Nationality of — Double Nationality — Powers of Secretary-General to Determine An Official's Nationality for Administrative Purposes.

JULHIARD *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

(Mme Bastid, President; Petrén, Perez Perozo.)

Administrative Tribunal of the United Nations. December 3, 1955.

THE FACTS.—The complainant entered the service of the United Nations on July 1, 1946, and was granted an indefinite appointment as a bilingual typist in the French typing pool of the Languages Division of the Department of Conference and General Services. On the application form completed by the complainant, she stated her nationality as being French-American. The complainant, who was born in the United States, held American citizenship *jure soli*, while she also held French nationality *jure sanguinis*. From September 1946 to July 1951, the complainant was employed as a secretary in the French Section of the Languages Division, and from July 30, 1951, until October 31, 1952, as a translator-trainee in the same section. On November 1, 1952, she was transferred to the Documents Control Division of the Department of Conference and General Services where, at the time her complaint was submitted, she occupied the post of Editorial Assistant.

By a letter dated June 29, 1953, which was received by the complainant on July 7, 1953, the Bureau of Personnel notified the complainant that the question of her nationality had been considered and that, in accordance with Staff Rule 104.8(b), which gave the Secretary-General authority to make a determination of nationality for the purposes of the Staff Regulations and Rules, it had been decided that she should be considered as being of United States nationality for the purposes of the Staff Regulations and Rules. On July 10, 1953, the complainant asked the Administration to indicate the reasons for this decision, and on July 28, 1953, the Acting Director of the Bureau of Personnel stated that "(3) The view was reached that it would be difficult for the purposes of the Staff Regulations and the Staff Rules, to regard a citizen of the United States as a citizen of another country while she was a resident in the United States; just as it would be difficult to regard a French citizen as a citizen of another country while she was resident in France, and (4) The record shows that your length of residence in the United States and your other associations with that country are both so considerable that they cannot well be overlooked."

On July 31, 1953, the complainant requested the Administration to reconsider its decision, and upon this being refused she filed an appeal with the Joint Appeals Board on December 21, 1953. In a report dated February 2, 1955, the Board indicated that it found no basis for review of the administrative decision appealed against by the complainant, and therefore made no recommendation in support of it. By a letter dated February 21, 1955, the Secretary-General confirmed the decision previously taken. On May 25, 1955, the complainant instituted proceedings before the Tribunal.

The main contentions of the complainant were as follows:

(a) The decision complained of caused serious injury to the complainant in that it deprived her of the rights and privileges hitherto accorded to her in accordance with the provisions of the Staff Regulations and Rules applicable to internationally recruited officials. In particular, as a result of the decision complained of, the complainant would no longer be entitled to (i) home leave, granted every two years, and involving the payment by the United Nations of travelling expenses to and from the home country of the official, as well travel time which was not deducted from the leave entitlement of the official concerned; (ii) repatriation grant, *i.e.*, a grant paid upon cessation of service in an amount proportional to the length of service of the official concerned; and (iii) payment of travel and removal expenses upon cessation of service. While it was true that as the wife of an official of French nationality, the complainant continued to enjoy certain privileges, the enjoyment of these privileges were dependent both on her marital status and on the official status of her husband, and the privileges themselves were less extensive than those which she enjoyed in her own right as an internationally recruited official. In particular, when the complainant accompanied her husband on the home leave to which he was entitled in respect of himself and his wife, she was not entitled to travel time, which was deducted from her leave entitlement. She also ceased to be entitled to the French national holiday of the Fourteenth of July.

(b) The decision complained of constituted an excess of authority and an arbitrary act in so far as it radically altered an essential element in the complainant's official status resulting from her contract of employment and terms of employment, although no new fact had occurred to change the complainant's personal status in the matter of nationality since she entered the service of the United Nations, nor had the defendant organization alleged any past error to justify its reversal of policy.

(c) The defendant organization, by originally recognizing that the complainant was of French nationality, had recognized certain rights which it failed to respect when it later revoked the decision. Thus the defendant organization had infringed the principle of inviolability of the individual effects of administrative decisions.

(d) The decision complained of, taken in accordance with Staff Rule 104.8(b), appeared to be due to a confusion between the purpose of the Rule, which was solely to determine a nationality for administrative purposes, and the grounds on which the determination was made and which involved considerations external to the United Nations, which were legal as well as political, linguistic and sentimental.

(e) The decision complained of was improper because in applying Staff Rule 104.8(b) errors of fact and of law had been made in the evaluation of the factors which might serve to determine the country with which the complainant was " most closely associated ". The criterion laid down in the Rule governing the determination of nationality must be applied individually and not *in abstracto*.

(f) In attaching great importance to the length of the complainant's residence in the United States, the defendant organization took a view directly contrary to the purpose of Staff Rule 104.8(b), which was to assign a single nationality to an official and not to regard him as having one nationality on some occasions and another on different occasions, according to his place of residence. This would be tantamount to assigning an official different nationalities according to his duty station.

(g) With respect to the fact that the complainant held a United States passport, relied upon by the defendant organization, it was natural and proper that, as a national of two States, the complainant should have in her possession a passport issued by the authorities of each State. The complainant specifically disputed that the fact that she had applied for and obtained a United States passport carried more weight in the determination of her nationality for the purposes of the Staff Regulations and Rules than the fact that she had applied for and obtained a French passport.

(h) The language element had not been given its due weight, and the complainant drew attention to the fact that, as from January 1, 1951, she received a language allowance for English, which was equivalent to an admission on the part of the Administration that English was not her mother tongue. For a total of seven years, the complainant occupied posts to which she had been assigned because French was her mother tongue and she was French by education and upbringing. Language was one of the factors which should be taken into account in determining whether, in a case of multiple nationality, an individual was more closely associated with one State than with another.

(i) With regard to the facts that the complainant was liable to taxation levied by the United States on the salary paid to her by the United Nations and the tax so levied was reimbursed to her by the United Nations, and that the complainant did not pay taxes in France, where United Nations officials were exempt from taxation on salaries paid by the United Nations, and was required to pay taxes in the United States, where officials did not enjoy such exemption, could not be taken into account in evaluating her links with those two countries. The fact that the Administration reimbursed the taxes levied by the United States did not constitute a benefit for the official concerned, but a means whereby the Administration ensured equality of treatment between officials who were liable to national taxation and those who were exempted from it.

The following main contentions were advanced on behalf of the defendant organization:

(a) The decision complained of was made under the terms of Staff Rule 104.8(b), which gave the Secretary-General discretionary power to make a determination of nationality for the purposes of the Staff Regulations and Rules with a view to ending administrative difficulties arising from the dual nationality of some officials.

(b) It was not denied that the complainant had close associations with France, but it was necessary, under the terms of Staff Rule 104.8(b), to choose one nationality only for administrative purposes. Among the elements contributing to the decision to regard the complainant as an American national, the following were relied upon: (i) The complainant was born in the United States, where she lived until the age of six; (ii) After spending most of her time in France from 1925 to 1941, with a two-year interval in the United

States, the complainant, upon attaining her majority, applied for and received a United States passport and returned to the United States in 1941, making use of her American passport for the purpose. The complainant still had a valid United States passport; (iii) Since 1941, the complainant resided continuously in the United States, and was a resident of the United States at the time of her appointment; (iv) Each year, from 1946 onwards, the complainant claimed and received reimbursement for income tax paid by her to the United States on her United Nations salary. Officials who were not citizens or permanent residents of the United States were exempted from payment of United States income tax.

(c) The decision complained of did not affect any acquired right of the applicant. Although the United Nations was aware of the complainant's dual nationality, it regarded her from the beginning as a United States national rather than as a French national for administrative purposes. The fact that the complainant was granted home leave to France in 1948 and 1952 would seem to be attributable to some uncertainty as to her nationality status and could not be construed as an acquired right. In 1950 and 1954, the complainant went on leave to France at the expense of the United Nations as the wife of an official of French nationality, and not in her own right. In this connection, the Tribunal ascertained and held that this contention was not in accordance with the facts, and that in 1950 the complainant enjoyed home leave in her own right.

(d) With respect to the contention that the complainant's professional assignments showed that the United Nations regarded her as a French national, these assignments had no bearing on the question of nationality.

(e) The injury allegedly sustained by the complainant appeared to be reduced substantially to the fact that, being regarded as a United States national, she could not be excused from work on the French national holiday, which hardly seemed sufficient ground for bringing a case before the Tribunal, and the Tribunal might consider whether the complaint should not be dismissed as frivolous.

(f) If the complainant really wished to be regarded as a French national, she could have renounced her United States citizenship.

(g) The decision complained of was neither arbitrary nor capricious, and in the absence of proof of improper motive the Tribunal had consistently declined to review the exercise of the Secretary-General's discretionary power, or to substitute its judgment for that of the Secretary-General.

Held: that the complaint must be dismissed. The complaint alleged non-observance of the Staff Rules capable of affecting the complainant's rights and was not frivolous; but the complainant had no acquired rights in the matter of nationality resulting from a previous decision of the defendant organization, no such decision having taken place. The Secretary-General had authority to determine for administrative purposes the nationality of officials enjoying double nationality; and in the exercise of the Secretary-General's discretionary powers it was reasonable, having regard to the facts of the case, to regard the complainant as a national of the United States for administrative purposes.

The Tribunal said: "The Application requests the Tribunal to order that the Secretary-General's decision of 23 April 1953, which was confirmed on 21 February 1955, to consider her as being of United States nationality for the purposes of the Staff Regulations and Rules, be rescinded and that the Applicant be regarded as a French national for those purposes.

"Though making no formal submission to that effect, the Respondent suggests that, having regard to the facts of the case and to the circumstance that the Applicant has suffered no damage as a result of the contested decision, the Tribunal might wish to consider whether the Application should be dismissed as frivolous.

"Under Article 7, para. 3, of the Tribunal's Statute, an application may be declared inadmissible on the ground that it is frivolous. The text of the paragraph is a follows:

> 'In the event that the recommendations made by the joint body and accepted by the Secretary-General are unfavourable to the applicant, and in so far as this is the case, the application shall be receivable, unless the joint body unanimously considers that it is frivolous.'

"In the present case, the Joint Appeals Board has not, to the Tribunal's knowledge, unanimously found the application to be frivolous. The conditions for the application of this provision have not, therefore, been fulfilled.

"In view of the Respondent's submission in his Answer, the Tribunal has examined the nature of the damage the Applicant alleges she has suffered.

"The Applicant maintains that the Respondent's decision to consider her as being of United States nationality has resulted in her losing home leave, repatriation grant and payment of travel and removal expenses in her own right (Staff Rule 104.7). She is thus deprived of the travel time granted to staff members travelling on home leave, which amounts to twelve days every two years.

"The Respondent contends that, as the wife of a staff member of French nationality, the Applicant is still entitled to home leave despite the fact that she is classified as a United States national. The damage she has suffered is reduced to the fact that, as a United States national, she cannot be excused from work on the Fourteenth of July.

"The Tribunal observes that every staff member as a consequence of his recruitment by the United Nations, is entitled to the benefits provided for in the Staff Regulations and Rules. He enjoys those benefits in his own right and may file applications with the Tribunal alleging non-observance of his contract or conditions of employment, even if he is enjoying equivalent benefits indirectly as the spouse of another staff member.

" Without going into the comparative advantages of home leave obtained by a staff member as a spouse or in his own right, the Tribunal is of the opinion that since the Application alleges non-observance of a provision of the Staff Rules capable of affecting the Applicant's legal status as a United Nations staff member, it must be examined as regards substance.

" The contested decision is criticized, first, on the ground that the Respondent has allegedly committed an excess of authority and an arbitrary act in so far as he has radically altered an essential element in the Applicant's official status resulting from her contract of employment and terms of appointment, although no new fact has occurred to change the Applicant's personal status in the matter of nationality since she entered the service of the United Nations. According to the Applicant, the Respondent decided as early as 1946 to regard her as being of French nationality. She contends that that decision created certain rights, which should be respected.

" The Respondent denies that such a decision was made. He maintains that, although the United Nations was aware of the Applicant's dual nationality, it considered her from the beginning rather as a United States national than as a French national for administrative purposes. The fact that she was granted home leave in her own right, together with travel time, would seem to be attributable to some uncertainty over her nationality status.

" The Tribunal observes that, before Staff Rule 104.8 came into force, the Respondent had found it necessary, in applying various provisions of the Staff Regulations and Rules, to consider the special position of staff members with dual nationality. Some of those provisions, however, did not refer to ' nationality ' or to the country of which a staff member was a ' national ', but to the ' country of origin ' or the ' home country '. Under Provisional Staff Regulations, provision was made at the time of appointment for the payment of travel expenses ' to and from the place recognized as the staff member's home '. A staff member employed by the United Nations in a country other than his home country was to be entitled to an allowance for children studying in the home country. The provision relating to home leave stated: ' . . . A staff member whose home country is the country of his official duty station or who continues to reside in his home country while performing his official duties shall not be eligible for home leave.'

" The Staff Rules which have been in force since July 1, 1951, use the term ' nationality ' in English and ' *ressortissant* ' in French. Rule 80, for example, provides that ' The primary purpose of home leave is to allow staff members who are serving outside the country of their nationality periodically to spend a substantial period of leave in that country'.

" In attempting to determine whether the Respondent had made a definite choice between the Applicant's two nationalities before the contested decision taken on the basis of Staff Rule 104.4, the Tribunal found that most of the official documents quoted by the two parties shed no light on this point. This is true of the documents in which reference is made to the Applicant's dual nationality, and of the personnel action forms dealing with other matters, in which no reference is made to the place of home leave. The memorandum of 11 January 1951 containing an entry to the effect that the Applicant would not receive non-resident's allowance cannot be regarded as proof that a decision had been taken in regard to her nationality, since under the rules relating to the allowance in question the latter depends on the place of residence at the time of appointment and not solely on nationality. The same applies to the documents containing a reference to the normal place of residence, as an entry under that heading does not involve a choice of nationality.

" The Applicant, on the other hand, draws attention to three facts, which, she submits, are evidence of a choice on the part of the Respondent between French and United States nationality. Two of these facts have not been contested by the Respondent. The first is that, from 1949 to 1953, the Applicant was described as French in the list of staff submitted annually to the General Assembly by the Secretary-General. The second is that until 1952 she was excused from work on the French national holiday. Lastly, the Applicant states that she was granted home leave in France in 1948, 1950 and 1952 and was allowed travel time in those years, which means that she was enjoying that benefit in her own right.

" In his Answer, the Respondent admits that the Applicant had home leave in 1948 and 1952, but states that in 1950 she went to France solely as the wife of a staff member of French nationality. After re-examining the official documents at the Tribunal's request, the Respondent has, however, admitted that in 1950 the Applicant travelled to France in her own right and was granted travel time.

" Thus, in various connexions and, in particular, for the purposes of Rule 80 of the Staff Rules in force on 1 July 1951, the Respondent treated the Applicant as a French national, just as he had previously regarded France as her home country.

" The parties disagree on the importance to be attached to the reimbursement by the United Nations of the taxes levied by the United States Government on the Applicant's salary. The Applicant's contract contained the following statement: 'Any taxation levied on your salary by your national government will be refunded to you by the United Nations Organisation.' The Respondent contends that, by reimbursing the amount of the income tax paid by the Applicant to the United States, the United Nations has shown that it has regarded her as a United States citizen from the beginning of her employment. In the Applicant's opinion, the clause quoted above does not provide that the United Nations has regarded her as a United States citizen from the beginning; she maintains that the clause was regularly included in contracts of employment and does not refer to any specific country. Furthermore, the reimbursement of taxes does not constitute a benefit for the official concerned, but a means whereby the Administration ensures equality of treatment among staff members.

" The Tribunal recognizes that the clause relating to the reimbursement of taxes was regularly included in contracts at the time the Applicant was recruited and that its presence is not in itself sufficient to determine the nationality assigned to the Applicant by the Respondent. But the Tribunal observes that the reason why the taxes paid by the Applicant to the United States Government were reimbursed was that the Respondent regarded that Government as the Applicant's national Government for the purposes of the above-mentioned clause.

" The Tribunal therefore concludes that the Respondent regarded the Applicant as French for the purposes of certain Staff Rules, but at the same time regarded the United States Government as her national Government. These facts are not inconsistent with the declaration of dual nationality made by the Applicant in her application for employment. The Tribunal cannot, therefore, accept the argument that the nationality specified by the Respondent in the Applicant's contract was to the exclusion of any other nationality. Consequently, it cannot admit that the Applicant thereby acquired a right or that the Respondent should be bound to observe that right, now that a new Staff Rule makes it mandatory for the Secretary-General to select a single nationality for the purposes of the Staff Rules and Regulations by reference to a criterion laid down in that Rule.

The Applicant further contends that, in applying Staff Rule 104.8, the Respondent has disregarded or misinterpreted the criterion laid down in that Rule. She claims that, in following that criterion, the Respondent committed errors in evaluating the factors which may serve to determine the State with which the Applicant is ' most closely associated '.

" While asserting that the United States is the State with which the Applicant is most closely associated, the Respondent states that the Secretary-General has discretionary power to make a determination of nationality. He points out that, in the absence of proof of improper motive, the Tribunal has consistently declined to review the exercise of the Secretary-General's discretionary power or to substitute its judgement for that of the Secretary-General.

" The Tribunal observes that Staff Rule 104.8 specifically authorizes the Secretary-General to determine the nationality of a staff member for the purposes of the Staff Regulations and Rules. In exercising this power, the Secretary-General is in no way bound by the action taken by national authorities in granting passports or exercising their powers of taxation.

" Under Staff Rule 104.8, however, the Secretary-General is required in exercising this prerogative to comply with the principle that the nationality assigned shall be that of the State with which ' the staff member is . . . most closely associated '. That being so, the Tribunal can, without substituting its judgement for that of the Secretary-General, consider whether, having regard to the circumstances, it was reasonable for the Secretary-General to conclude that the Applicant was most closely associated with one State rather than with another.

" In the present case, the points taken into account by the Secretary-General appear to be the fact that the Applicant was born in the United States; that she lived in the United States up to the age of six and subsequently from 1941 onwards, in addition to a period of two years from 1937 to 1938; that she applied for a United States passport on attaining her majority and at present holds such a passport; and that the taxes she has paid to the United States Government have been reimbursed by the United Nations since 1946.

" The Tribunal must first point out that if, as the Respondent states, the reason for the inclusion of Staff Rule 104.8 was to ensure that the United Nations did not have to pay home leave expenses and at the same time reimburse taxes levied by the United States, the text of the Rule, as at present drafted, makes no reference to that purpose. If that was the only factor to be taken into account, all staff members with United States and another nationality would automatically be assigned the former, which would obviously conflict with the provision requiring the Secretary-General to choose the nationality of the State with which the ' staff member is . . . most closely associated.'

" The Tribunal further points out that the Respondent's argument that ' had the Applicant really wanted to be regarded as a French citizen, she could have renounced her American citizenship ' disregards the purpose of Staff Rule 104.8. The purpose of that Rule is to provide a solution to the administrative problems created by possession of more than one nationality and not to bring indirect pressure on staff members to renounce one of their nationalities.

" The factors taken into account by the Respondent have been discussed at length by the Applicant. While she does not question the correctness of most of them, she draws attention to the fact that she settled in the United States in 1941 on account of the War.

She has emphasized that she has close links with France and that those links have been strengthened by her marriage to a Frenchman. Lastly, she contends that the Respondent should have taken account of other factors, and particularly of her native language.

"The Tribunal is not called upon to express an opinion as to the State with which, having regard to all circumstances, the Applicant is most closely associated. It considers, however, that, quite apart from the question of taxation, the facts taken into account by the Respondent unquestionably constitute links between the Applicant and the United States. Those links are such that, in the exercise of his discretionary power, it was reasonable for the Respondent to conclude that, for the purposes of Staff Rule 104.8, the United States is the State with which the Applicant is most closely associated. The Tribunal accordingly rejects the application."

[Report: Judgment No. 62 of the Administrative Tribunal of the United Nations: United Nations Document AT/DEC/62.]

International Organizations—Officials—Reimbursement to Judgment Creditors of Income Tax on Indemnities Awarded by United Nations Administrative Tribunal—Deduction of Notice and Termination Indemnities from Tribunal Awards of Compensation and Arrears of Salary.

See p. 689 (*Crawford et Al.* v. *Secretary-General of the United Nations*).

PART X

DISPUTES

A—ARBITRATION

I.—In General

i.—Conception and Function of Arbitration

Arbitration—In General—Conception of Arbitration—Distinction between Arbitral Tribunals and Conciliation Commissions.

See p. 867 (*Re Competence of Conciliation Commission*).

ii.—The Law Applied by Arbitral Tribunals

Arbitration—In General—Law Applied by Arbitral Tribunals—Arbitration of Dispute Arising out of an International Agreement between States—Application of International Law to Exclusion of Municipal Law of Either Party—Rules of Interpretation of the Agreement—Principle of Good Faith—Intention of the Parties—Consideration of Object of the Agreement—Circumstances in which it was Concluded—Principle of Effectiveness—" Clear and Unambiguous Clauses "—Burden of Proof—Choice of Money of Contract—Effect of Devaluation of Currency—Difference between Function of Currency as Medium of Payment and as Measure of Debt—Choice of Money of Account—Rate of Exchange—Whether to be Taken as at Date when Debt Arose or at Date of Settlement.

IN THE MATTER OF THE DIVERTED CARGOES (GREECE *v.* GREAT BRITAIN).

Cassin, Arbitrator. June 10, 1955.

THE FACTS (as stated in the report).—" During the Second World War, as a result of the occupation of Greece and the Greek Islands, a certain number of merchant vessels bound for various Greek ports were diverted from their original destinations to ports in the Middle East in Allied hands to avoid all risk of capture and seizure by the enemy. The British Authorities then, with the consent of the Royal Hellenic Government, took over the cargoes belonging to the latter so as to use them in the best interests of the Allied war effort. For the same purpose the British Authorities requisitioned the cargoes belonging to individuals or persons other than the Royal Hellenic Government. On February 11, 1942, the two Governments signed an Agreement governing the disposal of the diverted cargoes and the financial consequences thereof. In Section A of this Agreement, dealing with cargoes consigned or belonging to the Royal Hellenic Government which had been taken over by the British Authorities, it was laid down that (i) all cargoes or parcels of cargoes, the release of which might be required by the Royal Hellenic Government, should be released to the competent Hellenic Authorities in Egypt while the British Authorities would dispose of the rest in the best interests of the Allied War effort; (ii) the Royal Hellenic Government would be credited in respect of the cargoes taken over and disposed of ' upon the basis of the f.o.b. cost of the goods plus a sum equal to the cost of effecting marine insurance on the London market and war risk insurance with the competent office of the Ministry of War Transport on a value not exceeding the f.o.b. cost of such cargoes in respect of the original voyage to Greece or the Greek Islands as the case may be.'

" In Section B of the same Agreement, dealing with cargoes consigned otherwise than to the Royal Hellenic Government, it was laid down that:—

> '(i) All such cargoes shall be requisitioned by the Minister of War Transport or other proper authority or otherwise handed over to Her Majesty's Government in the United Kingdom upon their arrival at their respective discharging ports and there discharged.
>
> '(ii) After discharge the Minister of War Transport shall arrange for such cargoes or parcels to be disposed of on the advice of the Middle East Supply Centre in the best interests of the Allied war effort, but should the Royal Hellenic Government require the release of any cargoes or parcels of cargo, such cargoes or parcels of cargo shall be released to the competent Hellenic authorities in Egypt upon application to the Middle East Supply Centre within a certain period.
>
> '(iii) Should any cargoes or parcels of cargo, which are claimed by private persons, not be required either by the Royal Hellenic Government or otherwise in the interests of the Allied war effort, the Minister of War Transport or other proper authority may arrange for the release of such cargoes or parcels of cargo to the persons claiming them on such terms as he or they may direct.
>
> '(iv) If any claim for compensation is received by the Minister of War Transport or other proper authority within six months of the requisition or taking over of any cargoes or parcels of cargo referred to in Section B of the Agreement from any person claiming to be the owner of such cargoes or parcels of cargo, such claims shall be dealt with by the Minister of War Transport or other proper authority in such manner as he or they may think fit.
>
> '(v) If after the expiration of six months from the date of the requisition or taking over of such cargoes or parcels of cargo no claim has been received from any person claiming to be the owner thereof, the Minister of War Transport or other proper authority shall credit the Royal Hellenic Government with the f.o.b. cost of such cargoes or parcels of cargo together with a sum equal to the cost of effecting marine and war risk insurance in respect of the original voyage to Greece.
>
> '(vi) Where any cargo or parcels of cargo have been released to the Royal Hellenic Government under paragraph (ii) of this Section or where credit has been given to the Royal Hellenic Government or

where any payment has been made by Her Majesty's Government in the United Kingdom in accordance with the provisions of paragraph (v) of this Section, the Royal Hellenic Government shall indemnify Her Majesty's Government in the United Kingdom or other proper authority or any other officer or agent of the Crown against any claim and any costs occasioned thereby which may at any time be made against them or any of them in respect of the requisition or taking over, delivery or disposal of such cargoes or parcels of cargo.

'(vii) The Royal Hellenic Government undertake as soon as opportunity permits, to take all necessary action to prevent Greek nationals or other persons resident in Greece from making any claims upon or taking any legal proceedings of whatsoever nature against Her Majesty's Government in the United Kingdom or other proper authority or any other officer or agent of the Crown in respect of the requisition or taking over, delivery or disposal by them or any of them of any cargoes or parcels of cargo referred to in this Agreement.'

" Finally, in Section C of the Agreement . . . it was agreed that 'the financial arrangements for credit to be given in accordance with the provisions of Sections A and B of this Agreement shall be the subject of separate negotiations between Her Majesty's Government in the United Kingdom and the Royal Hellenic Government.'

"After the end of the war the two Governments concerned entered into negotiations on the total of the sums with which the Royal Hellenic Government was to be credited.

" In particular, [at the instance of] the British Minister of War Transport, a limited Anglo-Hellenic Committee was set up to undertake in London the examination of the relevant documents in respect of each cargo and the fixing of the values with which the Royal Hellenic Government was to be credited in accordance with the Agreement of February 11, 1942. This Committee was simply to be a Working Group concerned solely with questions of accounting, the members on both sides being free to refer back any major questions of principle. The Committee, which met at the beginning of 1946, did not in fact check the documents of an important section of the cargoes belonging to Greece referred to in Section A of the Agreement, namely, those acquired with Lease-Lend funds and those consisting of war material whether consigned to the ' Greek Service Ministers ' or not. It did, on the other hand, check all the documents relating to cargoes requisitioned from private persons and referred to in Section B of the Agreement. The work of the Committee ended, without a formal report or exchange of letters, by provisionally fixing the agreed value of goods purchased in pounds sterling at £1,438,600 and the agreed value of goods purchased f.o.b. in the United States in dollars, $4,051,401, for each of which there was an accounting conversion into pounds sterling at the parity then prevailing of 4·027 or a total of £1,012,850.

" However, further negotiations proved necessary, in particular on certain points, as a result of which . . . the British Government agreed in a letter dated August 25, 1951, to admit the Greek claim for all the goods purchased in the United States by the Royal Hellenic Government with funds of which they had the free disposal, where such goods were taken over by the British authorities as envisaged in Section A of the Agreement of February 11, 1942, to the sterling equivalent of $2,057,698·94.

"[In the meantime, however] the British Government found themselves obliged to devalue the pound sterling, so that from September 18, 1949, the parity with the dollar, which for many years before the war had been 4·03, was reduced to 2·80. This event gave rise to a fresh dispute about the sterling value of cargoes of all descriptions bought in dollars and on board the ships diverted from their original destinations to the Greek ports. In a letter dated March 17, 1950, the Minister of Finance of the Royal Hellenic Government stated ' that from the moment when the payment of the value of the requisitioned cargoes was not made before the devaluation of the pound sterling, and whatever may have been the cause of this, the Royal Hellenic Government is not responsible, . . . the payment of the British Government's debt, on whatever date it may be made, will not be a full discharge thereof, unless the sums intended for the settlement of the debt are adjusted, so as to take account of the actual parity prevailing, and it could be taken as a fact that none of the persons entitled (private persons whose cargoes were requisitioned) would agree to have his claim reduced in this manner or to give a discharge on such terms . . . and some among them have already informed my department of their intention to refuse to agree to such a reduction of their claims.'

" The British Government on their side stated in their letter of August 25, 1951, that they could not agree that the dollar/sterling exchange rate should be other than $4·03 to the £, the rate prevailing at the time that the cargoes were diverted—and that in the absence of any express provision to the contrary the credit to be given to the Royal Hellenic Government must be a credit in pounds sterling, unless it were a credit in drachmae."

The arbitrator was now asked to determine whether the amount in pounds sterling with which the Greek Government should be credited in respect of the cargoes shipped in America whose original f.o.b. price was expressed in dollars and which were taken over by the British Government should be ascertained in accordance with the parity in force at the date of payment or in accordance with the parity in force prior to September 18, 1949.

Held: that the amount with which the Greek Government was to be credited must be calculated by reference to the dollar, and the amount in pounds sterling owed by the British Government in respect of cargoes purchased f.o.b. and paid for in dollars must be calculated at the rate of exchange in force at the date of payment, that is, on the day on which the credit due to Greece was given.

The Arbitrator said: " [*As to the law applicable*]—In the absence in the agreement to submit to arbitration of any special provisions establishing the law upon which the decision of the arbitrator is to be based, or authorising him to effect an amicable settlement, that arbitrator is obliged to limit himself to the functions of a judge and to give his decision ' upon the basis of respect for law ' in accordance with Article 37 of the first Hague Convention of 1907.

" Accordingly: The Agreement of the 11th of February, 1942, binding the British Government to credit the Royal Hellenic Government with the sums representing the cargoes of which they disposed, contains no provision determining either a fixed rate of conversion or the date (the day on which the debt arose or the day on which it is paid) which the parties must adopt for fixing the rate, applicable in the particular case, for conversion between the dollar and the pound sterling. Indeed neither of these currencies is mentioned. The solution of the problem submitted to the arbitrator depends therefore upon a more general question—that of ascertaining whether in the case of cargoes coming from the United States which had been purchased f.o.b. in dollars the Agreement of the 11th of February, 1942 (which includes other items originally expressed in pounds sterling), should be treated as having made the dollar the currency in which the contract debt should actually be paid, or at least the money of account, the pound sterling being in that case merely the currency in which the creditor could or must accept payment; or whether on the other hand that Agreement implicitly chose the pound sterling as the sole currency, both of account and of payment, for all the items in the case, whether they were originally expressed in pounds sterling or in dollars, the conversion into pounds sterling of the items originally expressed in dollars taking place once and for all on the day on which the debt arose and at the rate in force on that day. It is on this point that the representatives of the two States concerned have concentrated their arguments. . . .

" The Agreement of the 11th of February, 1942, is an international agreement of a financial character between two States acting as persons subjects of international law, and is directly concerned with the effects of a war waged by them jointly against a third Power, and as such, it is therefore unquestionably governed by international law (Hague Permanent Court of International Justice, 12th July, 1929, A, Nos. 20/21 (two decisions)[1], and not by the domestic law of either of the States concerned, as for instance, the law of either of them in matters of prize or requisition. Accordingly, the dispute arising from the different interpretations of the manner in

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[[1] *Serbian Loans Case*, Series A, No. 20 (1929), *Annual Digest*, 1929–1930, Case No. 278; and *Brazilian Federal Loans Case*, Series A, No. 21 (1929), *Annual Digest*, 1929–1930, p. 266.]

which such an agreement should be performed must be decided on the basis of international law. The principles of international law governing the interpretation of international treaties or agreements and the manner of proof have been evolved by legal writers and more particularly by international case-law in close conformity with the rules for the interpretation of contracts adopted among civilised nations (see E. Hambro, *The Case Law of the International Court*, 1952, pp. 26 to 56, and, for France, Articles 1134, 1156 *et seq.* and 1315 of the *Code Civile*).

" Of these rules of interpretation those which must be particularly borne in mind are: the fundamental principle of good faith which governs both the interpretation and the performance of agreements and which leads to an enquiry as to the common intention of the contracting States (P.C.I.J., 11th August, 1932, *Statute of Memel*[1]); the consideration of the object of the agreement and of the time when, and the circumstances in which, it was concluded (P.C.I.J., 26th April, 1928, *Minorities in Upper Silesia*[2]); the principle of effectiveness which raises the presumption that the draftsmen of a clause intended it to have a specific meaning and a practical effect (P.C.I.J., *Acquisition of Polish Nationality*[3], 15th September, 1923—Opinions, Series B, pp. 16–17); and lastly, the rule that clauses that are clear and unambiguous do not require to be interpreted (see, in particular, P.C.I.J., 7th September, 1927, *Lotus*[4], decree No. 9, Series A, No. 10, p. 16; Ch. Rousseau, *Principes de droit international public*, Vol. I, pp. 676–764; *Droit international public*, 1953, No. 55; Delbez, *Le droit international public positif*, Vol. II, pp. 90 *et seq.*).

" As regards the burden of proof, it falls upon the State which claims from another State the performance of an obligation to establish the existence and the amount of the claim. (Delbez, *op cit.* Vol. II, p. 591.) Specifically, when there is a contractual claim for a sum of money, the claimant State must satisfy the judge or international arbitrator that the currency in which it demands payment is really that which was provided for in the agreement and, also prove that a money of account, different from the money of payment, should by virtue of the agreement determine the amount of the claim, that is, the quantity of the currency of payment with which the debtor State must credit the creditor so as to discharge its debt.

" The rules of interpretation and proof above referred to are applicable to the present case.

[1] *Interpretation of the Statute of Memel*, Series A/B, No. 49 (1932), *Annual Digest*, 1931–1932, p. 384.]

[2] *Certain German Interests in Polish Upper Silesia* (*Minority Schools*), Series A, No. 15 (1928).

[3] *Acquisition of Polish Nationality*, Series B, No. 7 (1923), *Annual Digest*, 1923–1924, p. 292.]

[4] *The Lotus*, Series A, No. 10 (1927), *Annual Digest*, 1927–1928, Case No. 296.]

" I.—The first question to decide is what is the currency—dollar or pound sterling—which the Agreement of the 11th of February, 1942, has chosen as the money of contract for the effective settlement of the claim of the Royal Hellenic Government in respect of the cargoes purchased by them or by private persons in the United States, on f.o.b. terms expressed in dollars.—The Royal Hellenic Government raised this question so as to justify their claim for a payment in pounds sterling at the rate of 2·80 dollars to the pound sterling which had been in force since the 18th of September, 1949. For this purpose they relied upon the terms in which the British Government in the Agreement of the 11th of February, 1942, undertook in Section A to credit the Royal Hellenic Government ' on the basis of the f.o.b. cost of the goods [which had belonged to the Greek State] plus a sum equal to the cost of effecting marine insurance on the London market and war risk insurance with the competent office . . . on a value not exceeding the f.o.b. cost of such cargoes in respect of the original voyage to Greece ' and in Section B (v) with ' the f.o.b. cost of the requisitioned cargo [from private persons] together with a sum equal to the cost of effecting marine and war risk insurance in respect of the original voyage to Greece.'

" From the undertaking thus expressed the claimant has inferred that Her Majesty's Government in the United Kingdom were subrogated to the rights and liabilities of the Royal Hellenic Government and of the Greek subjects in respect of the cargoes of which they disposed during the war and that they should therefore pay in dollars exactly and effectively all that had been paid out by the consignees for such cargoes, that is, not only the f.o.b. purchase price but also the expenses of insuring which were paid or expressed some in dollars and some in pounds sterling. It is claimed that this follows from the clause in Section A (ii) referring to ' a sum not exceeding the value of the cargoes ' which is said to bind Her Majesty's Government in the United Kingdom to credit the incidental expenses of insurance in the same dollar currency as the cost of the American cargoes themselves.

" This line of reasoning based alike on the letter of the Agreement and the object of the parties necessarily implies that the Agreement of the 11th of February, 1942, which created between the parties an account entirely separate, autonomous and independent of all the other financial relations existing between them as the result of other circumstances relating to the war, should have itself provided for the sub-division of this account into several accounts in different currencies, the one in pounds sterling in respect of the cargoes purchased in pounds sterling by the Royal Hellenic Government or its subjects and the other in dollars.

" The Royal Hellenic Government contend that, being an ally who wished to maintain the friendliest relations with Her Majesty's Government in the United Kingdom, they admittedly never refused to be credited in pounds sterling instead of in dollars as long as there was no immediate and important reason for refusing such a conversion. It was on this basis that they authorised one of their experts to take part in the checking of the shipping documents relating to the privately-owned cargoes carried out at the beginning of 1946 by the Joint Committee set up to examine the accounts, and accepted the conversion into pounds sterling that was then made of claims originally in dollars at the parity of $4·03=£1 which had obtained for many years and had been maintained throughout the war. On the 1st of August, 1949, they further expressed the intention of laying before the Hellenic Parliament a Bill authorising the acceptance of this conversion provided the points at issue were settled. This attitude was however the voluntary expression of their goodwill, and as far as they were concerned they had never waived their original right and as the pound sterling had been devalued on the 18th of September, 1949, before the two Governments had reached agreement on all the claims arising in favour of Greece under the heading 'diverted cargoes' the original claim that had never ceased to exist in dollars remained fully in force; and in short, they, as creditors, would never agree to exercise the option, which they had never ceased to possess, of accepting a settlement in pounds sterling unless this took place at the existing rate of exchange of $2·80 and did not involve any loss to them, who, in their turn, were debtors of their subjects who had owned the requisitioned cargoes and also contractual guarantors of Her Majesty's Government, in the United Kingdom, against any claims by such subjects.

"This argument could have been conclusive if the Royal Hellenic Government after the invasion of its territory by the enemy had assigned to Her Majesty's Government in the United Kingdom the benefit and the burden of the purchases or contracts in course of delivery with the suppliers in the United States. As on such an hypothesis it would have been a question of settling in dollars for goods supplied or promised to the merchants of a third State, the substitution of the British Government for the Royal Hellenic Government and its subjects would naturally have had the effect of binding the assignee to pay in dollars for the goods not yet delivered and also to repay or credit the assignors in dollars up to the value of the goods which had been the object of payments by instalments. This is what took place for instance when the British Government in June, 1940, having had assigned to them the war contracts entered into for France in America and partially paid for in advance in dollars, agreed to repay France, by a banker's credit in dollars when and as deliveries took place, the instalments already paid by her to the American suppliers.

"This, however, was not the case in the present instance; Her

Majesty's Government in the United Kingdom did not have assigned to them by the Royal Hellenic Government and its subjects at the time of the invasion of Greece and the occupation of its ports contracts involving relations with the merchants of a third country. They acquired a right to dispose of goods shipped f.o.b. and already paid for in America. By their Agreement the two Governments, closely united in their struggle against the common enemy, rejected the application of prize law, including the principles which in English law govern the compensation of owners of requisitioned goods or of non-contraband cargoes, the seizure of which is not legally justifiable. In short, the said Agreement gave rise only to legal relations limited to the contracting countries, Britain and Greece, and to the owners of the cargoes in question.

" From this it can be presumed, as Her Majesty's Government in the United Kingdom contend, that there was a single account arising out of the Agreement of 1942 and that the debt was entirely in pounds sterling, which happens to be the currency of one of the contracting States, the debtor State, in whose territory the King of the Hellenes and the Royal Hellenic Government had established themselves to escape the enemy occupation, had signed the Agreement of the 11th of February, 1942, and would normally receive the credit promised by that Agreement. Moreover it was in pounds sterling that the two Governments had expressed their numerous other financial transactions arising out of the war. There is therefore no need in order to justify the choice of the pound sterling as the money of payment of the debt recognised by the Agreement of the 11th of February, 1942, to have recourse either to the alleged existence of a huge current account between the two Governments, which is a conception of municipal law, of which none of the elements is here present; or even to the idea of a general rule of uniform application governing the totality of the financial relations between Great Britain and Greece. This presumption, which is entirely reconcilable with the autonomous nature of the Agreement, is a rebuttable presumption and there is no rule of international law which fetters or impedes the liberty of two contracting States to provide for the satisfaction of an obligation in the currency of a third State even for the purpose of settling a debt which does not involve any legal relations except between them. This presumption could have been rebutted by the Royal Hellenic Government, the creditor, but in actual fact it is impossible to accept that they have proved that the account arising from the Agreement of the 11th of February, 1942, should be settled partly in dollars and partly in pounds sterling.

" The undertaking given by the debtor to give a credit ' on the basis of the f.o.b. cost of the cargoes ' which belonged to the Greek State did actually not of itself imply that the credit should be expressed in dollars. Admittedly in the case of the cargoes belonging to private persons the obligation undertaken was ' to credit the f.o.b. cost of the cargoes requisitioned ', but the difference between the form of words used in Sections A and B of the Agreement of 1942 has been satisfactorily explained by Her Majesty's Government in the United Kingdom by the fact that the cargoes belonging to the Royal Hellenic Government had not been actually, but merely notionally and for accounting purposes, the subject of marine insurance contracts unlike the cargoes belonging to private persons. It has never been suggested by anyone that the cargoes belonging to the Greek State should be paid for in a currency different from that which could be demanded in the case of private cargoes and there is nothing anywhere in the text of the Agreement of the 11th of February, 1942, to imply that the parties had the common intention of imposing upon Her Majesty's Government in the United Kingdom an obligation actually to divest themselves of a currency for which, in the words of their representatives ' they were starving ' in 1942, for the purpose of settling their relations with the Royal Hellenic Government. To give effect to the fundamental considerations to which the Royal Hellenic Government appeal it is not necessary to interpret the Agreement of the 11th of February, 1942, as creating a claim payable in dollars to that Government.

" Moreover the manner in which the Royal Hellenic Government sought the carrying out of the said Agreement in 1946 and 1949 on the eve of the devaluation of the £ confirms that they aimed simply at obtaining a credit in pounds sterling ' for which they were starving ' and not in dollars. If this attitude could not in any way be considered as an admission of having agreed to the substitution of a new agreement or as any sort of renunciation of such of their rights as concerned the real ' substance ' of their claim—and such would have had to be based primarily on the fact that their representative on the Joint Committee of Experts, who had no authority to take any decision on questions of importance, had consented in 1946 to convert into pounds sterling at the rate of 4·03 the f.o.b. costs in dollars of the cargoes requisitioned from private persons—it is nevertheless the case that the Agreement of 1942 did not merely make the pound sterling a currency *in facultate solutionis* or give the claimant an option between the pound sterling and the dollar but effectively adopted the former as the sole medium of payment. In short, the Agreement of the 11th of February, 1942, created a single account in a single currency, and it was a credit in pounds sterling that the British Government undertook to give, subject to certain conditions and at the end of a certain period, to the Royal Hellenic Government to the exclusion of any other currency.

" II. Should the obligation undertaken by Her Majesty's Government in the United Kingdom to give a credit in pounds sterling, in as far as it relates to the value of cargoes of American origin, be calculated by reference to the dollar regarded as the unit of value and as the money of account ?—There are numerous authorities drawing a distinction in questions of international settlements between the different possible functions of currency, either as a medium of payment or as the measure of the amount of the contractual debt to be settled (see in particular the decisions cited by Nussbaum, *Money in the Law, National and International,* 2nd Edition, pp. 376 and 382 *et seq.*; Martin Domke, 'International Loans and the Conflict of Law,' in *The Grotius Society Transactions,* 1937; Penciulesco, *La Monnaie de paiement dans les Contrats Internationaux,* 1937; and, especially as regards French Civil and Private International Law, Planiol, Ripert, Radouant, *Traité pratique de droit civil,* Vol. VII, No. 1191 and 1193; Batiffol, *Traité élémentaire de droit international privé,* No. 628, text and notes 50 and 53; Y. Loussouarn, ' Note sur quatre arrêts de Paris ', in *Revue Critique de droit international privé,* 1953, pp. 389 *et seq.*). In particular, the text of the Uniform Law on Bills of Exchange resulting from the multilateral Convention adopted at Geneva on the 7th of June, 1930, Article 49 (I) of which provides that ' when a Bill of Exchange is expressed to be payable in any currency other than that of the place of payment, the sum due may be paid in the currency of the country at the rate of exchange on the day of maturity. If the debtor is in default, the holder may at his option require the total of the Bill of Exchange to be paid to him in the currency of the country, either at the rate on the day of maturity or at the rate on the day of payment.' Article 49 (III) excepts from the operation of the abovementioned provisions the case where the drawer has expressly provided that payment should be made in a particular currency (condition as to actual payment in a foreign currency). This example merely illustrates the large number of cases in which private persons or States adopt by agreement (or occasionally have imposed upon them) a medium of payment different from that which serves to determine the amount of the obligation.

" Admittedly, the language used to denominate and fix the respective functions of the different currencies which can appear in any given case gives rise to certain ambiguities or shades of meaning as between the legislation and case law of different countries and even in relation to international teaching (see Nussbaum, *op. cit.,* p. 360). In the present instance the Royal Hellenic Government, in order to support their claim for a settlement at the parity of 2·80, and in addition to their original argument based on the dollar being the ' money of contract ' which has just been rejected in as far as concerns the currency of actual payment—have as a secondary argument contended that in the performance of the Agreement in dispute the dollar should be used as the ' money of account ', that is to say, as the standard intended to measure the quantity of pounds sterling with which they claim to be credited. Her Majesty's Government in the United Kingdom for their part contend that the pound sterling was chosen both as the medium of payment and as the sole money of account.

" The terms of the agreement to submit to arbitration entered into between the claimant and Her Majesty's Government in the United Kingdom submit to the Arbitrator in concrete form the whole question as to the dollar-sterling rate of exchange which should govern the financial settlement of the relations between the parties which are subject to the Agreement of the 11th of February, 1952, and it is the Judge's duty to examine all aspects of this question.

" The Agreement of the 11th of February, 1942, does not, any more than the agreement to submit to arbitration, make use of any ' terms of art ' giving rise to ambiguity. It is therefore necessary only to discover its true nature except in so far as recourse must be had to meanings of words as established by the case law of the highest international jurisdiction (the Permanent Court of International Justice—the International Court of Justice).

" The terms of the Agreement of the 11th of February, 1942, its nature, the circumstances in which it was concluded, as well as the intentions of the parties, combine to establish that the dollar, which the contracting parties excluded as the currency of actual payment, was adopted by agreement between them as the currency by reference to which to calculate the debt in respect of the Greek cargoes of United States origin which had been used by the British Authorities.

" Her Majesty's Government in the United Kingdom in the first place undertook in Section A of the Agreement to credit the Royal Hellenic Government ' on the basis of the f.o.b. cost of the cargoes ' belonging to the latter, and in Section B with ' the f.o.b. cost of the cargoes ' belonging to private persons. For such of those cargoes as were shipped in America this cost was expressed and paid in dollars. Consequently this cost must *necessarily* be worked out and put down in dollars for the purpose of giving the Royal Hellenic Government credit in pounds sterling.

" The literal application of this clause, which is clear and precise, does not call for any interpretation; it is reinforced by the fact that the Accord of the 11th of February, 1942, presents the special character of an agreement entered into between two allied Governments in critical circumstances, without any idea of profit-making, in the interests of their struggle against a common enemy.

" On the one hand, the Royal Hellenic Government and the Greek shippers who owned cargoes at sea did not from the spring of 1941 have any Greek port safe from enemy occupation and so had every interest in ceding amicably to the British Authorities in the Mediterranean power to dispose of such cargoes rather than run the risk of having to warehouse the goods for an indefinite period at the port of discharge of the diverted vessels, or of having them requisitioned by the British Authorities, or sold by auction with payment made in pounds sterling on their value at the time and place of unloading. Moreover, the owners of these cargoes only rarely availed themselves of the provisions in the Agreement giving them the right to claim their cargoes *in specie* within a fixed period.

" On their side, the British Authorities had the plainest interest, for the economic and even for the military conduct of the war, in not allowing to fall into the hands of the enemy or even those of neutral speculators or hoarders large quantities of goods already acquired, paid for and arrived in the Near East in ports belonging to Powers which were not legally at war with Germany and Italy.

" On a legal analysis the Agreement of the 11th of February, 1942, is ' a cession to, or placing at the disposal of, Her Majesty's Government in the United Kingdom at cost price' of all Greek cargoes in diverted ships, with the addition of a formal indemnity by the Royal Hellenic Government to Her Majesty's Government in the United Kingdom against all claims by private owners of cargoes requisitioned by the latter. This Agreement forms an autonomous whole which is not to be performed or interpreted by reference to other legal concepts which were either excluded by the parties or at least not chosen by them. This being so, neither of the two Governments concerned has the right either to dispute, to minimise or to exaggerate the scope of the debtor's undertaking, which is based on the ' f.o.b. cost ' of the cargoes.

" In the first place, Her Majesty's Government in the United Kingdom, the debtor, cannot here invoke the principles of prize law in force in England, as well as in Greece and in France, whereby compensation for goods wrongly seized or for requisitioned goods is paid by the seizing State solely in its national currency, but without any regard to the cost price, that is to say, to the sum in foreign currency which the owner deprived of his goods may have paid at the port of loading. (Schwarzenberger, *International Law applied by International Courts and Tribunals*, Vol. I, pp. 278–285 and 296–324; Gervais, ' Le droit des prises dans la seconde guerre mondiale ', in *Rev. Gén. de droit international public*, 1948, pp. 147, 154 and 159; 1949, pp. 254, 457 and 465.)

" Her Majesty's Government in the United Kingdom is equally unjustified in alleging the 'artificial' or 'fictitious' character of the express and concrete reference made by the Agreement to the ' cost of acquisition ' of the Hellenic cargoes of trans-Atlantic origin.

" Finally, the proposition cannot be maintained that Her Majesty's Government in the United Kingdom undertook an alleged ' agency ' on behalf of the Royal Hellenic Government and those of Greek subjects for which the latter Government undertook to answer. If there had been a real agency the British Government would have had to render an account of the use made of the goods as well as for the actual profit and loss resulting from the acts of disposal effected by them subsequent to the Agreement in respect of the goods covered by that Agreement. Such a rendering of account has neither been claimed nor offered by either of the Governments concerned. Her Majesty's Government in the United Kingdom, like any other person into whose hands goods come, found themselves subject to the burden of the 'risks' attaching thereto, while undertaking, for their part, to credit the Royal Hellenic Government with a sum equal in accordance with the agreement to the f.o.b. cost of each cargo (at the port of shipment).

"Prize law itself recognises fully the validity of an amicable agreement whereby the captor State undertakes to compensate owners in accordance with rules of valuation different from those laid down by the general law of prize and requisition (see Conseil des Prises français, No. 72, *The Gothland*, 30 December, 1949, Rec. ii, p. 179, et Instructions, 21 December, 1939), and in the present instance the States concerned have clearly adopted bases of compensation different from those of the law of prize and requisition.

"On their side, the Royal Hellenic Government could not, without ignoring the essential nature of 'transfer at cost price' under the Agreement of the 11th of February, 1942, extend the scope of the obligation assumed by the debtor based on 'the f.o.b. cost' of the cargoes by contending that the dollar had been chosen throughout as the money of account for the repayment of all the marine insurance premiums and war risks premiums in respect of cargoes purchased in the United States either by the Greek State or by private shippers. On the contrary it is necessary in this connection to observe all the distinctions and adjustments imposed by the letter and spirit of the Agreement.

"Now, on the one hand, Section A (ii) of the Agreement of the 11th of February, 1942, provides that the Royal Hellenic Government shall be credited 'upon the basis of the f.o.b. cost of the goods plus a sum equal to the cost of effecting marine insurance on the London market and war risk insurance with the competent Office of the Ministry of War Transport on a value not exceeding the f.o.b. cost of such cargoes in respect of the original voyage to Greece', and, on the other hand, Section B (v) provides that 'the Minister of War Transport . . . shall credit the Royal Hellenic Government with the f.o.b. cost of cargo requisitioned [from private persons] together with a sum equal to the cost of effecting marine and war risk insurance in respect of the original voyage to Greece.'

"As a result of the above-cited clauses the dollar was adopted as the money of account and must be retained for the purpose of calculating the amounts to be refunded, not only in respect of the cost of the goods purchased f.o.b. in the United States, but also for that of all maritime and war risks insurance premiums which, *wherever* *the contract may have been made,* were in fact paid in dollars by the owners.

" But the position is not the same in the case of premiums expressed and actually paid in pounds sterling. In such cases there can be no question, without disregarding the fact that the Agreement was intended to provide indemnification only, of having recourse to the dollar as the standard for calculating the premiums to be repaid.

" *A fortiori* the dollar is excluded as the money of account in the cases, covered by Section A (ii) of the Agreement, of cargoes belonging to the Hellenic State in respect of which there had been no actual marine insurance policy but merely notional premiums calculated by reference to ' the cost of effecting marine insurance on the London market ' and where ' war risks insurance was effected with the competent Office of the Ministry of War Transport.'

" It is true that the Royal Hellenic Government have relied upon the last part of clause (ii) of Section A expressed as follows ' on a value not exceeding the f.o.b. cost of such cargoes in respect of the original voyage to Greece ' and have inferred from the fact this clause establishes a comparison that Her Majesty's Government in the United Kingdom had agreed that, in the case of goods acquired by the Greek State in America, the value of insurance premiums, whether actual or notional, should be calculated in dollars even when the original calculation and the actual payment was in sterling, and they claim that this follows from the rule that ' *accessorium sequitur principale* '.

" Such an inference, however, rests on no real foundation. Her Majesty's Government in the United Kingdom intended to protect themselves against inflated claims for insurance premiums by an express provision limiting to a sum not exceeding the f.o.b. cost of the diverted cargoes belonging to the Royal Hellenic Government their undertaking to repay the war risks insurance effected with the competent British Office and the estimate of the marine insurance that the Royal Hellenic Government would have had to pay on the basis of the rates prevailing on the London market if they had not been their own insurers. But it is impossible to interpret against a debtor a clause that was inserted solely for his benefit with the object of preventing consequential debts from exceeding the principal debt representing the value of the goods themselves. A comparison introduced for a particular and limited purpose cannot be transformed into an alleged reference which alters the subject matter of a debt consisting originally of an obligation to repay premiums fixed in pounds sterling, once and for all in the period when the cargoes were in transit, by substituting for that obligation an obligation to pay in dollars, or even by reference to the dollar regarded as the money of account.

" Finally, no inference can be drawn from the fact that the joint Anglo-Greek Committee, set up in 1946 to check the cargoes item by item and to fix provisionally the sums in respect of the various cargoes used by the British Authorities, in a number of instances converted into dollars the total of insurance premiums paid, or at least originally expressed, in pounds sterling so that they would thereby by implication have confirmed the interpretation put forward by the Royal Hellenic Government of the clause ' on a value, etc.,' at present being considered. In point of fact the parity rate of the pound sterling and of the dollar was at that time the same as that at the date of the Agreement in 1942 and the British member had therefore no interest in raising precautionary legal reservations when the only business of the Committee was to check the accounts. Since the Royal Hellenic Government properly denied that their representative on this Committee had any power to bind them in law by the attitude he adopted on the question of the conversion into pounds sterling of a debt of which the dollar should (as they contended) have been the currency of payment, parity of reasoning leads to the rejection of their arguments based on the implied consent alleged to have been given by the British member of the same Committee so far as concerns the scope of the clause ' on a value, etc.'

" To conclude: The Agreement of the 11th of February, 1942, retained the dollar (which had been excluded as the currency for actual settlement) as a standard of value, as a currency intended to measure the quantity of pounds sterling owing by Her Majesty's Government in the United Kingdom in respect of the Greek cargoes of United States origin used by them, and in the face of the clear and precise wording of the clause, the effect of this choice cannot be either limited or extended by means of restrictive or wide interpretations either of which would be equally speculative.

" III. On the last question as to what rate of exchange with the dollar adopted as money of account, for the cargoes of United States origin—the rate on the day on which the debt arose or that on the day of settlement—should be used to calculate the amount in pounds sterling with which Her Majesty's Government in the United Kingdom has to credit the Government of their creditor.—The adoption in a contract or agreement, which is to be the subject of an *international settlement*, public or private, of a money of account different from the national currency goes to the substance of the obligation since its object is to fix the amount of that obligation by reference to a standard of value. (Nussbaum, *op. cit.*, p. 377; Planiol, Ripert, Radouant, *op. cit.*, No. 1191.)

" This choice has a number of important consequences, in particular that of protecting the parties, even when they did not have this object specially in view, from the results of fluctuations in the currency of payment, either that of the debtor State or that of the State where the debt is to be settled.

" It allows, for instance, the creditor when the debt falls due, to claim the amount of the money of payment determined by the fluctuations of the rate of exchange with the money of account which have taken place since the debt arose (Ripert, Boulanger, *Manuel de droit civil*, Vol. II, No. 1612; Y. Loussouarn, *op. cit.*, *et loc.*).

" *A fortiori* the creditor is entitled to reject, in as far as it would affect the substance of his claim, the effect of any action taken by the debtor State itself to devalue its currency.

" The international practice in legislation, agreements and cases, as well as the practice of the great majority of nations, recognises that the rate of conversion from the money of account into the money of payment is that prevailing at the date on which the debt is settled.

" As far as practice in legislation and agreements is concerned, Article 49, cited above, of the Uniform Law adopted by the signatory nations of the Geneva Conventions of June 7, 1930, regarding Bills of Exchange and Negotiable Instruments provides one of the most striking instances of the great importance attached to 'the rate of conversion at the date of the payment of the debt.'

" By its two decisions of the 12th of July, 1929 (P.C.I.J., Series A, Nos. 20 and 21, *Serbian Loans* and *Brazilian Loans*, Dalloz, 1930, 2.45; E. Hambro, *The Case Law of the International Court*, Nos. 178–197) the Permanent Court of International Justice of The Hague has given international authority to the case law of the highest national courts, by recognising, on the one hand, the validity of the choice made by a State raising a foreign loan and by the French lenders, of a money of account (the gold franc in that instance) as a unit of measure for the settlement of interest or capital in another currency (French in that instance) and on the other hand by compelling the debtor State to pay on the basis of that standard of value at the rate of exchange on the day of payment despite the depreciation that had taken place, not only of the currency of the debtor State, against which the lenders had sought to protect themselves, but also of the currency of payment, a depreciation which the lenders had not foreseen. The Court laid down, *expressis verbis*, that 'this standard of value having been adopted by the parties, it cannot be alleged that it does not apply to the payment because the depreciation of the French currency was not, or as it was contended could not have been, even foreseen at the time the contracts were concluded. *It is not a question of what the parties actually did foresee or could have foreseen but of the means they chose to protect themselves*. To secure repayment of the loans they provided for payment in gold value, by reference to an accepted standard, as has been said above.'

" After reference to so decisive a monument of international case law it is unnecessary to add either the long list of decisions of courts of many countries in support of the principle of conversion on the day of actual payment (see for example the reasons given in support of this thesis by Nussbaum, *op. cit.*, p. 361, *et seq.*) nor an analysis of the cases of the Common Law countries which, starting from a different conception, that of ' conversion on the day of the breach of the contract ' frequently arrive in practice at conclusions very similar to those of other systems of law (see criticism by Nussbaum, *op. cit.*, p. 370, *et seq.*).

" What is needed is rather to make clear the reasons which combine to require the application to the present dispute of the principle of conversion ' on the day of actual payment.'

" 1. In the first place the wording of the Agreement of the 11th of February, 1942, is very clear in its conciseness; in undertaking to credit the Royal Hellenic Government ' with the f.o.b. cost of the cargoes ' used by them, Her Majesty's Government in the United Kingdom agreed to a clause of fundamental importance for the substance of their obligation, by virtue of which the total of pounds sterling to be credited to the claimant according to the cost of each cargo purchased f.o.b. in the United States, expressed in dollars, the money of account, must necessarily be ascertained by a conversion on the very day upon which the credit is actually given. *A contrario* this clause excludes all conversion on any other day, whether it be the day, as urged by the debtor Government, on which the debt arose, or that upon which this Government undertook to give the credit (by Section B (v) of the Agreement a maximum period of six months was laid down) or that upon which they may have been formally called upon to pay.

" Strict observance of this clause cannot be waived, even upon proof by the claimant that it is as a result of a default attributable solely to the debtor that the actual giving of credit for the full amount due to them was delayed beyond the 18th of September, 1949, on which date Her Majesty's Government in the United Kingdom devalued the pound sterling to a rate of exchange with the dollar of 2·80 although the rate for many years before the Agreement had remained at 4·03.

" On their side the British Government have not shown that the protraction of the negotiations provided for in Section C of the Agreement was due to the fault of the creditor which would have deprived them, the debtors, of the possibility of discharging their debt in full before the change in the conversion rate from the money of account to the money of payment. In reality the Royal Hellenic Government as early as the 1st of August, 1949, accepted the reduction of their credit (that is to say, a set-off) by the value of the supplies received from the U.K.C.C. as relief for the people of Greece, and even if it was only on the 17th of March, 1950, that they agreed to give up any claims in respect of the value of goods acquired with American Lease-Lend funds, this delay is not the ground of the debtor's opposition to crediting the Royal Hellenic Government with the cargoes not consigned to the ' Greek Service Ministries.' This opposition arose much earlier, as the first British memorial admits, at least as early as the 1st of February, 1949 and continued until the 25th of August, 1951.

" 2. The conclusion arrived at from a literal application of the Agreement is also the only one which accords with the non-profit making and strictly compensatory character which it was the common intention of the High Contracting Parties to impress upon their Agreement of the 11th of February, 1942, having regard to the circumstances of the war. The Royal Hellenic Government ceded ' at cost price ' the cargoes belonging to them without regard to any possible increase in the value of the goods once they had reached the Middle East. But against this they must receive exactly, at the moment when they are credited in pounds sterling, all that these cargoes cost them in dollars.

" As far as cargoes originally bound to Greek ports and belonging to private persons are concerned, Her Majesty's Government in the United Kingdom, waiving the right of prize and requisition, agreed to credit the Greek Government in pounds sterling, not with their value at the port of unloading, but with a sum representing their f.o.b. cost price (expressed in dollars in the case of cargoes from America) on condition that the Royal Hellenic Government themselves repaid the owners of the cargoes requisitioned and indemnified the British Government against all claims by the owners. Though this indissoluble line between the debt of Her Majesty's Government in the United Kingdom to the Royal Hellenic Government on the one hand, and the cost price of the cargoes bought f.o.b. by private persons and subsequently requisitioned on the other hand, may seem in conflict with the general law, it was nevertheless clearly established by the High Contracting Parties themselves because of the special nature of their Agreement. The debtor Government could not, either in law or in equity, claim to compel the Royal Hellenic Government to assume responsibility for all questions of compensation of the shippers if, on their part, they could disregard the scope of the clause corresponding to this indemnity by providing the Royal Hellenic Government only with a credit in pounds sterling representing, on the day on which it is given, a sum less than ' the f.o.b. cost expressed in dollars ' of the cargoes coming from the United States.

" Clear solutions to all the points at issue can be derived from the nature and terms of the Agreement of the 11th of February, 1942, itself. It has been possible to establish the substance and scope of the debtor's undertaking without need to have recourse to the rule of interpretation by which, in cases of doubt, an agreement is interpreted against the party which has required the obligation to be assumed, and in favour of the party which has assumed the obligation, and it is equally unnecessary to investigate whether in the present case there are present the conditions that are required for the application of the rule *contra proferentem* recognised by international law.

"FOR THESE REASONS THE ARBITRATOR DECIDES:—

"1. The Anglo-Hellenic Agreement of the 11th of February, 1942, the main object of which was to lay down the conditions of repayment by Her Majesty's Government in the United Kingdom for cargoes belonging to the Hellenic State or to private citizens of Greece or residents in Greece, which had been diverted by Her Majesty's Government in the United Kingdom during the war and used by them in the Middle East, created as between the High Contracting Parties a single account in a single currency.

"2. The dollar was not adopted as the money of contract, that is to say as the currency of effective payment for any of the cargoes. Even in the case of those purchased f.o.b. in the United States, and paid for in dollars, it was a credit in pounds sterling that Her Majesty's Government in the United Kingdom undertook to give, subject to certain conditions and at the end of a certain time, in favour of the Royal Hellenic Government to the exclusion of any other currency.

"3. But as the parties expressly agreed that this credit should be 'of the f.o.b. cost' of the said cargoes, they must be considered as having adopted, for their repayment, the dollar as a standard of value, that is to say, as the money of account.

"4. Consequently the total in pounds sterling with which Her Majesty's Government in the United Kingdom has to credit the Royal Hellenic Government in respect of the cost of all the cargoes purchased f.o.b. by the Royal Hellenic Government or by private persons in the United States and paid for in dollars, as well as all incidental marine insurance and other expenses in respect thereof actually paid in dollars—but only such expenses—must be calculated by reference to the dollar.

"5. It is at the rate of exchange with the dollar in force at the date of payment, that is to say, in the instant case on the day on which the credit due to the Hellenic State is given, to the exclusion of the parity in force either on the day on which the debt arose or any other date earlier than the 18th of September, 1949, that the amount in pounds sterling owed by Her Majesty's Government in the United Kingdom by virtue of the provisions of the Agreement of the 11th of February, 1942, in respect of cargoes purchased f.o.b. and paid for in dollars must be calculated.

"6. All contentions of the parties at variance with this decision are rejected."

[Report: Unpublished.]

For comment see the Note by Simpson in *International and Comparative Law Quarterly*, 5 (1956), pp. 471–483.

Arbitration—Law Applied by Arbitral Tribunals—Dual Nationals —Principle of Effective Nationality.

See p. 443 (*Mergé Claim*).

II.—Procedure

ii.—Competence. Competence to Determine Jurisdiction

Arbitration — Procedure — Competence — Competence of *Collège arbitral* Limited by Exchange of Notes Referring Question at Issue—*Compromis*—Restrictive Interpretation of—State Responsibility—For Acts and Omissions of State Organs and Officials—Executive Action—Sequestration of Property—Distinction between Inherited and Other Property.

MONTEFIORE CLAIM.

Franco-Italian Conciliation Commission. December 7, 1955.

(Bolla, Sorrentino, Perier de Feral.)

THE FACTS.—Guido Montefiore was an Italian national resident in Tunisia. In 1945 he was expelled from Tunisia. On August 24, 1946, he died, and half of his estate descended to his son Giulio. The latter's property had been sequestrated under a Residential Decree dated October 17, 1944, and on December 2, 1946, a second Decree placed under sequestration the property which he inherited from his father. That property remained under the control of a M. Dupré, the administrator-sequestrator appointed by the Decree of 1946, while the property which had been sequestrated in 1944 was transferred to the *Service de Liquidation des Biens italiens en Tunisie*. By an Exchange of Letters dated February 2, 1951, the French and Italian Governments, " while maintaining their previous juridical positions, but animated by the desire to settle pending questions in a spirit of amity ", arrived at an agreement on the following lines: " 1. The French authorities will return to the interested parties the property, rights and interests which they are holding for the account of the . . . Montefiore estates . . . as regards the application of Article 79 (6) (*d*) of the Treaty. . . . "[1]

Giulio Montefiore now claimed the return of the property which was his share of his father's estate.

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[1] Article 79 of the Peace Treaty with Italy, 1947, provides in part:

" 6. The property covered by paragraph 1 of this Article shall be deemed to include Italian property which has been subject to control by reason of a state of war existing between Italy and the Allied or Associated Power having jurisdiction over the property, but shall not include:

"(*d*) Property rights arising since the resumption of trade and financial relations between the Allied and Associated Powers and Italy, or arising out of transactions between the Government of any Allied or Associated Power and Italy since September 3, 1943;"

On behalf of the French Government, it was contended that the property inherited by the claimant from his father had been restored to the persons interested in pursuance of the accord of February 1951.

On behalf of the Italian Government, it was maintained that the contention of the French Government had failed to take into consideration not only the juridical principle that the estate of a deceased merged with that of the heir, but also that in a decision of the Conciliation Commission (sitting as a *Collège arbitral*) dated June 25, 1952,[1] the property of the claimant, both that which he inherited and that which he already owned, was held not susceptible of being liquidated. The effects of that judgment ought to prevail over those of the accord of February 1951.

Held: that the *Collège arbitral* was not competent to hear the claim. It drew its powers from the Exchange of Notes of December 2, 1952,[2] while the property had been restored pursuant to that of February 2, 1951.

The Commission said: " At the date when the Treaty came into force, the property bequeathed by Guido Montefiore to his son Giulio and placed under administrative sequestration had but recently become part of the latter's property. The rest of his property had also been placed under administrative sequestration. In order to save his property from liquidation, the claimant invoked Article 79 (6) (*c*) of the Peace Treaty[3] (exemption in favour of persons ' permitted to reside ') and, but only in respect of the property inherited from his father, sub-paragraph (*d*) of the same paragraph (exemption in favour of ' property rights arising since the resumption of trade and financial relations between the Allied and Associated Powers and Italy '). The French Government admits (in the Exchange of Notes of February 2, 1951) that the property inherited by Giulio Montefiore from his father ought to be restored to him under Article 79 (6) (*d*) of the Treaty. There remains in dispute only the question of the restitution to the claimant of his own property. The decision of June 25, 1952, which dealt with the meaning of the expression ' permitted to reside ' in Article 79 (6) (*c*) of the Treaty, having been given in the meantime, the French Government recognized that the claimant fulfilled the conditions contained in that provision as defined by the *Collège arbitral* and on December 2, 1952, undertook to restore to him the property, rights and interests held, for his account, by the *Service de Liquidation des Biens italiens en Tunisie*. The *Service* had never held the property inherited from the claimant's father. The administrator-sequestrator of that property had, until the end, been M. Dupré.

" It was shown, on behalf of the Italian Government, that by a *note verbale* dated July 4, 1952, the Italian Embassy at Paris had requested of the French Ministry of Foreign Affairs the restitution of, *inter alia*, the property of Giulio Montefiore, specifying ' both his own property [*les biens personnels*] and that which he inherited '. However, that request was dealt with by the French Government in the Exchange of Notes of December 2, 1952, in relation to Guilio Montefiore's own property only. That results from the fact that the Notes exchanged limit the duty of restitution to the property, rights and interests held by the *Service de Liquidation des Biens italiens en Tunisie*, while the inherited property has never been held by the *Service*. That deduction is confirmed by the context of the Notes of December 2, 1952, from which it appears that the duty of restoration was admitted by the French Government in furtherance of the arbitral award of June 25, 1952, which laid down the general principles according to which, in the relations between France and Italy, Article 79 (6) (*c*) of the Treaty ought to be applied. The inherited property, as has already been observed, had been restored to Giulio Montefiore in furtherance of the obligation undertaken by the French Government with effect from February 2, 1951, in pursuance of Article 79 (6) (*d*) of the Treaty, and had therefore remained quite outside the matters which were before the *Collège arbitral* on June 25, 1952.

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[1] See *Re Rizzo and Others*: *International Law Reports*, 1952, p. 478.

[2] See *Re Rizzo and Others* (*No.* 3), *supra*, p. 317, at p. 319.

[[3] See *supra*, p. 501.]

" As we have already said, the limits of the competence of the *Collège arbitral* are fixed, in the present case, by the Exchange of Notes of December 2, 1952; they are ' eventual claims on the part of all the beneficiaries of the arbitral award ', that is, the arbitral award of June 25, 1952, since that applies both to the persons who are recognized by the French Government as beneficiaries under the said decision and those who are so recognized by subsequent awards of the *Collège arbitral*. Among those who benefited under the arbitral award of June 25, 1952, was Giulio Montefiore, but in respect only of his own property, the property received from the estate of his father having already been restored to him in pursuance of para. 1 of the Exchange of Notes of February 2, 1951, and quite irrespectively of either Article 79 (6) (*c*) of the Peace Treaty, the arbitral award of June 25, 1952, or the Exchange of Notes of December 2, 1951, which drew from the award of June 25 certain consequences agreed by the two Governments. The basis of the obligation to restore the estate of Guido Montefiore, assumed by the French Government on February 2, 1951, is specified in the said accord—it is Article 79 (6) (*d*) of the Treaty. It is, then, not in pursuance of the accord of December 2, 1952, nor of the arbitral award of June 25, 1952, that the property inherited from his father's estate by Giulio Montefiore, was restored to him by the French Government, the restitution of the property having already been effected in pursuance of the Exchange of Notes of February 2, 1951.

" A clause of a *compromis* cannot be interpreted liberally [*extensivement*], particularly in the international sphere, as regards the competence of an arbitrator or arbitrators and that is why the *Collège arbitral* must declare itself quite incompetent to decide on the claims for compensation made by Giulio Montefiore in respect of property comprised in the estate of his late father."

[Report: *Recueil des Décisions*, Part 5, p. 269.]

Arbitration—Procedure—Competence—Competence of Conciliation Commission Sitting as *Collège arbitral*.

See p. 317 (*Re Rizzo and Others* (*No.* 3)).

IV.—The Award

Arbitration—Award—Interest on Amount Awarded—Principles on which Granted.

See p. 409 (*Fatovich Claim*).

ii.—Appeal and Revision

Arbitration — Award — Interpretation of — United Nations Administrative Tribunal.

See p. 689 (*Crawford et Al.* v. *Secretary-General of the United Nations*).

C—CONCILIATION

Conciliation — Conciliation Commissions — Rules of Evidence — Evidence in Support of Claims—Admissibility, Nature and Sufficiency of—Affidavits, "*Atti di Notorietà*" and Signed Statements —Invalidation of Evidence for Falsehood—Rules of Procedure of Conciliation Commission—Evidence and—Treaties—Peace Treaties—Duty of Conciliation Commission Set Up Under—As to Receiving and Evaluating Evidence—State Responsibility—Claims—In General—Evidence in Support of Claims—Admissibility, Nature and Sufficiency of.

AMABILE CLAIM.

Italian-United States Conciliation Commission. June 25, 1952.

(Sorrentino, Scanlan.)

THE FACTS.—This was a claim by a United States national for compensation for certain personal property which was lost or destroyed in Ostia, Italy, during the Second World War. The question at issue was whether or not the claimant had submitted sufficient evidence to establish her claim. In her Statement of Claim, verified under oath, the claimant alleged (*inter alia*) that she was the sole owner of the property lost or destroyed and that such loss or destruction occurred " following the time that the claimant was obligated to leave her apartment as a consequence of general orders evacuating the Lido di Roma during the course of the war. During such period the apartment was occupied by German Military Forces." This was repeated in an affidavit sworn by the claimant and the allegation was supported by an " Atto di Notorietà " sworn by four separate witnesses. Attached to the claimant's affidavit was an unsigned, undated list of 120 items of personal property, with a value set against each item, and the four witnesses in their affidavit deposed that they had examined the list which they " recognize to be fully correct and truthful ".

The claim was submitted to the Italian Government, who remitted it for valid evidence of (a) the existence and the value of the property at the time damage occurred, (b) the claimant's right of ownership, and (c) the destruction by acts of war and the extent of the damage. In response, it was stated that the claimant was unable to obtain further evidence as to the existence, value and description of the property, and it was submitted that the claimant " in view of the nature of the property and its description, has established the basis of her claim with the evidence already submitted by her and should not be required to submit further evidence ".

The claim was then submitted to the Conciliation Commission. On behalf of the claimant it was contended that (1) the claimant had submitted the only type of evidence which was available to her; (2) the very nature of the property itself accounted for the claimant's inability to produce other types of documentary evidence to establish the existence, ownership and value of the personal property which had been lost; (3) the Italian authorities were in a position to investigate the alleged facts in order to verify or disprove the statements made by the claimant or any of the four witnesses; (4) should the contentions of the Italian Government prevail, the result would be a denial of justice and an evasion of the obligations of the Italian Government under the Peace Treaty; (5) an " Atto di Notorietà " was recognized in the Italian Civil Code as having probative value; and (6) the special form which the Italian Government had prepared and accepted from Italian nationals submitting claims for household effects lost or damaged as a result of the war under Italian war damage legislation provided that an " Atto di Notorietà " was one type of evidence which could be used to document such a claim.

On behalf of the Italian Government it was contended that

" (1) as a general principle, an ' Atto di Notorietà ' does not constitute a means of proof in a true juridical sense because

> " (a) there is lacking the substance of evidence since the deponents are not obliged to distinguish matters regarding which they have a direct and personal knowledge from those

matters regarding which their knowledge has been derived from others;

" (b) the opportunity to cross-examine the deponents at the time the ' Atto di Notorietà ' is made does not exist;

" (c) the Notary or other public official before whom an ' Atto di Notorietà ' is made can only verify that which took place in his presence and cannot verify that the statements made in his presence under oath by the deponents are or are not in fact true;

" (2) since the rights, if any, of a United Nations national under Article 78 are subject to a judicial determination before the International Commission provided for under Article 83 of the Treaty of Peace, a United Nations national has the obligation of establishing his claim with documentary evidence which constitutes a means of proof in a true juridical sense;

" (3) since the rights, if any, of an Italian national under Italian war damage legislation are subject to a discretionary determination by the Italian administrative authorities, without the right of a judicial review, the Italian administrative authorities may conduct an *ex officio* investigation of a claim even though certain elements of the claim have been furnished in an ' Atto di Notorietà '."

While the proceedings before the Commission were pending, the claimant wrote to the Agent of the United States a letter (later filed as Annex A to the Brief of the United States of America) which read as follows:

" In re-examining the claim, submitted by me in connection with the reading of the Brief prepared by the Agent of the United States for presentation to the Italian-United States Conciliation Commission, I noticed that in the claim it is stated that I had to leave my apartment as the result of the evacuation of Ostia. I should like to take this opportunity to correct that statement and to point out that I actually had to leave Ostia as a result of the terrific bombardments to which it was being subjected. The danger to me was aggravated by the fact that my apartment was very close to the German headquarters, which was the target of the bombardment. During my absence, according to information supplied to me by my neighbors, the apartment was broken into and occupied by German Armed Forces.

" My review of the claim and my reading of the Brief indicates that in all other respects it states the facts of the case correctly."

Held: that the claim must fail. Although the Italian Government ought not to have rejected as valueless the evidence submitted in support of the claim, and although if the facts alleged by the claimant were true, she had established a right to assert a claim, the Commission were unable to give any credence to the evidence in support of the claim.

The Commission said: " The Commission considers that the issues raised by the pleadings of the two Governments can be summarized as follows:

" (1) Are affidavits, ' Atti di Notorietà ', signed statements and similar ex parte testimonial instruments forms of evidence which can be submitted to the Conciliation Commission in disputes presented by the Agents of the two Governments to establish the ownership, loss and/or value of personal property in Italy which was not sequestrated by the Italian Government, when other forms of evidence are not available to document the claim ?

" (2) When a national of the United States of America submits a claim for war damage to the Government of the Italian Republic, is there an obligation on the Government of the Italian Republic under the Treaty of Peace, as implemented by the Memoranda of Understanding and the Exchange of Notes dated August 14, 1947, to conduct such an investigation of the claim as may be necessary to establish or refute the material allegations made by the claimant, and thereafter to make a determination of the particular claim, even though essential elements of the claim can be established by the claimant only with documentary evidence presented in the form of ex parte testimonial instruments ?

" (3) What criteria will the Conciliation Commission follow in determining the evidentiary weight or probative value to be given to such affidavits, ' Atti di Notorietà ', signed statements and similar ex parte testimonial instruments ?

" (4) Do the documents submitted as evidence in the instant case established the claimant's right to compensation or other relief under the provisions of Article 78 of the Treaty of Peace; and, if so, what is the amount of such compensation and the nature of such other relief ?

" The question of the types of evidence which can be used by claimants in establishing their claims, and the weight which is to be given to the evidence furnished in a particular case, repeatedly occur in a large number of the disputes pending before the Commission, and have been exhaustively dealt with in the arguments presented in the instant case. Therefore, for the future guidance of the Agents of the two Governments, the Commission desires to make the following observations.

" Neither the Treaty of Peace nor any of the Agreements supplemental thereto or interpretative thereof make any specific reference to the types of evidence required to establish a claim under Article 78 of the Treaty Peace. Paragraph 3 of Article 83 provides, however, that ' Each Conciliation Commission shall determine its own procedure, adopting rules conforming to justice and equity.'

" It must be borne in mind that a claim arising under Article 78 of the Treaty of Peace is submitted first to the Government of the Italian Republic by or on behalf of the claimant, that the claim must be in written form and must be supported by documentary evidence, and that both the investigation and the consideration of such claim by the Government of the Italian Republic are in the nature of *ex parte* proceedings.

" It is only after the appropriate Italian administrative authorities have had an *opportunity* to investigate and consider a particular claim that a ' dispute ' arises between the two Governments which is submissible [*sic*] to the Conciliation Commission provided for under Article 83 of the Treaty of Peace; and, ordinarily, the basis of the ' dispute ' between the two Governments has been clearly drawn by the documentary evidence obtained in the course of such investigation which supports or rebuts the allegations of fact or of law which have been made in the particular case.

" It is, of course, necessary that evidence regarding the circumstances which have given rise to each individual ' dispute ' be presented to the Conciliation Commission. The difficulties inherent in securing evidence to document claims presented to an international Commission have long been recognized, and it is seldom practicable either for the Government to submit or for the Commission to receive the oral testimony of witnesses.

" The Rules of Procedure of the Conciliation Commission adopted in Rome on June 29, 1950, by the Representatives of the two Governments of necessity recognize the practical problems involved in establishing, processing and investigating a claim arising under Article 78 of the Treaty of Peace. . . . Clearly, the Rules of Procedure contemplate that the evidence to establish all of the essential elements of a particular claim would be developed in written form.

" The Agent of the Italian Republic in his Reply Brief referred specifically to paragraphs (a) and (b) of Article 10 of the Rules of Procedure, which read as follows:

> " ' (a) The Commission does not hear oral testimony save in exceptional cases for good cause shown and upon Order of the Commission authorizing its admission and fixing the time and the place where it shall be received. Should oral testimony be introduced on behalf of one Government, the Agent of the other Government shall have the right of cross-examination.
>
> " ' (b) The Commission may order in exceptional cases officials of either Government to receive the sworn testimony of a witness taken in answer to written questions prepared by the Agent of either Government and approved by the Commission; the Order of the Commission shall name the witness whose sworn testimony is to be taken and shall specify the time when, the place where, the official before whom the witness shall testify, as well as the questions to be asked.'

" The contention of the Agent of the Italian Republic that the last-cited paragraphs of the Rules of Procedure limit the use of sworn testimony to the two instances referred to in these paragraphs is obviously erroneous. The mere fact that the rules contained in both these paragraphs are expressly limited to ' exceptional cases ' is sufficient to show that oral testimony before the Commission or replies to written interrogatories are not the only types of sworn testimony which may be used to establish or to rebut the allegations of fact made in a particular case.

" Moreover, paragraph (a) of Article 18 of the Rules of Procedure specifically provides that ' . . . Supporting statements, affidavits, and documentary evidence may be submitted in any language.' To this extent, at least, it is clear that the Rules of Procedure do not exclude the use of *ex parte* testimonial instruments.

" A national of the United States of America who has suffered a loss of or damage to non-sequestrated property in Italy, as a result of the war, is confronted with the problem of finding a suitable means of proof to establish the facts in such a manner as will permit him to exercise his rights under Article 78; and this problem is an extremely serious one in the absence of the property itself or of documentary evidence which antedates the occurrence of the loss or damage. Particularly in the case of loss or damage to non-sequestrated personal property, it might be reasonably anticipated,—and experience has proven it to be true,—that the average claimant possesses little, if any, documentary evidence of the ownership, date and value of his personal property which existed prior to the date on which the loss or damage occurred. In the absence of proof of this nature, the individual is able to support his claim for compensation under Article 78 only with his own statement of the pertinent facts and the statements of other persons, if any, who were in a position to have personal knowledge of the actual facts regarding the ownership, nature and value of the property, and the cause of its loss or damage. Great credibility may be given to declarations of this nature when they are submitted as statements made under oath in the form of either Affidavits or ' Atti di Notorietà '.

" In considering the question of the right of a national of the United States of America to use Affidavits, ' Atti di Notorietà ', signed statements and similar *ex parte* instruments as testimonial documentary evidence, in attempting to establish a claim under Article 78 of the Treaty of Peace, it is necessary to have a clear understanding of each of these instruments.

" The ' Affidavit ' is a statement or declaration, made by an individual, which has been reduced to writing and acknowledged by him before a Notary Public or other official authorized by the State or federal laws of the United States of America to administer an oath and to take an acknowledgment. An ' Affidavit ' should show the purpose for which it was made and must state the place where and the public official before whom the acknowledgment was taken.

" The ' Atto di Notorietà ' (translated literally as ' Act of Notoriety ') is a written certification, prepared by a Notary Public or other public official authorized by the laws of the Italian Republic to administer an oath and to execute such a certificate, of the statements or declarations made under oath and in his presence by the four persons named therein. To execute an ‘ Atto di Notorietà ’, four persons must appear before the Notary or other public official, assert that they are each qualified to act as a witness, and that they are not otherwise interested in the subject-matter; and thereafter while under oath, separately and in the presence of each other, and before the said Notary or other public official, assert that it is public knowledge and notorious, as well as to the personal knowledge of each of them, that certain facts are true, which statements or declarations are then reduced to writing by the public official before whom they were made, and attested to by each of the four witnesses and by the public official.

“ A ‘ Signed Statement ’, as this term is used in this decision, consists simply of a written instrument which an individual has declared to be his own by affixing his signature thereto in the customary manner. A ‘ Signed Statement ’ is not made under the legal or moral bonds of an oath administered by any qualified public official.

“ It is pertinent here for the Commission to comment on the many similarities which exist between the form and use of the Affidavit in the legal practice of the United States of America and the form and use of the ‘ Atto di Notorietà ’ in the legal practice of Italy. Both an Affidavit and an ‘ Atto di Notorietà ’ are in the form of an *ex parte* statement or declaration and, while each is used extensively in the administrative proceedings of the respective countries, neither can be used ordinarily as evidence to establish an allegation of a material fact in a controverted legal proceeding before a domestic court of law either in the United States of America or Italy. It is not disputed that a Notary or other public official only verifies as true that which has actually occurred in his presence, and does not verify that the statements made by the deponents under oath in the Affidavit or in the ‘ Atto di Notorietà ’ are in fact true. Moreover, the opportunity to challenge the statements of the deponents in an Affidavit or in an ‘ Atto di Notorietà ’ does not exist at the time such statements are made.

[The Commission referred to the Federal laws of the United States which provide for the punishment of perjury in affidavits taken before a Consular Officer of the United States of America (2 U.S.C.A., Sec. 1203) and the giving of false evidence before an international tribunal or commission (*ibid.*, Sec. 270); and to the Italian laws providing for the punishment of perjury in a document or the use of a false document (Italian Penal Code, Articles 483, 485 and 489). The Commission continued:]

“ Obviously, under paragraph 3 of Article 83 of the Treaty of Peace with Italy, . . . the Commission is empowered to determine its own procedure and rules of evidence. It has not been the purpose of this Commission to promulgate any new principles or rules of evidence nor to derogate from those principles and rules of evidence generally recognized and accepted in international law. The Commission has noted that the arguments of the Agents of the two Governments on the admissibility of certain evidence reflect in a large measure the fundamental differences in the domestic legal systems and customs of the two countries. It is an essential fact to be remembered, however, that the Conciliation Commission is an international arbitral body, charged with the duty of performing those functions attributed to it by the Treaty of Peace with Italy and the Agreements supplemental thereto and interpretative thereof. Unlike a domestic court of law, the Commission is not obliged to exclude all evidence which does not meet the criterion recognized by the legal system under which a domestic court of law functions; on the contrary, the Commission has been empowered by the Treaty of Peace to employ the widest possible latitude in receiving and evaluating evidence in its search for the truth; and, in adopting such a criterion, the Commission is only conforming to the customary practice followed in international arbitral claims procedures.

" No reference in the Treaty of Peace with Italy, or in the Agreements supplemental thereto or interpretative thereof, precludes acceptance by this Commission of *ex parte* testimonial instruments as evidence to document a claim. The Rules of Procedure of the Conciliation Commission not only do not preclude the use of such forms of documentary evidence, but recognize the fact that such documentary evidence will be used. International Claims Commissions have customarily adopted a liberal attitude regarding the form, submission and admissibility of evidence (unless restricted by the arbitral agreements). This Commission knows of no rule of international law which would preclude the claimant's use of Affidavits, ' Atti di Notorietà ', signed statements and similar *ex parte* testimonial instruments as documentary evidence, under the applicable agreements between the United States of America and Italy; and none has been cited. It is general knowledge that non-sequestrated personal property in Italy belonging to many United Nations nationals was lost or damaged as a result of the war. To accept the contention of the Agent of the Italian Republic in this case would be equivalent to denying to numerous nationals of the United States of America who sustained loss of or damage to non-sequestrated personal property in Italy their rights under Article 78 of the Treaty of Peace. Therefore, in order to give effect to Article 78 of the Treaty of Peace, and more particularly to para. 4(*a*) thereof, the Commission concludes that Affidavits, ' Atti di Notorietà ', signed statements and similar *ex parte* testimonial instruments are forms of evidence which may be submitted to the Conciliation Commission to establish the elements of a claim for loss of or damage to personal property in Italy which was not sequestrated by the Italian Government, when other forms of evidence are not available.

" Prompted by the necessity of considering the best available evidence, other international tribunals and commissions have refused to exclude *ex parte* testimonial instruments submitted in support of international claims. The admissibility of such evidence is sometimes specifically provided in the Convention establishing the tribunal or in the Rules of Procedure governing the tribunal or commission.[1]

" When the Convention or Rules of Procedure are silent, the international tribunal or commission itself must decide the question of the admissibility of *ex parte* testimonial instruments when this question is presented to it. The practice of admitting Affidavits as evidence, in the absence of any provision relating thereto in the arbitral Convention or in the Rules of Procedure, is widely recognized by international legal authorities. In the book *L'Organisation Judiciare, La Procédure et la Sentence Internationales*, Paris, 1937, p. 255, the French jurist J. C. Witenberg says:

" (Translation) ' The affidavit, which is of Anglo-Saxon origin, was introduced very early in international arbitral procedure. And, notwithstanding the objections which have been raised against it, its admissibility has finally been completely admitted. This admissibility can now be considered as customary in international arbitral law.'

" Also in the book *Evidence before International Tribunals*, Chicago, 1939, p. 180, Mr. Durward V. Sandifer states that:

" ' [International] Tribunals have uniformly declined to accept the validity of arguments against the admission of affidavits. It seems doubtful whether a tribunal would today refuse to receive affidavits for appropriate consideration unless bound to do so by a provision in the arbitral agreement. . . .'

" The Commission has observed, *supra*, the many similarities between the Affidavit and the ' Atto di Notorietà ' and has noted that questions regarding the admissibility of such *ex parte* testimonial instruments which have arisen before other international tribunals or commissions have involved particularly Affidavits. Applying the same criterion which permits the use of Affidavits in international arbitral claims proceedings, the Commission finds that there is no logical basis or legal principle in international law which would preclude the use of an ' Atto di Notorietà ' as documentary evidence to establish elements of a claim presented under Article 78 of the Treaty of Peace.

" Therefore, based upon the Treaty of Peace, and the Agreements supplemental thereto and interpretative thereof, and supported by logic and authority, the Commission accepts in evidence the Affidavits, the 'Atto di Notorietà' and the signed statements of witnesses, all of which were submitted in this case as documentary evidence in support of the claimant's sworn Statement of Claim. The Commission has stated, *supra,* the reason for its acceptance in evidence of the claimant's letter of September 4, 1951, which was attached to Annex A to the Brief of the Agent of the United States of America.

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[1] See Article VI, Agreement of August 10, 1922, between the United States of America and Germany, pp. 1–2, First and Second Report of Robert C. Morris, Agent of the United States before the German-United States Mixed Claims Commission, Washington, 1923; and Article 27, Rules of Procedure of the Italian-Mexican Claims Commission adopted December 8, 1930, under the Convention between Italy and Mexico, signed at Mexico City on January 13, 1927, p. 516: Feller, *The Mexican Claims Commission*, New York, 1935.

"Although the Commission holds that it is entitled to receive in evidence and to consider Affidavits, 'Atti di Notorietà' and signed statements when submitted in evidence, it must be emphasized and made very clear that the Commission has not thereby established the probative value which it will give to such *ex parte* testimonial instruments. The question of the evidentiary weight which the Commission will give to such documentary evidence is a separate matter which must be determined in the light of all the circumstances surrounding a particular case; this question will be considered later in this Decision.

"It is the contention of the United States of America that the submission of a claim based only on *ex parte* testimonial instruments creates certain responsibilities on the Italian Republic under the Agreements between the two Governments. Preliminary to a consideration of any aspect of this subject, it should be observed that, under Article 78 of the Treaty of Peace, there is no presumption in favor of either the claimant or the Government of the Italian Republic. The claimant must submit sufficient documentary evidence in support of his claim to establish the basis of his rights to assert a claim. It is obvious that the nature of the property and the circumstances surrounding the loss or damage will be determinative in most instances of the type and quantity of evidence which the claimant can furnish to document his claim but, even where the nature of the property and the circumstances surrounding a particular claim have placed a severe limitation on the claimant's means of proof, the claimant is not relieved of the obligation to submit the best available evidence in support of his claim and to make a full and complete disclosure of all the pertinent facts; where this has not been done, the Commission will be justified in drawing reasonable inferences from the non-production of evidence which it would appear could have been furnished by the claimant, or from the lack of a satisfactory explanation of the claimant's failure to produce such evidence.

"When a claim under Article 78 of the Treaty of Peace is first submitted to the Government of the Italian Republic by a national of the United States of America, and it is clear from a preliminary examination thereof that the claim is neither frivolous nor fraudulent, that Government can either accept the evidence submitted in support of the particular claim or request its administrative agencies to conduct an investigation of the claim as may be necessary in order to develop evidence which will refute, limit or confirm the declarations made by the claimant. Hence, the Government of the Italian Republic, even before a disputed claim is submitted to the Commission, has the right and opportunity to challenge the declarations made by the claimant or witnesses in Affidavits, 'Atti di Notorietà', signed statements, or similar *ex parte* testimonial instruments. However, when there has been a failure by the respondent Government to produce any evidence or to submit any analytical argument which would refute or limit the declarations made by a claimant or witness in Affidavits, 'Atti di Notorietà', signed statements or similar *ex parte* testimonial instruments, the Commission will be justified in drawing reasonable inferences from such failure and in giving such instruments the evidentiary value which in its opinion appears to be warranted under all the circumstances of the case.

" Paragraph 5 of Article 83 of the Treaty of Peace with Italy, which reads

> " 'The parties undertake that their authorities shall furnish directly to the Conciliation Commission all assistance which may be within their power'

is a clear recognition that the Commission has no authority to *compel* the appearance and testimony of witnesses or to conduct an investigation of any allegation of fact made in a particular case.[1] The Commission must act through the Agents of the two Governments but this does not mean that the Commission, in its quest for the truth, does not have the right to rely confidently upon each of the two Governments and upon each of the Agents of the two Governments before the Commission for the highest degree of co-operation including a full and complete disclosure of the facts in each case in so far as such facts are within their knowledge or can reasonably be ascertained by them.

" The reason why it is the responsibility of the Government of the Italian Republic to investigate a claim of a national of the United States of America, when it is clear from a preliminary examination thereof that the claim is neither frivolous nor fraudulent, is derived from the particular relationship between the United States of America and Italy growing out of the Agreements and Supplementary Exchanges of Notes signed at Washington, D.C., on August

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[1] On July 13, 1930, by Act of Congress, an international tribunal or Commission to which the United States of America is a party was empowered to require by subpoena the attendance and the testimony of witnesses and the production of documentary evidence. The Act of June 7, 1933, allows the Agent of the United States of America before such a tribunal or Commission to apply to the United States District Court for such a subpoena. (See U.S.C.A., Title 22, Sec. 270 to 270g, inclusive) Where a claimant or witness resides or is to be found only outside the United States of America, the use of these statutory powers is limited.

14, 1947 (approved by Italian Legislative Decree No. 1747 of December 31, 1947). These Financial and Economic Agreements implement certain provisions of the Treaty of Peace with Italy, and provide for the settlement of certain wartime claims, the unlocking of the Italian assets in the United States and the payment of certain claims of nationals of the United States of America, and other related matters. In one of the Notes exchanged between the two Governments on August 14, 1947, the Government of Italy undertook certain obligations ' with respect to the assistance to be given to nationals of the United States of America with respect to their property in Italy '; the keynote of this obligation is expressed in the word ' assistance '. The Note further recites that ' This assistance is directed particularly to the implementation of Article 78 of the Treaty of Peace with Italy and to Article III, paragraph 16, of the above Memorandum of Understanding '. A further assurance is contained in the second paragraph of this Note, which reads:

" ' The Government of Italy shall, as soon as possible, designate an Italian governmental agency having authority to receive and determine claims of nationals of the United States of America with respect to their properties in Italy, and to effect the restoration of such properties, or pay compensation, or both, as provided in Article 78 of the Treaty of Peace with Italy, and in accordance with the terms of Article III, paragraph 16, of the Memorandum of Understanding.'

The assurance that Italy ' would receive and determine claims of nationals of the United States of America ' carries with it by necessity the responsibility that all such claims which are not patently frivolous or fraudulent on their face would be investigated by the Italian Government because only after making such an investigation can the claimant's rights be ' determined '.

" Because of the foregoing reasons it is clear that, when the claim which is under consideration here was presented, the Italian Government should not have rejected the documents submitted in support of the claim as having no evidentiary value because it would appear that if all the facts alleged by the claimant were true, she had established the basis of her right to assert a claim. Admittedly, the claimant had submitted a minimum of evidence and had not made a full and complete disclosure of all the pertinent facts. Under these circumstances, the Italian Government might properly have requested the claimant to furnish additional information regarding (a) her civil status in Italy following her marriage to Prof. Dr. Gennaro Amabile of Rome, (b) the individual items of personal property acquired prior to 1931 and for the loss of which the claimant has requested compensation as the sole owner of such property, (c) the additional individual items of personal property acquired by the claimant after her marriage and evidence to substantiate the allegation of sole ownership of such additional property, (d) the date and full particulars regarding the alleged forced evacuation of the claimant from her apartment at the Lido di Roma (Ostia) and its use thereafter by German Military Forces, as well as when the claimant returned to the Lido di Roma (Ostia) and was able to resume possession of her apartment.

" It would, of course, be the claimant's obligation to furnish such additional information, if available; and, in this case, it would appear that this information would be particularly within the knowledge of the claimant. When, however, the claimant has furnished all the information which reasonably could be ascertained by her, it becomes the responsibility of the Italian Government under the Agreements between Italy and the United States of America to make a determination of the claim.

" It appears from the record that the Italian Government maintains that the documents submitted by the claimant in support of the claim cannot be considered as sufficient proof to establish the basis of her right to assert a claim, and therefore the administrative agencies of the Italian Government had no responsibility to investigate this claim; the Commission has disposed of these arguments, *supra.* No request for a reservation concerning any aspect of the evidence submitted by the claimant, and no evidence of any kind has been submitted by the respondent Government. Neither of the Agents requested the Commission to hear oral testimony of witnesses, subject to cross-examination, as provided for in exceptional cases under the provisions of Article 10 (a) of the Rules of Procedure. Under these circumstances, it becomes the duty of the Commission to examine carefully everything which has been received in evidence in order that the Commission may determine the weight to be accorded to such evidence and its sufficiency to support the alleged rights of the claimant under Article 78 of the Treaty of Peace.

" The weight or probative value which in general has been accorded to Affidavits and other forms of *ex parte* testimonial instruments by other international tribunals and commissions was expressed by the British-Mexican Claims Commission, in its unanimous decision on the demurrer files by the Agent of the Mexican Government in the claim of *Mrs. Virginia Lessard Cameron* (Claims Commission between Great Britain and Mexico—*Decisions and Opinions of the Commissioners in accordance with the Convention of November* 19, 1926, London, 1931, p. 33,[1] at p. 35):

> " ' It is true, no doubt, that affidavits contain evidence which can be described as secondary evidence and is often of a very defective character. In many cases, it may be, affidavit evidence may possess little value, but the weight to be attached to that evidence is a matter for the Commission to decide according to the circumstances of a particular case. Affidavits *must and will be weighed with the greatest caution and circumspection,* but it would be utterly unreasonable to reject them altogether.' (Emphasis supplied.)

[[1] *Annual Digest,* 1929–1930, Case No. 272.]

" The writings of international jurists on this subject also emphasize the ' caution ' and ' circumspection ' which must be exercised in evaluating such forms of evidence. In *L'Organisation Judiciaire, La Procédure et La Sentence Internationales, supra,* Witenberg says (p. 256):

" (Translation) ' It should be pointed out, however, that the probative force of the affidavit is less than that of other means of proof. Especially in those cases in which it was made by the interested party himself and those cases in which it was possible to have recourse to other means of proof and the interested party neglected to do so.'

" Sandifer summarizes his conclusions regarding the practices of international tribunals and commissions and the probative value which they accord to affidavits in his book *Evidence before International Tribunals, supra,* as follows (pp. 182–183):

" ' The tribunal may accord to them " much, little, or no weight " according to its evaluation of the testimony contained in them under the particular circumstances of the case. In determining the probative value of affidavits, the tribunal will, of course, take into account such facts as the credibility, sources of information, pecuniary interest and family ties of the affiants. It will also take into account the fact that the witness has not been subject to cross-examination, and that the opposing party may not have had an adequate opportunity for answering the allegations contained in the affidavits.

" 'A tribunal may, if the circumstances seem to warrant, deny any probative value of affidavits, but as previously indicated it is generally held that this may not properly be done on the grounds that affidavits as such carry no evidentiary weight.'

" Bearing in mind the principles and practices followed by international tribunals and commissions and approved by writers on the subject, the Commission has carefully examined the declarations of the claimant and of the other witnesses in the instant case.

" Despite the fact that no evidence has been submitted by the respondent Government, the sum total of the evidence *now* before the Commission is substantially different from that which documented this claim when it was initially rejected on June 24, 1950, by the Italian administrative authorities or when the Petition was filed on November 21, 1950, by the Agent of the United States of America. The reason for this substantial difference is to be found in the signed letter of the claimant herself dated September 4, 1951, which was filed as 'Annex A' to the Brief of the Government of the United States of America and was accepted in evidence by the Commission. Quoted in full, *supra,* this letter is the most illuminating and important document submitted in this case.

" While the claimant's letter, *supra,* leaves much to be desired in its wording, its meaning is clear when viewed against the entire record in this case. To understand the full import of the claimant's signed statement of September 4, 1951, *supra,* it is only necessary to recall the sworn documentary evidence upon which this claim is predicated and to remember that the claimant had to establish that the alleged loss was ' as a result of the war ', within the meaning of this phrase as used in para. 4 (*a*) of Article 78, in order to be eligible to receive compensation under the Treaty of Peace.

" In her Affidavit of February 23, 1949 (Annex 2 of the Statement of Claim), the claimant verified under oath that the following statement was true:

> " '. . . that as a result of the war *and more particularly as a result of the forced evacuation of her house and the fact that her house was occupied by German military forces*, the entire contents of the house . . . was lost or irretrievably damaged; . . .' (Emphasis supplied.)

"Again, in the Statement of Claim, the claimant verified under oath on March 16, 1949, that the following statement was true:

> " 'All the property listed on the list attached to Annex 2 was lost or irretrievably destroyed, *such loss or destruction having occurred following the time that the claimant was obligated to leave her apartment as a consequence of general orders evacuating the Lido di Roma during the course of the war. During such period the apartment was occupied by German Military Forces.*' (Emphasis supplied.)

Also, in the 'Atto di Notorietà ' of February 16, 1949 (Annex 3 to the Statement of Claim), the four witnesses named therein attested under oath that the following statement is true:

> " 'All of these items were destroyed or lost as a result of warlike causes. In fact, *the lady was forced, by the authorities, to abandon her home,* she left everything and on her return found nothing.' (Emphasis supplied.)

" From a careful reading of the claimant's letter of September 4, 1951, *supra*, it is obvious that essential elements in each of the foregoing statements are not true. The claimant on September 4, 1951, repudiated that portion of her own sworn statements of February 23, 1949, and March 16, 1949, respectively, in which she had previously stated that she had been forced by the authorities to evacuate her apartment. Moreover, the claimant on September 4, 1951, admitted that of her own and direct personal knowledge she was unable to verify as true that portion of her previous sworn statements in which she had stated that ' during such period the apartment was occupied by German Military Forces '.

" The claimant's letter of September 4, 1951, also impugns portions of the 'Atto di Notorietà ' submitted in evidence as Annex 3 to the Statement of Claim. No explanation has been offered of the circumstances which prompted the claimant on September 4, 1951, ' to correct ' portions of her previous sworn statements upon which the claim is based; and the Commission will not indulge in speculation. Suffice it to say that the Commission is unable to give any credence to the evidence introduced in this case; and the claim is therefore rejected in its entirety. Moreover, the Commission suggests that the appropriate legal authorities may desire to make a determination of whether or not the laws of either of the two Governments were breached in the preparation of the sworn documentary evidence which formed the basis of the claim for compensation in this case."

[Report: Unpublished (Decision No. 11).]

Conciliation—Conciliation Commissions—Evidence in Support of Claims before—Sufficiency of—Affidavits and "*Atti di Notorietà*" —Evidence of Ownership of Property Destroyed—Relevance of Prior War Damage Claim under Municipal Legislation—Measure of Damages.

STEINWAY CLAIM.

Italian-United States Conciliation Commission. April 10, 1953.

(Sorrentino, Scanlan.)

THE FACTS.—The claimants, Steinway & Sons, a company incorporated in the State of New York, claimed compensation for the loss of a grand piano, manufactured by their branch factory in Hamburg, Germany, which was at a conservatory in Milan, Italy, and was destroyed when the conservatory was damaged in an air raid in 1943. In support of the claim were filed: Annex 1—A certificate of the incorporation in the State of New York in 1876, and a copy of the By-Laws, of Steinway & Sons; Annex 2—A declaration dated July 11, 1944, by the Secretary of the Conservatory of Music in Milan that concert grand piano No. 243002, K. 232, trademark " Steinway & Sons ", was destroyed on August 15, 1943, during the air raid on that date; Annex 3—An Affidavit made by the President of the claimant corporation on February 7, 1947, before a duly commissioned Notary Public of the State of New York affirming that Steinway & Sons was incorporated only under the laws of the State of New York and had no subsidiaries or affiliates, that a branch office and factory of Steinway & Sons were maintained in Hamburg, Germany, that all of the assets of the branch in Hamburg were owned by the claimant corporation, and that the management of the said branch was directed by an employee whose powers and authority were derived from a revocable power of attorney issued by the claimant corporation; Annex 4—An unsigned and unsupported statement that the replacement value of a " Grand D Ebon " Steinway piano was $2,880 or 1,656,000 lire at the then rate of exchange of 575 lire to the dollar.

In response to an allegation made on behalf of the Italian Government that at the relevant time the piano belonged to the firm of Ricordi & Finzi, S.A., of Milan, a further affidavit was filed to the effect that the aforementioned piano was the exclusive property of the firm that manufactured it, Steinway & Sons of New York, and was entrusted to the care of Ricordi & Finzi exclusively for concert purposes. The claimants also submitted a photostatic copy of an official receipt issued on September 2, 1944, by the Superintendent of Finance of Milan, which showed that on that date, the President of Ricordi & Finzi had filed with the competent office of the Italian Government in the name and on behalf of " Steinway & Sons—Hamburg " a claim for war damage for the loss of the piano.

On behalf of the claimants it was contended that they had established their ownership of the piano, that it was property lost as a result of the war, and that they were therefore entitled to the compensation provided for in para. 4(*a*) of Article 78 of the Peace Treaty with Italy of 1947.[1] In support of their contentions the claimants cited the following passages from the decision in the *Amabile Claim*:[2]

> (a) ". . . that Affidavits, 'Atti di Notorietà ', signed statements and similar *ex parte* testimonial instruments are forms of evidence which may be submitted to the Conciliation Commission to establish the elements of a claim for loss or damage to personal property in Italy which was not sequestrated by the Italian Government, when other forms of evidence are not available "

—and

> (b) ". . . the responsibility of the Government of the Italian Republic to investigate a claim of a national of the United States of America, when it is clear from a preliminary examination thereof that the claim is neither frivolous nor fraudulent, is derived from the particular relationship between the United States of America and Italy growing out of the Agreements and Supplementary Exchange of Notes signed at Washington, D.C., on August 14, 1947, . . ."

They argued (1) that an officer of the claimant corporation, highly reputable and world-famous manufacturers of pianos, had sworn in the Statement of Claim that they were the owners of the piano in question on the date of loss; (2) that the "Atto di Notorietà " executed on June 18, 1951, by four presumably disinterested and creditable witnesses that the same piano was owned solely by Steinway & Sons, and had been consigned to Ricordi & Finzi, S.A., only for concert use, confirmed the ownership interest of the claimant corporation in the said piano; (3) that the allegation made by the respondent Government that Ricordi & Finzi were the owners of this piano on the date of loss appeared to be based on an assumption which was not supported by substantial evidence; (4) that the documents pertaining to the consignment of the piano from the branch of Steinway & Sons in Hamburg to Ricordi & Finzi were destroyed in Milan during the war, but that nevertheless the request for compensation filed on September 2, 1944, under the provisions of Italian domestic war damage legislation, by the President of Ricordi & Finzi, in the name of and on behalf of " Steinway & Sons—Hamburg " is clear proof that Ricordi & Finzi recognized that the piano in question was the property of the claimant corporation on the date of loss; and (5) that in making an investigation of this claim the authorities of the Italian Government would have access to the records of the said War Damage claim.

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[1] Article 78, para. 4(*a*), provides in part: " . . . In cases where . . . as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered."

[2] Decision No. 11; see *supra*, p. 843.

On behalf of the Italian Government it was contended that the piano involved was manufactured by Steinway, was imported into Italy by Ricordi & Finzi, S.A., and was delivered to the Conservatory by the latter, and that in the absence of precise evidence to the contrary it must be held that Ricordi & Finzi purchased it from Steinway and became its owner, having had a relationship of deposit and not of purchase and sale with the Conservatory. In support of this contention, a letter dated November 17, 1950, was filed from the Director of the Milan branch of Ricordi & Finzi to the Italian Government. The heading of the letter showed that the firm was the sales representative for pianos manufactured by Steinway & Sons. The letter stated as follows:

> " . . . the Steinway & Sons Piano Mod. K/232/243002, imported by us and consigned in deposit to the Giuseppe Verdi Conservatory of Milan, was required exclusively for concert purposes.
>
> " Said instrument was imported from Hamburg around 1941 and I cannot produce the pertinent documents as our office at Piazza S. Maria Beltrade 1 was completely destroyed during the air bombardment of August 15, 1943, as appears from the Statement of Claim already filed with the competent office and from which the fact emerges that the archives also were destroyed.
>
> " I believe that the documents establishing the date of importation of the instrument in question and the statement of deposit of the piano with the G. Verdi Conservatory of Milan, where it was subsequently destroyed during the air bombardment of the same day, are attached to the relative claim prepared by Steinway & Sons of Hamburg and filed with the competent Ministry through the American Consulate in Milan."

On the basis of this letter it was argued that (1) no reference was made by Ricordi & Finzi in its letter of November 17, 1950, regarding the ownership interest of Steinway & Sons in the piano in question or to any relationship between Steinway & Sons and the Conservatory; (2) the " Atto di Notorietà " prepared on June 18, 1951, in which four witnesses swore that Steinway & Sons were the owners of the piano on the date of loss, does not show what relationship, if any, existed between such witnesses and the " interested parties " or how such witnesses acquired knowledge of the facts to which they attested; (3) why did the Director in Milan of Ricordi & Finzi participate only as a petitioner and not as a witness in the " Atto di Notorietà " prepared on June 18, 1951? and (4) the obligation of the Italian Government to make a determination of a particular claim on an administrative level arose " . . . only after all the information that the claimant could give has been received. . . . " (citing the *Amabile Claim*[1] in support of their argument).

Held: that the claim must succeed. The claimants had established that they were owners of the piano at the time of its destruction. The claimants were entitled to receive 1,500,000 lire as compensation.

The Commission said: " The Commission will limit itself in this decision to the application of the principles previously enunciated in its Decision No. 11 [in the *Amabile Claim, supra*] and to resolving the arguments made by the Agents of the two Governments.

" The Commission finds from the evidence submitted in this case that the claimant corporation established in the Statement of Claim and the Annexes submitted in support thereof a *prima facie* basis for its claim under Article 78; that a report of the investigation conducted in Milan by the competent agencies of the Italian Government was made on November 30, 1950, to the Italian Ministry of the Treasury (said report was not submitted in evidence); that thereafter the administrative authorities of the Italian Government rejected this claim, denying the ownership of the claimant corporation in the subject piano and asserting that said ownership at the time of loss was in the Italian firm of Ricordi & Finzi, S.A.; that the claimant corporation subsequently submitted to the Italian Government an ' Atto di Notorietà ' made on June 18, 1951, at the request of the Director in Milan of Ricordi & Finzi, S.A., in which four witnesses affirmed the ownership of the claimant corporation in the subject property; that the Italian Government did not consider that the submission of said ' Atto di Notorietà ' necessitated a reinvestigation of this claim, but rejected it on the ground that said ' Atto di Notorietà ' was not valid evidence to establish the ownership of the claimant corporation; and that the Italian Government did not disclose at any time prior to the filing of the Answer in this case the evidence upon which it relied in its rejection of this claim.

" The Commission must assume that the respondent Government has submitted with its Answer all of the evidence developed in its investigation of this claim which supports its contention that the claimant corporation was not the owner of the property in question at the time of loss. The *only* evidence submitted by the Italian Government to document this contention is the letter dated November 17, 1950, from Ricordi & Finzi, S.A., which has been quoted above. Evaluating this letter either alone or in the light of all the evidence submitted in this case, the Commission finds that said letter is barren of any reference to ownership on the date of the loss.

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[1] See *supra*, p. 843.

" The Agent of the Italian Republic argues that (in translation) ' in the absence of precise evidence to the contrary, it is to be held that Ricordi & Finzi, S.A., purchased it [the subject piano] from Steinway & Sons and became its owner.' Such a presumption of fact would fill the gap in the evidence needed to support the contention of the respondent Government; but the Commission can find no basis for such a presumption, and none has been cited. Moreover, the documentary evidence submitted by the Italian Government destroys any basis for such a presumption; the Commission believes it unreasonable to consider that the Director in Milan of Ricordi & Finzi, S.A., would have failed in his letter of November 17, 1950, . . . to assert the ownership interest of his own firm in said piano—if in fact such ownership did exist—since said letter clearly demonstrates that Ricordi & Finzi, S.A., had knowledge that two claims for war damage (one under Italian domestic war damage legislation and the other under the Treaty of Peace) had been filed previously with the Italian Government in the name of and on behalf of ' Steinway & Sons—Hamburg '.

" The admissibility of an ' Atto di Notorietà ' as documentary evidence to establish elements of a claim has been resolved in Decision No. 11 [*Amabile Claim*], *supra* [p. 843]. The Director in Milan of Ricordi & Finzi, S.A., acted as the petitioner in the ' Atto di Notorietà ' made on June 18, 1951. The Agent of the Italian Government impugns the ' Atto di Notorietà ' on the ground that the Director appeared and signed the document as the Petitioner and not as a witness, and therefore he has not sworn under oath to the ownership of the subject piano. The Commission does not consider the argument to be relevant. The character of the party applying for the ' Atto di Notorietà ' is different under Italian law from that of a witness, and the petitioner is not required to act as a witness nor to swear under oath that the statements made by the four witnesses are in fact true. Moreover, a person who acts as a witness under Italian law must affirm in an ' Atto di Notorietà ' that he is not interested in the subject-matter except as a witness. Under the facts in the instant case, it is apparent why the Director in Milan of Ricordi & Finzi, S.A., abstained from giving testimony as a witness in said ' Atto di Notorietà '.

" The Agent of the respondent Government maintains in the Answer that the ' Atto di Notorietà ' does not show how the four witnesses described therein acquired knowledge of the facts to which they have affirmed, namely, that the claimant corporation was the owner of the subject piano on the date of loss. This question and any other question regarding the relationship, if any, between the said witnesses and the subject-matter of the dispute could have been readily ascertained by the competent authorities of the Italian

Government in the course of an additional investigation of this claim. From the evidence it appears that the assertion made by the Agent of the Italian Republic that Ricordi & Finzi, S.A., owned the subject piano is based merely on the letter of November 17, 1950, signed by the Director in Milan of this firm, and certainly the subsequent showing that this same individual had acted as the petitioner for the ' Atto di Notorietà ' made on June 18, 1951, should have been sufficient to prompt a further investigation of this claim by the respondent Government under the obligations assumed by it in the Agreement and supplementary Exchange of Notes signed at Washington, D.C., on August 14, 1947 (approved by Italian Legislative Decree No. 1747 of December 31, 1947).

" As further evidence to rebut the contention of the Italian Government that Ricordi & Finzi, S.A., was the owner of the subject piano on the date of loss, there was submitted with the Petition a photostatic copy of an official Receipt issued by the [Superintendent of Finance] of Milan for a previous claim; that claim was filed in the name and on behalf of Steinway & Sons by the President of Ricordi & Finzi, S.A., acting under a Power of Attorney, on September 2, 1944, under the provisions of Italian domestic war damage legislation. The letter of November 17, 1950, *supra*, was addressed to the [Superintendent of Finance] of Milan and makes reference to this previous claim. The documents submitted on September 2, 1944, to the Italian Government are not in evidence in this case, and no reference thereto was made in the Answer. The Commission must infer from these facts that nothing contained in any of the documents submitted on September 2, 1944, sustains the position taken by the respondent Government in this dispute. Moreover, the fact that this declaration was made to an Italian public officer long before the provisions of the Treaty of Peace could be envisaged confirms the conviction of the Commission that the piano in question was the property of Steinway & Sons.

" For these reasons, the Commission must conclude, and hereby finds, that Steinway & Sons was the owner of the subject piano at the time of loss. The fact that Steinway & Sons is a ' United Nations national ' within the meaning of Article 78 of the Treaty of Peace and the fact that the loss was a result of the war are not in dispute.

" As far as the indemnity is concerned, the claiming Government requests that this be fixed on the basis of the ' replacement value ' of the subject piano, which amount was stated as being $2,880.00, equal to 1,800,000 Lire at the present rate of exchange of 625 Lire to the dollar. The Agent of the Italian Republic disputes this valuation and maintains in the Answer that ' the present value of a piano of the type and condition of that which was destroyed is indicated to be about One Million Lire '.

" While the model, serial number and finish of the subject piano have been established by the evidence, there is lacking in this case any evidence to establish ' value '. Annex 4 attached to the Statement of Claim of the claimant corporation is simply an unsigned and unsupported statement on plain paper. Similarly, the brief reference to value made in the Answer is not documented.

"Under the provisions of para. 4(*a*) of Article 78 of the Treaty of Peace, the obligation of the Government of the Italian Republic in this case must be based upon the cost as of the date of this Decision to purchase a piano similar in type, age and condition to that of the subject piano on the date of loss, that is, on August 15, 1943. Considering the probative value of the evidence submitted, and the obligation of the Government of the Italian Republic under the Treaty of Peace as implemented on February 24, 1949, by an Exchange of Notes between the two Governments, the Commission holds that the claimant corporation is entitled to receive as compensation in this case 1,500,000 Lire."

[Report: Unpublished (Decision No. 15).]

Conciliation Commission—Determination of Existence of a Dispute—Restitution and Reparation Provisions of Treaty—Evidence of Loss or Damage—Burden of Proof.

BATCHELDER CLAIM (*THE KIRINKUOISKA* AND *THE THELE*).

Italian-United States Conciliation Commission. July 26, 1954.

(Sorrentino, Matturri.)

THE FACTS.—Batchelder, a United States national, claimed compensation, under Article 78 of the Treaty of Peace with Italy of 1947, for the loss of household furnishings and other personal property which had been removed during the war from his villa at Lussinpiccolo, a town on the Dalmation coast of the Adriatic, and two yachts, the *Kirinkuoiska* and the *Thele*, which were seized by the Italian Navy in Adriatic ports and subsequently destroyed in Italian territorial waters. When the claim was first submitted to the Italian authorities it was rejected on the ground that the Italian Government was not responsible because (i) Lussinpiccolo had never been Italian territory and (ii) there was insufficient evidence of the fate of the two yachts.

The claim was referred to the Commission. On behalf of the Italian Government a preliminary objection was taken with regard to the question whether there existed a dispute between the two Governments, as required by Article 83[1] of the Peace Treaty under which the Commission was established. The Italian Agent stated that the alleged dispute was based on a presumption of rejection of the claim because of the protracted silence of the Italian Government, whereas the Italian authorities had twice expressed an opinion. On the substantive claim it was now admitted that Lussinpiccolo was at the relevant time under Italian sovereignty, but it was contended (i) that, on the one hand, there was no certain proof of the existence of ownership of the household furnishings and other personal property located at Villa Flora at Lussinpiccolo, and that, on the other hand, the evidence submitted by the claimant himself proved that the loss of that property could not be attributed to an event of war; and (ii) that there was no evidence that the loss of the two yachts had been caused by an act of war.

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[1] Article 83 provides in part:

" 1. Any disputes which may arise in giving effect to Articles 75 and 78 and Annexes XIV, XV, XVI and XVII, part B, of the present Treaty shall be referred to a Conciliation Commission consisting of one representative of the Government of the United Nation concerned and one representative of the Government of Italy, having equal status. . . ."

Held: (1) that the preliminary objection must fail; a dispute had in fact arisen. (2) (i) The claim in respect of the personal property must be rejected for insufficiency of evidence; and (ii) the claim in respect of the yachts must succeed.

The Commission said: " I. In view of the fact that there exists a communication of the Italian Ministry of the Treasury, dated July 27, 1953, which takes a position with regard to the claim of George Lewis Batchelder, and that it is in relation to the said decision that the dispute has arisen, the Commission holds that the Petition of the Agent of the United States of America is admissible and that therefore it is not necessary in the instant case to examine and decide the question whether delay in the decision of a claim on the administrative level can constitute a presumption of its rejection, so that a dispute may be considered to have arisen within the meaning of Article 78 of the Treaty of Peace.

" II. As the Italian Government now admits that Lussinpiccolo was in Italian territory, Article 78 would be applicable to injury or damage as a result of the war to personal property located in that town belonging to the claimant, a national of one of the United Nations. However, it is necessary for the claimant, or the Government claiming on his behalf, to submit proof that such loss occurred as a result of the war or, at least, to submit sufficient evidence of a causal connection between the war and the loss that the burden of rebuttal would be shifted to the Italian Government. In the instant case, an examination of the evidence submitted by the claimant leads to the conclusion that there is in the record neither proof that the loss was caused by the war nor evidence sufficient to oblige the Italian Government to prove the contrary.

" Two documents were submitted by the claimant in support of the claim for compensation for the loss, as a result of the war, of household effects and other personal property which were in Villa Flora at Lussinpiccolo. One is his own affidavit of claim which reads as follows, in the pertinent part:

" ' 6. I left Lussinpiccolo in June 1945 with my wife Pia C. Batchelder who is the owner of Villa Flora at Lussinpiccolo in or about which the articles listed in Exhibit A were located. I have been informed by persons who left Lussinpiccolo during September 1946 and since that date that all of the furnishings and contents of the Villa listed in Exhibit A were confiscated and carried away by the Yugoslavian Army and Government officials and that none of the property can be traced or recovered. See letter from Joe Cattarinich dated September 23, 1946 (Exhibit J). I am also informed that the land and buildings known as Villa Flora in Lussinpiccolo have been confiscated by the Yugoslavian Government.'

The second document is the letter of Joe Cattarinich referred to by the claimant in his affidavit quoted above. Said letter is dated September 23, 1946, and bears a return address in Venice, Italy. The pertinent part of the letter reads as follows:

" ' Few days ago arrived from Lussinpiccolo the wife of Guido Tebaldi and she told that Tito's regular army or better to say the yugoslav army stole or removed everything from your house, furniture and all your personal silver and pictures and everything that was in the house! One of the army's captain made a payment receipt to himself for the furniture of the room near the bath and for the sewing machine so to show to the authority that may have asked a receipt! Anna Consulich who has your power of attorney protested to the judge and to the president of the district of Lussin but her action and the action of the judge and president of the district were not taken in consideration by the army and they took everything as if it would have been their owen! . . .' [*Sic.*]

" Another document submitted by the claimant is an Act of Notoriety dated February 19, 1951, and executed at Bordighera, Italy, in which four witnesses state under oath that the personal property located in the Villa Flora at Lussinpiccolo belonged to the claimant. Prescinding from the value of this document as proof of ownership, it makes no statement whatsoever concerning the facts surrounding the loss of property.

" Now it appears from the two documents quoted above that both the claimant and the writer of the letter, Mr. Cattarinich, are making statements concerning facts which are not within their own personal knowledge but which are at most a repetition of what they have heard other people say. The facts involved are in their nature susceptible of being proved by witnesses who speak from their own knowledge. The statements quoted above rest on the veracity and competency of some other, unidentified, persons. Apart from any question whether the loss of property in circumstances such as are alleged here constitutes a loss ' as a result of the war ', the Commission must reject the claim for household effects and other personal property located at Lussinpiccolo, for the reason that the claimant has failed to make even a ' prima facie ' case with regard to the loss of such property or to the causal connection between the war and the loss. On the basis of the evidence in the record, the Commission is unable to find as a fact that there actually was a loss of the property in question or that the loss, if any, occurred ' as a result of the war '.

" III. With regard to the two yachts, the evidence in the record as to their loss in Italian territory as a result of the war is deemed sufficient by the Commission to entitle the claimant to compensation. They were seized by the Italian Navy, subsequently requisitioned, and placed at the disposal of the Italian Government. They were sunk in the waters of the Port of Zara as a result of an air bombardment."

[Report: Unpublished (Decision No. 25).]

Conciliation—Conciliation Commissions—Jurisdiction of—Competence to Determine Jurisdiction—Distinction between Power to Determine Procedure and Power to Determine Jurisdiction—Jurisdiction to Decide on Abstract Questions of Law—Conciliation Commissions Set Up under Peace Treaty—Distinguished from Arbitral Tribunals—Treaties—Interpretation of—Principles and Rules of Interpretation—Existence of—Avoidance of Absurdity—Intention of the Parties—Comparison of Texts in Different Languages—Conformity with Rules of International Law—Literal Interpretation — Restrictive Interpretation — Treaties Regarded as Limitations of Sovereignty of State.

Re COMPETENCE OF CONCILIATION COMMISSION.

Anglo-Italian Conciliation Commission. May 8, 1954.
(Hannaford, Sorrentino, da Matta.)

THE FACTS.—On June 6, 1952, the British Government referred to the Anglo-Italian Conciliation Commission the general question whether an individual [physical person], included within the definition of " United Nations national " contained in the first part of Article 78 (9) (*a*) of the Peace Treaty with Italy of 1947,[1] was excluded from the right to present a claim under that Article if, at a certain period, he was also, according to Italian law, in possession of Italian nationality.

For the Italian Government it was objected that the jurisdiction of the Conciliation Commission was limited to disputes which might arise with regard to the application of Articles 75 and 78 of the Treaty; that is, to the determination of actual cases: it did not extend to abstract or theoretical questions.

In reply, on behalf of the British Government, it was pointed out that Article 83 of the Peace Treaty under which Conciliation Commissions were established gave the Commission " jurisdiction over all disputes which may thereafter arise between the United Nations concerned and Italy in the application or interpretation of [*inter*

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[1] For the text see *supra*, p. 444.

alia] Articles 75 and 78 " of the Treaty. There was no limitation to a concrete case.

The Commission ordered the Parties to present written memorials on the preliminary point of the competence of the Commission to adjudicate on the question submitted to it by the British Government.

On behalf of the British Government it was contended that the Commission was competent to decide the question. The Conciliation Commission, according to the wording of Article 83 of the Treaty of Peace, had jurisdiction over all disputes relating to the application and interpretation of the said Article, both disputes arising from the application of the Article to a particular case and disputes of a general nature based on the interpretation of a special provision of that Article. " If the Commission were to have had jurisdiction only in the case of disputes arising from individual claims, Article 83 would have stated this expressly. And the interpretation of the British Government is based on the fact that the Commission has jurisdiction not only in questions concerning disputes relating to claims under Article 78, but also in the case of disputes raised regarding the application of other Articles of the Peace Treaty, where it is even more probable that the dispute concerns rather the general interpretation to be given to some provisions than the application of a particular provision."

In order to define the competence of the Conciliation Commission it was necessary to consider the provisions of Article 83 of the Peace Treaty. It was a principle of international law, often confirmed by the international courts, that the jurisdiction of an international tribunal is established and defined in the agreement which created it, in this case the Peace Treaty. It was irrelevant that other international tribunals might have held that no question of principle could be decided without the agreement of the Parties, as the question of knowing whether a tribunal was competent or otherwise depended exclusively on the terms of the instrument which created it.

The argument had sometimes been put forward that the Conciliation Commission could not decide the general question mentioned above, because, in so doing, it would be expressing an advisory opinion which could not be requested by one only of the two Parties to the dispute. The question was discussed before the Permanent Court of International Justice in the case concerning the *Statute of the Memel Territory*,[1] when the Court decided that it was competent to give a decision with obligatory effect, and not only an advisory opinion, on the interpretation of a particular international instrument.

Finally, the British Government " firmly maintains that the jurisdiction conferred on the Conciliation Commission by para. 2

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[1] Judgment of June 24, 1932, in the case concerning *Interpretation of the Statute of Memel*: *P.C.I.J.*, Series A/B, No. 47 [*Annual Digest*, 1931–1932, p. 384].

of Article 83 of the Peace Treaty is sufficiently extensive to give the Commission the possibility of being seised, without the agreement of the other party, of a dispute of a general nature relating to the interpretation to be given to the expression 'United Nations nationals' contained in Article 78."

On behalf of the Italian Government it was contended that the Commission was not competent to decide the question raised by the British Government. The Commission could and must interpret the provision of law exclusively . . . in concrete cases. It was not competent to give an abstract and general interpretation of the law, having effect for future cases; that would amount to an activity inherent to the legislative function. The Conciliation Commissions contemplated in Article 83 of the Peace Treaty had exclusively jurisdictional functions; they could not give an authoritative interpretation of the provisions of the Peace Treaty as, in this case, it would be a question of entering into the province of a legislative function which did not belong to them. Consequently, the request should be declared inadmissible.

In his argument the Agent of the British Government recognized that the work of the Conciliation Commissions was of a jurisdictional nature, and continued: "Now, the expression 'jurisdiction' and the function indicated thereby have, in international law, the same significance as is attributed to them in internal legislation. The Permanent Court of International Justice has always decided in this sense. And the distinction between the jurisdictional and the legislative function can easily be established, the latter being destined to determine the rules of law which will have to be observed in each particular case as forming part of the juridical organisation and having as characteristic elements both abstraction and generality; the former being destined to apply the law to a practical case and characterised by the concrete and particular aspect. The obligatory strength of a judicial decision and the authority of the thing judged are necessarily limited to the parties '*en cause*' and to the subject of the dispute."

In the international field this principle was established in Article 59 of the Statute of the Permanent Court of International Justice. It followed, therefore, that the jurisdictional function could not include the faculty to interpret the provisions in an abstract and general manner having obligatory effect for all future cases. This—authoritative—interpretation formed part of the legislative function.

The invoking, as a precedent, of the dispute on the Statute of the Memel Territory in which the Permanent Court of International Justice issued a binding decision on the interpretation of a special international instrument, lacked consistency. On the contrary, the Court did not intend to interpret the Statute as having obligatory effect for the future, and in fact held that its decision could not be obligatory between the Parties even as regards the particular case which had been examined. The Court gave an advisory opinion, having authority without doubt, but without the character of being obligatory. Therefore the decision concerning the Statute of the Memel Territory could not be invoked as a precedent in connection with the present case.

" As regards the Conciliation Commissions established under Article 83 of the Peace Treaty, there are no elements to permit one to consider that their jurisdiction is different from the normal jurisdiction or that the Commissions have other functions than the jurisdictional function. Paragraph 1 of Article 83 considers the disputes which might arise on the *application* of Articles 75 and 78, and the application cannot be effected except in respect of concrete cases. Paragraph 2 makes express mention of the jurisdictional nature of the work of the Commission. The expression ' application ' or ' interpretation ' contained therein does not imply an authoritative interpretation of the provisions, made in a general way and in contemplation of future cases; the Conciliation Commissions have the nature not of political bodies but of jurisdictional bodies." The object of the paragraph was to avoid the necessity for establishing a Conciliation Commission for each particular dispute, as is normally done with the Arbitral Tribunals. On the other hand, paragraph 2 expressly stated that the Conciliation Commissions would have jurisdiction.

Held: that the Commission was not competent. Its jurisdiction was limited by the wording of the Peace Treaty, namely, to disputes arising from claims presented under Article 78 of the Treaty, and did not extend to interpreting the provisions of the Treaty " in an abstract and general manner ".

The Commission said: " Let us analyse the question, limited to this last and essential aspect—admissibility or non-admissibility of the dispute of a general nature—in the light of the principles of international law and of the provisions of the Peace Treaty.

" We have before us a clear and precise provision of the Peace Treaty—such is the contention of the Agent of the British Government. But one could commence by asking: is it always easy to know if the text is sufficiently clear ? Does not the fact that there is a dispute prove that, for one at least of the parties, an interpretation is necessary ? In the new ' Projet Définitif de résolution sur l'Interprétation des Traités ', presented on the 19th of October 1953 at the session of the Institute of International Law at Siena, it is stated, in Article 1, that the apparent clarity of the provisions of a treaty would neither be sufficient to exclude proof to the contrary nor render it unduly difficult.

" We could say first of all, with Anzilotti (Publications of the

P.C.I.J., Series A/B, No. 50, p. 383[1]), that one cannot see how it would be possible to say that an article of an agreement is clear, before having determined its object and its end; it is only when one knows what the Contracting Parties proposed to do, the object they wished to achieve, that one can ascertain that the natural sense of the terms used either remains within or exceeds the said intention.

" There are some rules for the interpretation of treaties, despite the opinion of certain authors, like Hall, Lawrence and Oppenheim, who deny this. But it is strange that Oppenheim himself, after having said that no rules exist concerning the interpretation of treaties, adds that it is important to enunciate the rules of interpretation which commend themselves on account of their suitability (*International Law*, vol. I (7th ed., 1948), §§ 553 and 554). Notwithstanding the unilateral genesis of Peace Treaties, which are imposed on the vanquished by the victors, they are really bilateral conventions and their interpretation is regulated by the general rules of interpretation of treaties (*Recueil des Décisions des Tribunaux arbitraux mixtes*, vol. VII, para. 47). The Court of International Justice, and its antecedent, the Permanent Court of International Justice, have continually made use of the rules of interpretation (*vide* Hudson, *The Permanent Court of International Justice* (1943, paras. 631 and following). One could not subscribe to the opinion of Lord Phillimore (*Commentaries upon International Law*, vol. II, Part V, Chap. VII), according to which (these are the principles of Grotius and his successors) the provisions of a treaty must be interpreted in an equitable and not in any technical manner. The great majority of authors have shown themselves contrary to this opinion. (See, for example, Cavaré, *Le Droit international public positif* (1951), pp. 194 and following.) Schücking, for his part (in *Friedenswarte*, September 1928, p. 268), is of the opinion that an arbitral tribunal is obliged to apply the same law as the Permanent Court of International Justice. It is only in default of rules of law which are applicable that it can make laws *ex aequo et bono*. But this is not the case. It must be said that it accords with the practice and the decisions of the Court that the application of general principles shall not exceed the limits of positive law; in applying them the judge does not become free to decide *ex aequo et bono*. This arises from the fact that Article 38 of the Statute requires a formal agreement between the Parties if the Court is to have the power to decide according to the principles of justice and equity.

" In order to be able to establish the true meaning of Article 75 of the Peace Treaty, and, as an essential element, in order to obviate the paradoxical consequences which an interpretation exclusively taken from the words of the text would—and this is not an hypothesis—at times be liable to reach, one must have recourse to the determination of the *ratio legis* of the Treaty. The application of this principle is found in all jurisprudence established by the Permanent Court of International Justice. (See the Advisory Opinion of April 6, 1935.[1])

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[1] [Advisory Opinion of November 15, 1932, on *Interpretation of the Washington Convention of 1919 concerning the Employment of Women during the Night* (*Annual Digest*, 1931–1932, Case No. 217).]

" It is true that there is so little precision and clarity in the Peace Treaty with Italy that the interpretation of it becomes at times difficult. One must observe, for instance, the difference of wording used in the French and English texts. Paragraph 2 of Article 83 in the French text states that ' Lorsque une commission de conciliation sera constituée en application du paragraphe 1 er elle aura *compétence* pour connaître de tous les différends . . . ' In the English text, it is stated that ' When any Conciliation Commission is established under paragraph 1 above, it shall have *jurisdiction* over all disputes . . . ' This difference of terminology has, on the other hand, very little importance, the competence being only the limit of jurisdiction, the measure of the power to judge. After all, it is always a question of a jurisdictional function. But must this jurisdiction be considered as limited to disputes arising from individual claims under the terms of Article 78, or can it include also disputes arising from the general interpretation to be given to some provisions contained in the Peace Treaty ? That is the question. Despite the designation of Conciliation Commissions (which is acceptable when it is a question of the settlement of a dispute between a representative of the Government of the United Nation concerned and a representative of the Italian Government seeing that the Commission can settle disputes amicably), they are in cases like the present real arbitral tribunals. This is particularly so in the case of the addition of a Third Member, when, according to para. 6 of Article 83, the decision of the majority of the members of the Commission shall be the decision of the Commission and shall be accepted by the Parties as definitive and binding. Which means that its mission is not to decide along the lines of what it considers just and equitable but to determine the disputes according to the strict rules of law. This is what was established as regards the Mixed Arbitral Tribunals which were set up by virtue of the Peace Treaties of 1919. This intention of the draftsmen of the Treaty of Versailles appears clearly from para. 2 of the Annex to Article 304, which orders that the Tribunal shall adopt ' for its procedure ' rules which are in conformity with justice and equity (a formula which appears reproduced, in the same terms, in para. 3 of Article 83 of the Peace Treaty with Italy) which, as Blühdorn observed (' Le fonctionnement et la jurisprudence des Tribunaux Arbitraux Mixtes ' in *Recueil des Cours de la Haye*, 1932 (iii), p. 190), excludes the application of these rules to the disputes themselves. The tendencies of international arbitration are . . . to lean more and more towards obliging the arbitral tribunals to give their decisions not according to a more or less vague conception of equity, but according to the rules of law. The competence of the arbitrator is limited exclusively to knowledge of the treaty. (See Salvioli, ' La règle de droit international ', in *Recueil des Cours de la Haye*, 1948 (ii), p. 391.)

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[1] *Minority Schools in Albania*: *P.C.I.J.*, Series A/B, No. 64; *Annual Digest*, 1935–1937, Case No. 182.]

" The Conciliation Commission holds that it is not given to it to exceed the limits which the Peace Treaty assigns formally to its jurisdiction.

" If it is a matter, therefore, . . . of the exercise of a jurisdictional function, one can only conclude that the Commission must limit its activities to determining the disputes arising from claims presented according to the terms of Article 78 of the Peace Treaty, the meaning of jurisdiction being the same in international and internal law. One cannot exceed the limits which the principles, the text and the spirit of the Treaty assign to the competence of the Commission. To interpret the Treaty in such a way that the Commission would also have the power to interpret the provisions of the Peace Treaty in an abstract and general manner, with obligatory effect for all future cases, would be to run the risk, because [the power] is open to abuse, of the Commission's giving a judgment blemished by excess of power—it would create rules of law, which is not a jurisdictional function but a legislative function—a very serious position in the present case because, according to the provisions of para. 6 of Article 83 of the Peace Treaty, the decision is to be definitive and binding.

" It has been pointed out that if the Conciliation Commission were to have to limit its activity solely to the determination of disputes based on individual claims, that is, concrete cases, Article 83 of the Treaty of Peace would have expressly laid this down. But we can say, on the contrary, that if it had been intended to give to the Conciliation Commission a jurisdiction which is not that which is generally attributed to conciliation commissions, and which does not come within their normal functions, it should there be stated expressly. Even as regards the International Court of Justice, it was contended that it could not be seised of a question posed in abstract terms, since that would mean giving the Court almost a legislative rôle. This argument was rejected for the sole reason that the Charter of the United Nations and the Statute of the Court state expressly that the Court can give an opinion on all juridical questions, abstract or otherwise. (S. Bastid, ' La Jurisprudence de la Cour Internationale de Justice ', in *Recueil des Cours de la Haye*, 1951 (i), p. 603). And it must be added that these opinions have no obligatory value unless a special text stipulates an undertaking to apply the opinion requested of the Court. That is the established practice. There is no word in the Peace Treaty which can lead to the conclusion that the interpretation of a provision by an advisory opinion comes within the function of the Conciliation Commission. It appears therefore that we must reject that the jurisdiction conferred on the Commission by Article 83, para. 2, of the Treaty is sufficiently comprehensive to give the Commission the possibility of being seised of a request by one of the Parties without the concurrence of the other. There is no indication of the acceptance of this doctrine in the cases—and they are very numerous—submitted to the consideration of the Arbitral Tribunals or the Conciliation Commission. On the contrary, a conciliation commission would not know how to issue the requested opinion without infringing the well-established principle of international law that all judicial proceedings arising from a juridical question pending between States calls for the consent of these States.

" It is not possible, without falling into a serious contradiction, to admit; on the one hand, the postulate that the decision of the Commission must bring the dispute to an end, and, on the other, the recognition of the right to establish the same decision unilaterally. This argument has been put forward because para. 3 of Article 83 states that each Conciliation Commission will determine its own procedure, adopting rules which are in conformity with justice and equity; the Commission has the capacity to determine its own jurisdiction. But it must not be forgotten that it is one thing to *determine a procedure* and another, entirely different, to *determine the jurisdiction*; the provision contained in para. 3 of Article 83 cannot but mean that each Commission has the power to determine, *within the limits of its jurisdiction*, the procedure to be followed. When a tribunal or an arbitral commission is authorised to determine *its own jurisdiction*, this is expressly stated—as was done, for example, in the Hague Convention of 1899 for the peaceful settlement of international conflicts, in its Article 48. The provisions of a treaty must be interpreted in such a way that they may conform as much as possible with the rules established by international law rather than derogate from these rulings. And let us say once for all that the arbitrator cannot replace the legislator (*vide*, for example, Carabiber, ' L'arbitrage international ', in *Recueil des Cours de la Haye*, 1950 (i), pp. 265 *et seq.*; Brierly, ' Règles du Droit de la Paix ', *ibid.*, 1936 (iv), p. 137).

" Procedure, competence, jurisdiction, are technical words with a precise meaning. No interpretation must ever arrive at a solution other than that which emerges formally from the terms of the treaty, unless, obviously, this leads to an absurd result.

" There is one last remark: international jurisprudence normally interprets the provisions of international treaties in a restrictive manner, as it regards them as limitations of the sovereignty of the State, by the application of the principle which submits to a restrictive interpretation provisions which derogate from common law

(Ch. Rousseau, 'L'Indépendence de l'État dans l'ordre international', in *Recueil des Cours de la Haye*, 1948 (ii), p. 211).

"In the present case neither the provisions of the Peace Treaty nor the principles allow an affirmative reply to be given to the submission presented by the British Government."

[Report: Unpublished.]

Conciliation—Conciliation Commissions—Evidence—Expert Evidence—Extent to which Commission should Rely Thereon.

I.V.E.M. Claim.

Franco-Italian Conciliation Commission. March 7, 1955.

(Perier de Feral, Sorrentino, Bolla.)

In this case, the Commission had ordered that an expert witness should examine and report on the claimant's books of account. In the course of its decision, the Commission observed: "In accordance with the practice of the Conciliation Commission,[1] the opinion of the expert witness does not bind the Conciliation Commission, which ought to base its findings on its own convictions. At the same time, when it concerns enquiries and assessments which presuppose technical knowledge denied to the members of the Conciliation Commission, there is no reason why the latter should not adopt the opinion of an expert—so long as the latter's reasoning is not contrary to the facts which appear on the dossier or to common knowledge or, of course, to the provisions of the law or the dictates of logic. The report of an expert is only one way of convincing the Court: however, the latter, being ignorant of certain facts which it might know but which in fact it does not know, can only be sure about them through the knowledge of the expert. . . . All that remains for the Conciliation Commission is to ascertain whether the expert witness may not, by chance, have exceeded the limits of his science and entered into the sphere of law, or whether his arguments ought to be regarded as inconclusive or whether they conflict with facts known to the Commission."

[Report: *Recueil des Décisions*, Part 5, p. 153 (at p. 177).]

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[1] See, *e.g.*, the decision dated November 20, 1953 (*Recueil des Décisions*, Part 4, p. 200) concerning property of the Duc de Guise.

Conciliation—Conciliation Commissions—Competence of—Competence to Pronounce on Question of Compliance of Municipal Law with Peace Treaty—Concurrent Jurisdiction of Municipal Courts—Peace Treaty with Italy, 1947—Refund of Italian Special Capital Levy Duties Paid—Whether Excluded by Change in Nature of Tax—Time Limits of Prohibition in Treaty of Imposition of Tax.

MICHELIN ITALIANA CLAIM.

Franco-Italian Conciliation Commission. December 7, 1955.

(Perier de Féral, Sorrentino, Bolla.)

THE FACTS.—This was a claim against the Italian Government for repayment to the French Michelin Italiana Company of the sum of approximately 26 million lire paid on April 28, 1947, by the Company to the Provincial Treasury at Turin. The money was paid under an Italian Legislative Decree, No. 241 of September 13, 1946, which levied a tax of 25 per cent. on the increased value appearing in the accounts of trading companies resulting from the monetary revaluation by virtue of the Legislative Decree No. 436 of May 27, 1946. Subsequently, Decree No. 241 was repealed and replaced by Legislative Decree No. 48 of February 14, 1948, amended by No. 1057 of May 5, 1948, Article 9 of which was in the following terms:

> " (1) Sums paid to the State under Legislative Decree No. 241 of September 13, 1946, are regarded as anticipatory payment of the companies' special capital levy [*impôt extraordinaire proportionnel sur le patrimoine des sociétiés et des personnes morales*] and are therefore deducted from the amount of the said levy.
>
> " (2) The reimbursement of any excess above the amount of the capital levy is excluded."

The companies' capital levy had been imposed in Italy by Law No. 828 of September 1, 1947, and the Company claimed to be exempt from that levy by virtue of Article 78, para. (6), of the Treaty of Peace,[1] the interpretation of which was the subject of a decision by the Commission on August 29, 1949, in *Re Italian Special Capital Levy Duties.*[2] In pursuance of this claim, the Company applied on June 27, 1950, to the Italian Treasury for repayment of the sum paid, with interest. The application was rejected. The

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[1] Article 78 (6) provides as follows:

" 6. United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Italy by the Italian Government or any Italian authority between September 3, 1943, and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded."

[The Treaty came into force on September 15, 1947.]

[2] *Recueil des Décisions*, Part I, p. 95; *International Law Reports*, 1951, Case No. 128.

Company, reserving its right of recourse to the Commission set up under the Peace Treaty, sued the Administration of State Finance in the Court of Turin, on the ground that the refusal to refund the monies paid was equivalent to subjecting the Company to the capital levy, from which it was exempt. In its defence, the Administration, conceding that the Company was exempt from the capital levy, pleaded that the tax on the credit balance resulting from monetary revaluation was something different from the capital levy and that the Legislative Decree of February 14, 1948, did not have retroactive effect. There was, therefore, no obligation to refund the monies paid, even if they could not be regarded as an anticipatory payment of the capital levy.

The Court of Turin gave judgment for the Company and this judgment was upheld by the Court of Appeal of Turin. The Administration lodged an appeal against the latter judgment, which appeal was pending when the present claim came before the Commission.

On behalf of the French Government (for the Company) it was contended that the tax of 25 per cent. on the increased value resulting from monetary revaluation imposed on trading companies lost its character of a separate tax as the result of the Legislative Decree of May 5, 1948. Sums already remitted in payment of that tax must now be regarded as having been paid on account of the capital levy. Companies exempt from that levy ought therefore to obtain a refund of the monies remitted in payment of a tax to which they were not liable. The Legislative Decree of May 5, 1948, had a retroactive effect because, *ex hypothesi*, it applied to monies paid before its promulgation and because its purpose was to divert those monies to objects other than those for which they had been paid. The object of Article 9 (2) of Legislative Decree No. 1057 of May 7, 1948, was to retain in the public purse the monies remitted in payment of the tax in those cases where companies subject to the capital levy were mulcted to a lesser extent by the new impost. But that reasoning (it was contended) was only valid on the hypothesis that the capital levy, independent of its amount, was not due. The consequence of the reasoning of the Italian Government would be that the Company would be contributing to the capital levy from which it was exempt by the Treaty of Peace as interpreted by a definitive decision of the Franco-Italian Conciliation Commission.

In reply, it was contended on behalf of the Italian Government that the only object of Article 9 of Legislative Decree No. 1057 of May 7, 1948, was to define the alternative between the two taxes and to exempt payments to the extent of the capital levy imposed by the Law. Companies which, for whatever reason, were exempt from the capital levy ought to make that payment in accordance with the Decree of 1946, which had never been repealed. On the other hand, with regard to the Treaty of Peace it was necessary to take into consideration the juridical situation existing at the moment when it entered into force, as is expressly provided in Article 78 (6) of the Treaty. Changes which took place thereafter could not be taken into consideration. In consequence, the Company, which was not liable to pay the capital levy, ought to have been exempted from the tax on the monetary devaluation of credit balances after the entry into force of Legislative Decree No. 1057 of May 7, 1948.

But, if the argument put forward on behalf of the French Government were to be accepted, reimbursement could not, indeed, be effected before the determination, in the abstract, of the amount of the capital levy which the Company would have been liable to pay if it were not exempt therefrom, seeing that reimbursement could be made only within those limits, the reimbursement of the difference being excluded by the terms of Article 9 (2) of Legislative Decree No. 1057 of 1948.

In the reply on behalf of the French Government it was recalled that Article 6 of Legislative Decree No. 48 of February 14, 1948, ran thus: " The Legislative Decree of the Provisional Chief of State, No. 241 dated September 13, 1948, is abrogated "; and it was pointed out that the legislative decision which created the obligation to pay the capital levy was taken on September 1, 1946, and therefore was wholly within the period envisaged by Article 78, para. 6, of the Treaty of Peace.

Objection was further taken on behalf of the Italian Government to the competence of the Commission on the following grounds: (1) The question for decision was that of the right of the Company to repayment of an Italian tax and only the Italian national courts were competent to decide that question. In any event, the Company had already resorted to those courts. (2) The competence of the Conciliation Commission to decide whether an Italian tax was of the character envisaged by Article 78 (6) of the Treaty of Peace did not, under that provision, extend to taxes created after the entry into force of the Treaty (September 15, 1947); after that date there was nothing to prevent Italy from imposing a capital levy on United Nations nationals and their property. The Conciliation Commission was not therefore competent to decide whether Legislative Decrees No. 48 of February 14, 1948, and No. 1057 of May 7, 1948, were or were not compatible with Article 78 (6) of the Peace Treaty.

Held: (1) that the Commission was competent to hear the claim, and (2) that the claim must succeed. The Company was entitled to be refunded the sums paid under the Legislative Decree of September 13, 1946, to the extent of the total of the capital levy which would have been due if the Company had not been exempt from payment. The decision regarding the restitution of the balance was left to the competent Italian court.

The Commission quoted Article 78 (6) of the Treaty of Peace[1] and continued: " This provision imposes on the Italian Government two obligations: (1) To exempt United Nations nationals and their property from certain exceptional taxes. (The Conciliation Commission, in its decision of August 29, 1949,[1] held that that exemption applied to the special capital levy duties imposed by Decree No. 828 of September 1, 1947); (2) To refund sums collected for the abovementioned taxes.

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[1] See *supra*, p. 876, n. 1.

" The second of these obligations is limited neither in time nor as to payments made during a determined period. Moreover, an allegation that this obligation has not been complied with calls into existence the competence of the international tribunal on which devolve disputes relating to the application of Article 78 of the Treaty of Peace. The Conciliation Commission is therefore competent to decide whether the sum of 25,711,357 lira, paid on April 28, 1947, by the Company to the Italian Treasury must in view of the terms of the Peace Treaty be regarded as having been levied for the capital levy which it was not liable to pay. Indeed, the sum in question was not paid on April 28, 1947, by way of payment, in whole or in part, of the capital levy—which had not then been imposed—but by way of payment in full of the tax on increased value on monetary revaluation imposed by Legislative Decree No. 241 of September 13, 1946.

" The question which presents itself is, therefore, whether after the Legislative Decrees No. 48 of February 14, 1948, and No. 1057 of May 7, 1948, the account for which the payment of April 28 was made ceased to be, purely and simply, with retroactive effect or without being replaced by another basis compatible with Article 78 (6) of the Treaty of Peace. On those two hypotheses, the sum paid on April 28, 1947, by the Company could not be held by the Italian Treasury to be appropriated to the capital levy which the Company was not liable to pay. Such an appropriation would, indeed, constitute an unjustifiable refusal on the part of the Italian Government to refund a sum collected definitively by way of payment of the capital levy.

" In order to decide, according to international law, whether Italy did not, in this case, comply with the obligation which is imposed on it by the last sentence of Article 78 (6) of the Peace Treaty, it is essential that this Commission examine as a preliminary point of law the scope of the Italian Legislative Decrees No. 48 of February 14, 1948, and No. 1057 of May 7, 1948, in order to see whether those Decrees abrogated, with retroactive effect, the taxes on increased values due to monetary revaluation and if, in expressly abrogating them, they have not replaced them by another which Italy could impose on United Nations nationals and their property without infringing Article 78 (6) of the Treaty of Peace.

" The competence of an international tribunal to pronounce on preliminary pleas the decision on which depends on the municipal law of one of the States parties to the litigation, cannot be contested and it has consistently been affirmed by this Conciliation Commission, in particular in its decision of August 29, 1949,[1] by which United Nations nationals and their property were recognized as being exempt from the special capital levy on individuals and from the special capital levy on corporations. In that decision, the Conciliation Commission had to pronounce on the preliminary question, raised by the Italian Government and by Italian law, of the juridical scope of an Italian Law during the *vacatio legis* between the publication of the Law and its entry into force.

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[1] *Re Italian Special Capital Levy Duties* (see *supra*, p. 876, n. 2).

" Article 6 of Legislative Decree No. 48 of February 14, 1948, expressly provides for the abrogation of Legislative Decree No. 241 of September 13, 1946—that is to say, the abrogation of the tax on the increasing value on monetary revaluation, without discriminating in any way between the commercial companies upon whom the tax was imposed and in particular without excluding from the effect of the abrogation commercial companies which might be able to take advantage of their status as ' United Nations national ' within the meaning of Article 78 (9) (*a*) of the Treaty of Peace; in consequence, the question whether such a discrimination would have been legitimate under international law may be left in suspense.

" The point at issue between the parties is the question whether the abrogation was intended by the Italian Legislature to have effect *ex tunc* or *ex nunc*. It appears from the first paragraph of Article 9 (which reproduces the third paragraph of Article 7 of Legislative Decree No. 48 of February 14, 1948) and from Article 10 of Legislative Decree No. 1057 of May 7, 1948, that, in principle, the abrogation intended by the Italian Legislature was *ex tunc*, that is to say, with retroactive effect, from the moment when the monies received by the State by virtue of Legislative Decree No. 241 of September 13, 1946, were regarded as an anticipatory payment of the special capital levy (Article 9 (1)) and that the unconditional restitution of shares transferred to the State by way of payment under Legislative Decree No. 241 of September 13, 1946, could be insisted on. Retention under another head of taxation would conflict with the maintenance of the head under which the money had been paid.

" However, the opening words of the first paragraph of Article 9 admit an exception, that is to say, in the terms of the second paragraph of the same Article (reproducing Article 7 (3) of Legislative Decree No. 48 of February 14, 1948) ' reimbursement of any excess above the amount of the capital levy is excluded '. Within these limits, which will be described later, the tax on the increased value due to monetary revaluation must be regarded as abrogated only

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[1] In *Re Italian Special Capital Levy Duties* (*supra*).

ex nunc, that is to say, without retroactive effect; the former head of taxation remained, giving the State the right to retain the 'excess'—it was not replaced by the special capital levy.

"It was urged on behalf of the Italian Government that once the period between November 3 and the date of the coming into force of the Peace Treaty (September 15, 1947) had expired, Article 78 (6) of the Treaty no longer forbade the creation of taxes and their imposition on United Nations nationals and their property—even taxes of the kind mentioned in the Article. It will here suffice to say that Italy has not made use of such a possibility. Legislative Decrees No. 48 of February 14, 1948, and No. 1057 of May 7, 1948, did not create a special capital levy affecting commercial companies exempt from payment of the tax imposed by Law No. 828 of September 1, 1947.

"Nor is it confirmed that the second paragraph of Article 10 of Legislative Decree No. 1057 of May 7, 1948, which is based on the hypothesis of commercial companies which had not yet fulfilled their obligation of paying the revaluation balances, exempts them from that obligation without making a distinction between those which were and those which were not subject to the special capital levy, so that, to take a company which was a 'United Nations national' and which had not yet, by an oversight, paid Italy what it owed by way of tax on the increased value on monetary valuation, the Italian Treasury would no longer have the right, in the terms of Decree No. 1057 of 1948, to make the company pay the sum which it had not yet discharged, certainly not by way of tax on the increased value due to monetary revaluation and still less by way of special capital levy.

"The second paragraph of Article 9 of Legislative Decree No. 1057 of May 7, 1948, the retroactive nature of which has already been recognized, can be interpreted in two ways. According to the interpretation given to it by the Court of Turin in its judgment of January 13, 1954, and by the Court of Appeal of Turin in its judgment of November 30/December 30, 1954, one can speak of a surplus only as of one quantity in relation to another quantity, but it is not possible to speak of a surplus in relation to something which does not exist. It follows that what has been paid by way of tax on the increased value on monetary revaluation by commercial companies exempt from the special capital levy, must be restored to them in its entirety.

"On behalf of the Italian Government, another interpretation has been urged before this Commission, according to which the Italian Treasury would, in every case, have the right to retain the difference between the sum paid by the Company by way of tax on the increased value due to monetary revaluation and the, presumably lesser, sum which it would have had to pay by way of special capital levy, if it had been liable to pay that levy. The

Conciliation Commission ought in this regard to limit itself to recognizing that, even if the second paragraph of Article 9 had the meaning attributed to it on behalf of the Italian Government, it would not infringe the Peace Treaty. The balance, as thus conceived, would not, in fact, be retained by the Treasury by way of special capital levy but by way of a tax validly created by Decrees No. 48 and 1057 of 1948. In these circumstances, the Conciliation Commission ought to leave to the competent Italian courts the choice between the two possible interpretations of an Italian Law, they not being preliminary points of law a decision on which would be necessary for the decision whether Italy has complied with the obligations imposed on it by Article 78 (6) of the Treaty of Peace."

[Report: *Recueil des Décisions*, Part 5, p. 232.]

Disputes—Conciliation—Conciliation Commission Set Up under Peace Treaty—Whether Possessing Exclusive Jurisdiction to Adjudicate on Disputes arising out of Treaty—The Law of Italy.

COMBES DE LESTRADE *v.* MINISTRY OF FINANCE.

Italy, Court of Cassation (United Chambers). October 31, 1955.

THE FACTS.—Article 78 (6) of the Treaty of Peace with Italy of 1947 provides:

> "6. United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Italy by the Italian Government or any Italian authority between September 3, 1943, and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded."

Mme. Combes de Lestrade, a French national, who had paid certain Italian taxes of the nature described in the Article quoted, sued the Ministry of Finance for reimbursement of the sums which she had paid. The Court of Appeal of Catania dismissed the case on the ground that as the claim was already pending before the Taxation Commission, an administrative tribunal, the Court was not competent to adjudicate on the claim. Mme. Combes de Lestrade appealed against this decision on two grounds: (a) that under the Peace Treaty only Conciliation Commissions had jurisdiction to decide disputes arising out of the operation of the Treaty; and (b) that the Treaty introduced a special procedure for the decision of such disputes, and, therefore, the ordinary principle that, in taxation matters, the administrative tribunals had jurisdiction to the exclusion of the ordinary courts, could not apply to disputes arising out of the Peace Treaty.

Held: that the appeal must be dismissed on both grounds. (a) Only States, and not individuals, could bring proceedings before the Conciliation Commission; and (b) there was in the Peace Treaty no limitation as to the tribunal before which the appellant's claim could be brought.

The Court said: " Article 83 of the Peace Treaty between Italy and the Allied and Associated Powers, signed in Paris on February 10, 1947, provides for the referring to a Conciliation Commission, constituted and regulated by the same Article, of all disputes which may arise in the application of certain provisions of the Treaty. One of these provisions, Article 78 (6), lays down that United Nations nationals and their property shall be exempt from any exceptional taxes, levies or imposts imposed after September 3, 1943, and that all sums paid thereunder shall be refunded. Therefore, it is contended, on a true interpretation of Article 83 of the Peace Treaty, the competence of both the ordinary courts and the Taxation Commissions to hear any dispute arising out of the application of Article 78 (6) is excluded. That was the basis of the decision of the Court of first instance. The logical result of that decision would be that the only tribunal competent to determine disputes [arising out of the Treaty] is the Conciliation Commission.

" We cannot accept the contention of the appellant which, in fact, throws doubt on the regularity of the course which she herself followed [in commencing proceedings in the ordinary courts]. The clear terminology of Article 83 of the Peace Treaty and its logical interpretation, as with other provisions of the Treaty, points to the fact that it concerns the signatory States, and them alone. Therefore, only those States, and not individuals, have the power to proceed to the establishment of Conciliation Commissions and to submit to them disputes which may arise in connection with the application or interpretation of the Articles and Annexes of the Treaty mentioned in Article 83. Therefore, again, unless the matter is referred to the Conciliation Commission by the State to which they belong, the United Nations nationals who assert that they have the right, under Article 78 of the Peace Treaty, to exemption from taxation, and to reimbursement, may commence proceedings only before the Italian courts, and they must comply with the general rules relating to the competence of the various courts. If any other possible construction were to be accepted, the functions and nature of the Conciliation Commission would be lost sight of. Its main purpose is to reach a decision on disputes by agreement between the States concerned; only if no agreement can be reached between the members of the Commission, who are on a footing of absolute parity, is a third member designated and a judicial decision arrived at, which is definitive and binding. The establishment of a Conciliation Commission is therefore the creation of an international organ; it has many similarities to the Anglo-Saxon type of arbitration (and in that system also the designation of an umpire, or of a third member, is envisaged only if there is a disagreement[1]); in view of the nature and scope of the instrument which created it, the Commission must be deemed to have jurisdiction over all disputes which may arise between the States parties to the Treaty in specified matters. Even if a dispute concerns an individual or an artificial person, it is the State to which the person belongs which must refer the dispute to the Conciliation Commission. In the present case the appellant herself requested the Finance Administration of the Italian State to recognize her right to exemption from taxation and consequent reimbursement. Therefore, it is evident that she can no longer contend that under Article 83 of the Peace Treaty the Franco-Italian Conciliation Commission has exclusive jurisdiction in the matter. . . .

" It is contended by the appellant that in its decision the Court below has ignored Articles 1, 2 and 3 of Decree Law No. 1430 of November 28, 1947, which brought the Peace Treaty between Italy and the Allied and Associated Powers into operation in Italy; Article 10 of the Constitution; Article 22, last paragraph, of Royal Decree Law No. 1639 of August 7, 1936; and Article 360 (5) of the Code of Civil Procedure. . . .

" The argument of the appellant that the Court of Appeal was wrong in holding that it was temporarily not competent to hear her case is based on the principle of automatic adaptation of municipal law to international law. But that principle does not really support her contention. It is well known that in order to adapt municipal law to the provisions of an international Treaty—which, even if not negotiated, is always regarded as a bilateral agreement—we do not always use the same method. In principle, such an adaptation is effected by specific legislative enactments which are intended to modify the municipal legal system so as to ensure observance of international obligations under the Treaty. Besides this method, which we may term the ordinary one, there is another in which the adaptation is made by an executive Order; the Order is the promulgation of a particular legislative act by which the State expresses its will that a treaty, the text of which is published as an annex to the Order, should be operative. A third method is the so-called automatic adaptation: the municipal legal system is adapted to the rules of international law without the necessity of promulgating from time to time any formal acts for this purpose. The automatic adaptation concerns only those rules of international law which have a general or common character: it is not spontaneous but is established by a norm, which may be expressly formulated, as in Article 10 of the Italian Constitution, or may be implicit, as in some other municipal legal systems.

[[1] *Cf.* the (British) Arbitration Act, 1950, s. 8.]

"We must remember that in Italy the adaptation of internal law to the conventional rules of international law is made—as a general rule—by means of an executive Order which may be in the form of a law or decree providing that a certain international treaty or convention is fully operative. This was the method followed in the bringing into operation of the Peace Treaty between Italy and the Allied and Associated Powers, signed in Paris on February 10, 1947 (Article 1 of Decree Law No. 1430 of November 28, 1947), with the reservation that provisions necessary for the execution of the Treaty itself may be enacted even if contrary to existing laws (Article 2). It is clear that one cannot argue in the present case that there has been an automatic adaptation of the Peace Treaty; hence, it cannot be argued that it is necessary to take proceedings before an administrative tribunal before having recourse to the ordinary courts in the matter of exemption from taxation and refunding of sums paid. . . .

"Once we have established that the Peace Treaty is in operation in Italy as the result of an executive Order, and seeing that the Treaty does not contain any particular provision as to the kind of proceedings which United Nations nationals should take in respect of litigation to enforce their right to the exemption from taxation and to refund of moneys, and seeing that no special law has been enacted in Italy for this purpose, it is clear that the rules of the Italian legal system concerning the particular type of claim made by the appellant must be observed."

[Report: *Giurisprudenza Italiana*, 1956, I, 1, p. 128.]

Conciliation—Conciliation Commissions—Procedure of—Binding Force of Decision of Another Commission.

See p. 945 (*Armstrong Cork Company Claim*).

Conciliation—Conciliation Commissions—Rules of Procedure of —Necessity for Strict Compliance with.

See p. 340 (*Carnelli Claim*).

Conciliation—Conciliation Commissions—Practice of—Acceptance as Precedent of Decisions of Similar Commissions Set Up under Peace Treaty.

See p. 626 (*Agache Claim*).

Conciliation—Conciliation Commissions—Practice of—Law Applied by—Reference to Decisions of Arbitral and Other International Tribunals.

See p. 443 (*Mergé Claim*).

Conciliation—Conciliation Commissions—Practice of—Acceptance as Precedent of Decisions of Similar Commission Set Up under Peace Treaty.

See p. 959 (*Shafer Claim*).

Conciliation Commission—Evidence before—Rules as to Admissibility.

See p. 864 (*Batchelder Claim*).

Conciliation—Conciliation Commission—Evidence in respect of Claims Before—Insufficiency of Evidence as to Condition of Inherited Property.

See p. 338 (*Caccamese Claim*).

Conciliation—Conciliation Commissions—Interest on Claims Before.

See p. 409 (*Fatovich Claim*).

Conciliation—Conciliation Commission Sitting as *Collège arbitral* —Powers of—Power to Examine Relevant Municipal Law—Whether Conciliation Commission Bound by Contrary Decision of Municipal Court.

See p. 500 (*Re Rizzo and Others* (*No.* 2)).

Conciliation—Competence of Conciliation Commission Sitting as *Collège arbitral*.

See p. 317 (*Re Rizzo and Others* (*No.* 3)).

F—MISCELLANEOUS

International Courts—Court of the European Coal and Steel Community—Judgments of—Interpretation of a Judgment—Meaning of " party to the dispute "—Obtaining of New Judgment by Means of Interpretation of Earlier Judgment—Treaty Establishing the Coal and Steel Community—Accompanying Convention Containing Transitional Provisions.

ASSOCIAZIONE INDUSTRIA SIDERURGICHE ITALIANE (ASSIDER) *v.* THE HIGH AUTHORITY.

Court of Justice of the European Coal and Steel Community. June 28, 1955.

THE FACTS.—In 1954 the Italian Government brought an action against the High Authority of the European Coal and Steel Community alleging that Decision 2–54 of the High Authority violated para. 30.2 of the Convention containing the Transitional Provisions (see *supra*, p. 740). The Court upheld this allegation and annulled the Decision. Before this case had been heard, " Assider " had also challenged this Decision alleging that because para. 30.2 of the Convention had not been observed the High Authority had committed a *détournement de pouvoir*. However, as by the time judgment came to be given in the *Assider* case, judgment had already been given in the action brought by the Italian Government so that the relevant articles of Decision 2–54 had already been anulled, the Court refused to give judgment again upon those articles.

In its judgment in the *Italian Government* case,[1] the Court had declared:

> " Even if one is of the opinion that paragraph 30 of the Transitional Provisions especially aims at prohibiting the alignment with the prices of the Italian enterprises, it does not necessarily follow that this article excluded a protection under different forms. To sustain the opposite would be a real petitio principii because in the absence of a clear and precise text it is also legitimate to admit that the Convention wanted to make the Italian enterprises benefit integrally, exceptionally and temporarily, of the protection which the Treaty provided for them. Its real purpose therefore is to prevent the non-Italian enterprises to compete with the Italian enterprises on the Italian market by applying prices inferior to their own price-lists.
>
> " In the opinion of the Court, paragraph 30 of the Transitional Provisions prohibits all sales in Italy below the prices provided for in the price-lists. This prohibition has meaning only if in the other countries of the Community, sales below the prices of the price-lists are exceptionally allowed on the ground of special provisions. Such is the case for the right of alignment provided for in Article 60, paragraph 2 (*b*). On the other hand, the Decisions in question create a new regime—which can be applied to the entire common market—on which grounds sales below the prices of the price-list are lawful. It must be admitted that this regime remains submitted to the prohibition of paragraph 30 and the more so now this paragraph does not expressly mention the alignment, but uses very general terms. Paragraph 30 must therefore be interpreted in the following sense: even if sales below the prices of the price-lists were by exception lawful, this could not be legal on the Italian market. In the present case, paragraph 30 prohibits to extend to the Italian market the system of deviations from the price-lists. Since Decision 2–54 has not taken this prohibition into account, it violates a legal rule concerning the application of the Treaty."

The crucial sentences in this passage were those where the Court stated: " In the opinion of the Court, paragraph 30 of the Transitional Provisions prohibits all sales in Italy below the prices provided for in the price-lists " and " Paragraph 30 must therefore be interpreted in the following sense: even if sales below the prices of the price-lists were by exception lawful, this could not be legal on the Italian market ". After that judgment, the High Authority proceeded on the view that the words " prohibits all sales in Italy below the prices provided for" meant *all* sales, that is to say, they prohibited sales by Italian enterprises in Italy below their price-lists as well as sales by non-Italian enterprises in Italy below their own price-lists. " Assider ", an Italian enterprise, however, acted upon the assumption that these words merely prevented non-Italian enterprises selling below their price-lists in Italy, so that Italian firms could do so with impunity.

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[1] *Government of the Italian Republic* v. *The High Authority* (*supra*, p. 737).

On February 28, 1955, the High Authority wrote a letter to " Assider " in which they quoted the two sentences set out above and continued:

> " These two passages only permit one conclusion: in the prevailing circumstances, the Italian steel enterprises are bound to apply, on the Italian market, only the prices of their respective price-lists, unless they find themselves in competition with enterprises from third countries; in that case they align their offers with those of the enterprises outside the Community.
>
> " The High Authority wants to draw the attention of your association on the importance of the foregoing. It asks you to remind your enterprises of the necessity to respect the rules of the Treaty in their methods of quotation."

" Assider " brought the present action requesting the Court to interpret the relevant passage of its judgment in *Italian Government* v. *The High Authority* (*supra*), and invited the Court to declare that para. 30.2 of the Convention containing the Transitional Provisions prohibits the alignment of the prices of non-Italian enterprises on the Italian market, while at the same time it does not prohibit, within the Italian market, the alignment of the prices of Italian enterprises with other Italian enterprises, or the alignment of the prices of Italian enterprises with the prices of the non-Italian enterprises of the Community.

Held: that the interpretation which the High Authority in their letter of February 28, 1955, had placed upon the judgment in the *Italian Government* case was inaccurate. Nevertheless, the plaintiff's request for the Court to rule upon the legality of the alignment of the prices of Italian enterprises with those of other Italian or with non-Italian enterprises was ill-founded as that matter did not arise out of the judgment in question.

The Court said: " Article 37 of the Protocol on the Statute of the Court prescribes that in case of ' difficulties ' concerning the meaning or the scope of a judgment, it falls to the Court to interpret it at the request of a party or an institution of the Community, which can prove its interest in the matter.

" Have these requirements been fulfilled in the present case?

" (1) Has Plaintiff given proof of an interest in the interpretation?

" In its letter of February 28, 1955, addressed to Plaintiff, the High Authority expressly referred to the Judgment pronounced in case 2/54 in order to justify its interpretation of paragraph 30 of the Transitional Provisions; according to this interpretation the Italian enterprises, inside the Italian market, may only apply their own price-lists and are not permitted to align their prices either with the prices of other enterprises belonging to the Community, or with the prices of their national competitors.

" Plaintiff is of the opinion that the High Authority was wrong in drawing these conclusions from Judgment 2/54 because this Judgment only concerns the protection of the Italian enterprises against the competition from non-Italian enterprises belonging to the Community.

" The question which of the two interpretations is in accordance with Judgment 2/54, presents a direct interest for the enterprises belonging to the association which is Plaintiff in the present case. The answer to this question can only be given by way of interpretation of the Judgment and Plaintiff has no other means for inquiring about the correct interpretation.

" Thus Plaintiff has proved its interest in requesting interpretation of the Judgment in question.

" (2) Is Plaintiff ' party ' in the dispute which ended with Judgment 2/54 of which it requests interpretation ?

" Apart from the Institutions of the Community, the parties in a dispute have the right to request interpretation of the Judgment which decides in that dispute.

" Plaintiff was ' party ' in the Appeal 3/54 against the High Authority, but Plaintiff does not request interpretation of the Judgment given in that case.

" Plaintiff requests interpretation of the Judgment pronounced in case 2/54 (Government of the Italian Republic *vs.* High Authority), in which dispute Plaintiff was not a party. . . .

" However, the Court, agreeing in principle with the conclusions of the Advocate General, admits that Plaintiff has a right to request interpretation of Judgment 2/54 (*Italian Government* v. *High Authority*) and this for the following reasons:

" In case of several Appeals against the same decision of the High Authority and if, on the ground of one of these Appeals, the said Decision is annulled, Plaintiffs in the other cases can be considered as ' parties ' in that dispute, in the sense of Article 37 of the Protocol on the Statute of the Court, however, on the explicit condition that Plaintiff has put forward, in its Appeal, the same ground on the basis of which the Judgment to be interpreted has annulled the Decision, or has declared the Appeal well-founded, as in the present case. All these parties have thus the right to request interpretation of the Judgment which pronounces the nullity or which declares well-founded one of the other Appeals.

" The Appeal of the Italian Government (case 2/54) was declared well-founded where it concerns Article I of Decision 2–54 of the

High Authority, namely, because that Article violates paragraph 30, No. 2 of the Convention containing the Transitional Provisions. Plaintiff has put forward the same ground in it's (*sic*) Appeal for Annulment which it previously filed (case 3/54). In its Judgment 3/54 the Court admitted the admissibility of the Appeal without examining, neither ruling on the merits of the ground ' détournement de pouvoir ' put forward by Plaintiff, nor on the question whether Plaintiff was entitled to put forward a violation of the Treaty. The fact that the Court did not rule on these questions can not prejudice Plaintiff's right to file validly its request for interpretation.

" Thus Plaintiff can be considered as being a party in the Judgment in question.

" (3) Is there a ' difficulty ' concerning the meaning and the scope of the Judgment in question ?

" According to Article 37 of the Protocol on the Statute of the Court of Justice the request for interpretation of a Judgment supposes that difficulties exist as to the meaning and the scope of the Judgment. The expression ' difficulté ' is general; it is less limited than the expression ' contestation ' of the French text of Article 60 of the Statute of the International Court of Justice. For the admissibility of a request for interpretation it suffices that the parties in question give different meanings to the text of that Judgment. This is the case in the present dispute.

" (4) What passages of a Judgment can become the subject of interpretation ?

" It is necessary to determine what passages of a Judgment can become the subject of interpretation. It is absolutely evident that it can only be those which express the Judgment of the Court in the dispute submitted to the Court: the enacting terms and, among the motives, those on which the terms are based and which for that reason are essential; therefore, those passages of the Judgment which constitute the matter which the Court has judged. On the contrary, the Court does not have to interpret the passages which, accessorily, complete or explain those essential motives.

" In the present case, all the motives mentioned in Section II, No. 11 of Judgment 2/54 must be considered as essential, and, therefore, can give rise to interpretation.

" On the ground of all those reasons, the request is admissible.

" *On the merits*

" The Court ascertains, in agreement with the conclusions of the Advocate General, that the text of the motives of the Judgment does not contain any obscurity and that there are therefore, in principle, no grounds for interpretation.

" From the facts mentioned in Judgment 2/54 and reproduced above, it follows that parties have only submitted to the Court the question whether Article I of Decision 2–54 of the High Authority violates paragraph 30 of the Convention containing the Transitional Provisions because it permits the non-Italian steel producers of the Community to grant, on the Italian market, reductions from their price-lists.

" From the above mentioned it follows that in case 2–54 parties merely had asked the Court not only whether, according to paragraph 30 of the Convention containing the Transitional Provisions, it was prohibited for the non-Italian steel producers of the Community to align their prices with those of the Italian producers, but, also whether it was prohibited for them, in a general way, to sell on the Italian market at prices below those mentioned in their price-lists.

" Paragraph 3 of No. 11 of the motives, Section II, explains the aim of paragraph 30 of the Convention containing the Transitional Provisions: according to this text, the non-Italian enterprises must be prevented from competing with the Italian enterprises, on the Italian market, by way of price-offers below those of their price-lists. The next paragraph, the last paragraph of No. 11, which justifies this interpretation on the ground of its contents and which determines that not only the alignment, but generally any offer below the prices of the price-lists are illegal, only concerns the protection of the Italian market against competition by non-Italian enterprises of the Community: there exist a close relation between this paragraph of the motives and the explanation given in paragraph 3.

" The High Authority is therefore wrong when it believes that it can find in Judgment 2/54 a justification for its opinion in the question whether paragraph 30, No. 2 of the Transitional Provisions also prohibits the alignment of the Italian enterprises among themselves or the alignment of Italian enterprises with the prices of non-Italian enterprises belonging to the Community. In case 2/54 this question was not put to the Court and the Court did not rule on this point. Judgment 2/54 did not declare that those alignments were permitted; it did not declare that they were prohibited. Therefore this question cannot be answered by way of interpretation. For the same reasons, the Court can not accept the second part of Plaintiff's request to interpret Judgment 2/54 in the sense that paragraph 30, No. 2 of the convention containing the transitional provisions does not prohibit inside the Italian market the alignment of the Italian enterprises with the prices of other Italian enterprises, neither the alignment of Italian enterprises with the prices of non-Italian enterprises belonging to the Community.

" In an Interpretation-Judgment the Court can only determine the meaning and the scope of a former Judgment; the Court cannot rule on problems which have not been settled by that Judgment. Parties cannot, by way of interpretation, ask for a new decision in new disputes.

" However, as both parties in question have explicitly declared that they wish an interpretation of the passage of the Judgment to which they give contradictory meanings, the Court is of the opinion that it is advisable to re-state in the purview below the scope of its Judgment 2/54. . . .

[The Court] ascertains that the scope of Judgment 2/54 is determined in the Judgment itself in paragraph 3 of No. 11 of part II of the grounds, by the words: ' (The) real purpose (of the Convention) therefore is to prevent the non-Italian enterprises to compete with the Italian enterprises on the Italian market ' and that the next paragraph of the Judgment only concerns the sales in Italy, of the non-Italian enterprises mentioned in said definition; on the other hand, the problem of the alignment of the Italian enterprises with the prices of other Italian enterprises and the alignment of Italian enterprises with the prices of other non-Italian enterprises, belonging to the Community, was not settled in Judgment 2/54."

[Report: *Official Gazette of the European Coal and Steel Community*, 4th Year, No. 17, 1955, pp. 270–280.]

NOTE.—There are two statements in the present judgment which may be of importance in future cases:

(1) Article 37 of the Protocol on the Statute of the Court declares that a request for the interpretation of a judgment of the Court may be made, *inter alia*, by a " party to the action ". The Court held that this term, " party to the action ", is not to be limited so as to cover merely the parties represented in the original dispute but rather that it is wide enough to cover parties to other actions if in those other actions the same Decision of the High Authority has been challenged and the same ground of challenge has been advanced as was accepted by the Court in the original dispute.

(2) The Court was careful to make it clear that its interpretative judgment was to be limited to the meaning and scope of the former judgment and that the parties did not obtain judgment upon an entirely separate dispute.

Tribunal Set up under Peace Treaty—Law Applied by Tribunal—Decisions Based on Law Not Decisions *ex aequo et bono*.

See p. 103 (*Italy* v. *Libya*).

International Courts—Judgments of—Court of the European Coal and Steel Community—Grounds of Judgment—Whether Limited to Contentions of the Parties.

See p. 749 (*Government of the Italian Republic* v. *The High Authority*, Note (2)).

PART XI

WAR AND NEUTRALITY

A—WAR IN GENERAL

I.—Definition and Technical Meaning of War. Belligerency and Insurgency

War—Meaning of—Hostilities in Absence of Declaration of War—The Korean Conflict—The Term " War " in an Insurance Policy.

Christensen *v.* Sterling Insurance Company.

United States, Supreme Court of Washington. May 26, 1955.

The Facts.—The insured, whose beneficiary was the plaintiff in this action, died as the result of an automobile accident in Alaska in 1952, while he was serving in the armed forces of the United States. The life insurance policy upon which this action was based contained a " war service " clause which provided:

> " If the Insured shall die from any cause while in Military, Naval or Air Service of any country at war . . . Company shall be liable only for a refund of the premiums paid, or the reserve . . . whichever is greater. . ."

The defendant insurance company refunded the premiums paid and denied further liability on the ground that the death had taken place while the United States was " at war " in Korea. The County Superior Court dismissed the action.

On appeal,

Held: that the decision of the Court below must be affirmed. The term " war ", as used in the insurance policy, was to be given its ordinary, popular meaning. The Korean conflict constituted a " war " in this sense.

The Court said: " Was the United States a ' country at war ' on May 11, 1952 (during the Korean conflict), within the meaning of the terms of a life insurance policy?

" The answer is to be found within the scope and meaning of the word ' war.' Is it to be construed in its legal or technical sense, or is it to be given its ordinary meaning as used in common speech?

" Such construction becomes important in four distinct situations which concern an insured in military service:

" First: Where death occurs prior to the formal declaration of war, as, for example, during the attack on Pearl Harbor, December 7, 1941; the official declaration of war by Congress being made the following day.

" Second: Where death occurs while the armed forces of the country are engaged in combat in which a formal declaration of war was never made.

" Third: Where death occurs after the cessation of hostilities in a formally declared war, but before the war is officially ended.

" Fourth: Where death occurs after the cessation of hostilities in an armed conflict in which a formal declaration of war never was made.

" We are concerned, in this case, with a factual situation arising under the second category. . . .

" Based upon a stipulation of counsel and facts which the court judicially noticed, it appears: that the Congress of the United States did not, at any time, make a formal declaration of war against the government of North Korea nor against any of its allies; that certain nations, including the United States, had adopted the ' Charter of the United Nations '; that the United States was ' obligated to join . . . in carrying out the measures decided upon by the Security Council ' of the United Nations; that the Security Council requested ' members of the United Nations to furnish the necessary assistance to repel the armed attack and restore international peace ' in Korea; that armed forces of the United States were dispatched to Korea by direction of the President, and that, prior to and on the date of the death of the insured (May 11, 1952), the ' armed forces of the United States, including all divisions of the service, were engaged in actual armed combat with the military troops of North Korea ' and troops from China; that the government of the United States stated officially that, as of May 9, 1952 (two days prior to insured's death), the United States had suffered 108,413 casualties, of which 19,096 had been killed in combat in the Korean conflict.

" Plaintiff relies on those cases that have construed the word ' war,' as used in life insurance contracts, in its strict, constitutional sense. These cases hold that an armed conflict is not a war, in the legal or constitutional sense, in the absence of a declaration of war by the Congress of the United States. *Beley* v. *Pennsylvania Mutual Life Ins. Co.*, 373 Pa. 231, 95 A.2d 202, 36 A.L.R.2d 996, *certiorari* denied 1953, 346 U.S. 820, 74 S.Ct. 34, 98 L.Ed. 346[1] (Insured killed in Korea); *Harding* v. *Pennsylvania Mutual Life Ins. Co.* 1953, 373 Pa. 270, 95 A.2d 221[2] (Insured killed September 11, 1950, in train wreck on way to military camp); *Rosenau* v. *Idaho Mutual Benefit Ass'n*, 1944, 65 Idaho 408, 145 P.2d 227[3] (Insured killed at Pearl Harbor); *West* v. *Palmetto State Life Ins. Co.*, 1943, 202 S.C. 422, 25 S.E.2d 475, 145 A.L.R. 1461[4] (Insured killed at Pearl

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[1] [See *International Law Reports*, 1953, at pp. 583, 584 and 585.]

[2] [*Ibid.*, at p. 585.]

[3] [*Annual Digest*, 1943–1945, p. 293.]

[4] [*Ibid.*, p. 289.]

Harbor); *Savage* v. *Sun Life Assurance Co. of Canada*, D.C.La., 1944, 57 F.Supp. 620[1] (Insured killed at Pearl Harbor).

" These decisions are based, in part, on the rule that a court cannot take judicial notice of the existence of a war until a formal declaration has been made by the proper department of the Federal government.

" Other courts, in construing similar clauses, have held that in private matters, unaffected by a public interest, the courts are free to take judicial notice of the existence of a war although no formal declaration of war has been made by the Federal government. *Western Reserve Life Ins. Co.* v. *Meadows*, 1953, 152 Tex. 559, 261 S.W.2d 554[2] (Insured killed in Alaska during Korean conflict); *Langlas* v. *Iowa Life Ins. Co.*, Iowa 1954, 63 N.W.2d 885[3] (Insured killed in Korea); *Stanbery* v. *Aetna Life Ins. Co.*, 26 N.J.Super. 498, 98 A.2d 134 (1953)[4] (Insured killed in Korea); *Weissman* v. *Metropolitan Life Ins. Co.*, D.C.Cal., 1953, 112 F.Supp. 420[5] (Insured killed in Korea); *Gagliormella* v. *Metropolitan Life Ins. Co.*, D.C.Mass., 1954, 122 F.Supp. 246 (Insured killed in Korea).

" In these cases, the court construed the word ' war ' in its ordinary, popular sense and held that the Korean conflict was a war within the meaning of the terms of the policy.

" We cannot subscribe to the reasoning of the *Beley* case, *supra*, and those decisions which have followed it. To our mind, it overlooks four considerations which are controlling.

" First: in matters which are purely private, courts may take judicial notice that a war exists.

" Second: the word ' war,' as it is generally understood, involves armed conflict between the military forces of two or more nations. Its existence does not depend upon a declaration by Congress. ' In common understanding, war is war, whether declared or undeclared.' *Langlas* v. *Iowa Life Ins. Co.*, *supra*.

" Third: it ignores the well-known purpose of insurers.

" Fourth: the legalistic determination of the question ignores the *modus operandi* of the United Nations. As one legal writer observed:

> ' . . . if the Charter of the United Nations is strictly applied, war of the declared or constitutional type may be for historians.' Cecil J. Olmstead, [in] 1953 *Annual Survey of American Law*, page 12.

" This court has recognized the right of parties to a contract to use the term ' war ' in other than its strict, constitutional sense. *Hoover* v. *Sandifur*, 1946, 25 Wash. 2d 791, 171 P.2d 1009, 168 A.L.R. 170.

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[1] *Annual Digest*, 1943–1945, p. 283.]
[2] *International Law Reports*, 1953, p. 578.]
[3] *Ibid.*, 1954, p. 416.]
[4] *Ibid.*, 1953, at p. 584.]
[5] *Ibid.*, at pp. 584–585.]

"When construing the terms of a policy of insurance, the court seeks to determine the intent of the parties, and the general rules governing the construction of contracts must be applied. The people to whom policies of insurance are issued consider and understand the terms in their popular and ordinary meaning, *Kane* v. *Order of United Com. Travelers*, 1940, 3 Wash. 2d. 355, 360, 100 P.2d 1036, and the court will give the language used such a construction '. . . unless it is apparent from a reading of the whole instrument that a different or special meaning was intended or is necessary in order to avoid an absurd or unreasonable result.' *Richards* v. *Metropolitan Life Ins. Co.*, 1935, 184 Wash. 595, 601, 55 P.2d 1067, 1069.

"When, as in Korea, the military forces of two or more nations, under the direction of their governments, meet in armed combat over an extended period of time and in numerous engagements, such activity is ordinarily called 'war.' It is war in the ordinary, popular sense of the word.

"A reading of the whole instrument does not disclose that a different or special meaning was intended by the words 'country at war.'

"The purpose of a war service clause is to define a risk and exclude it from the general coverage of the policy. If 'war' is given its ordinary, popular meaning, liability is determined by actual combat, a factor which naturally affects the risk; if given its strict, constitutional meaning, liability is determined by a formal declaration which, unless coupled with actual combat, does not increase or decrease the risk. In the light of the apparent object of the clause, we conclude that the parties did not intend to have the language used, construed in its strict, technical sense.

"The United States was a 'country at war,' within the meaning of the terms of the policy."

[Reports: 46 Wash. 2d 713, 284 P.2d 287.]

NOTE.—The same view, namely, that the Korean conflict constituted a "war" for the purposes of an insurance policy, was taken in *Lynch* v. *National Life and Accident Insurance Co.* 278 S.W. 2d 32 (St. Louis, Mo., Court of Appeals, 1955). In that case, the insured died as the result of a wound received in combat in Korea.

The previous cases dealing with this issue are considered in *American Law Reports, Annotated*, 2d Series, 36 (1954), p. 1018.

War—Meaning of—Hostilities in Absence of Declaration of War—The Korean Conflict—Suspension of Hostilities by an Armistice—Whether War for the Purposes of United States Military Law.

UNITED STATES *v.* SANDERS.

United States, Court of Military Appeals. April 20, 1956.

THE FACTS.—The accused was convicted by a special court-martial, sitting in Japan, of sleeping on post on June 4, 1955 (a date subsequent to the conclusion of an armistice in Korea), in violation of Article 113 of the Uniform Code of Military Justice, 50 U.S.C. § 707. A violation of Article 113 is punishable by death or such other punishment as a court-martial may direct if it is committed " in time of war ". The Code and regulations issued in implementation thereof provided that an officer exercising general court-martial jurisdiction over the accused can refer a capital case to a special court-martial for trial as a non-capital offence. The accused contended that the court-martial lacked jurisdiction, since the offence charged was a capital one and the competent authority had not directed that the case be tried as non-capital.

A board of review of the Air Force held that the special court-martial which tried the accused had jurisdiction, since on June 4, 1955, a state of war did not exist in Korea and accordingly the offence charged was not a capital one. [Report: 20 C.M.R. 845 (1955).]

On petition for review by the accused,

Held: that the decision of the board of review must be affirmed. The court-martial had jurisdiction because the conclusion of an armistice and other measures taken by the United States indicated that the " time of war " in Korea had ended.

The Court said: " If committed ' in time of war ' a violation of Article 113 is punishable by death, or such other punishment as a court-martial may direct. A special court-martial cannot try a capital case, except in accordance with regulations prescribed by the President of the United States. Article 19, Uniform Code of Military Justice, 50 USC § 579. In the *Manual for Courts-Martial*, United States, 1951, the President provided that an officer exercising general court-martial jurisdiction over the command which includes the accused and a special court-martial authority empowered by department regulations can refer a capital offense, other than one for which a mandatory punishment is prescribed by the Uniform Code, to a special court-martial for trial. *Manual for Courts-Martial*, *supra*, paragraph 15*a*. Since the President's order suspending the Table of Maximum Punishments for this offense in the Far East was still in effect and the record does not show that a competent authority directed that the case be tried as non-capital, the accused contends that the court lacked power to proceed.

" In *United States* v. *Bancroft*, 3 USCMA 3, 11 CMR 3,[1] this Court held that a ' time of war ' situation does not result only from a formal declaration of war by the Congress of the United States. See United States Constitution, Article 1, Section 8. We pointed out that a war situation can result from the fact that our armed forces are engaged in actual combat against an organized armed enemy. Necessarily, if the relations between the opposing forces are substantially altered the change can terminate the war. Although a cease-fire order or a formal armistice alone may be insufficient to effect the termination, see *Hamilton* v. *McClaughry*, 136 F. 445 (CC Kan), when that circumstance is combined with other facts indicating that the consequences of actual hostilities are no longer present, the ' time of war ' condition is ended. In other words, if a ' time of war ' situation depends upon the existence of actual armed hostilities, *United States* v. *Gann*, 3 USCMA 12, 13, 11 CMR 12, the cessation of hostilities ends the condition.

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[1] *International Law Reports*, 1953, p. 586.]

"An armistice has existed between the United Nations Command, of which our armed forces are a part, and the enemy command from July 27, 1953. Since then, many steps have been taken to end the consequences of the armed conflict. Thus on February 1, 1955, the President ended the period of eligibility of entitlement to certain veterans' benefits for those members of the armed forces participating in the Korean conflict. Proclamation No. 3080, dated January 1, 1955, 20 FR 173. The President also terminated certain income tax benefits for those engaged in combat activities in the Far East. Executive Order No. 10585, dated January 1, 1955, 30 FR 17. Taking into consideration all the circumstances existing on June 4, 1955, the date the offense in this case was committed, the inescapable conclusion is that a ' time of war ' condition had ended. The special court-martial, therefore, had jurisdiction of the offense."

[Reports: 7 U.S.C.M.A. 21; 21 C.M.R. 147.]

NOTE.—In *United States* v. *Takafuji*, 21 C.M.R. 511 (1956), an Army board of review held that desertion in the Far East Command alleged to have commenced on May 5, 1952, was a capital offence, since a " time of war " existed in that command at that date.

War—Meaning of—Actual Hostilities and *de jure* State of War—Validity of Will of Member of New Zealand Armed Forces Posted to Korea—Will Made " on actual military service."

In re BERRY.

New Zealand, Auckland Supreme Court. July 1, 1955.

(North J.)

THE FACTS.—Berry, a soldier in the New Zealand Army, was posted to Kayforce[1] and was directed to enter Waiouru Camp in New Zealand for training. Whilst in this camp, and when under the age of twenty-one years, Berry executed a will. Subsequently, in September 1952, he left New Zealand for Korea and was there killed in action in the armed conflict which was then taking place.

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[1] " Kayforce " was the name given to the New Zealand force which was formed in order to fulfil the New Zealand Government's obligations in the armed conflict taking place in Korea.

The validity of his will was attacked, and it was necessary, in order to uphold the will, to show either that at the time of making the will the testator was a soldier " on actual military service ", and thus entitled to the privilege extended by s. 11 of the Wills Act, 1837, or that at that time he was a member of Her Majesty's Forces " during any war in which Her Majesty the Queen may . . . be engaged " and thus was entitled to the benefit of s. 3 of the Soldiers' Wills Emergency Regulations, 1939.

Held: that the will was made " on actual military service ".

The Court said: " . . . The circumstances in which a military force from New Zealand was sent to Korea have been set out, for the assistance of the Court, in a letter from the Minister of External Affairs, addressed to the plaintiff's solicitors. The Minister, speaking on behalf of the Government, said that in June 1950 the Security Council of the United Nations determined that the armed attack upon the Republic of Korea by forces from North Korea constituted a breach of the peace. After some preliminary steps had been taken, the Security Council, in pursuance of its functions under the United Nations Charter, recommended that the Members of the United Nations furnish such assistance as might be necessary to repel the armed attack and to restore international peace and security in Korea. New Zealand land and sea forces were sent to Korea in accordance with these and other decisions made by the appropriate organs of the United Nations. These forces were made available to, and served under, the Unified Command established at the instance of the United Nations. The New Zealand forces were engaged in active hostilities and suffered casualties. The Government said that it regarded the employment of New Zealand forces in Korea as arising from New Zealand's membership of the United Nations, and as giving effect to New Zealand's obligations under the United Nations Charter. In this connection, no declaration of war has been made. The authority upon which the New Zealand Government relied in taking this action included the provisions of the Emergency Forces Act, 1950, s. 4 of which reads:

> ' 4. (1) The Governor-General may from time to time, in the name and on the behalf of His Majesty the King, raise and maintain an emergency military force for fulfilling the obligations undertaken by New Zealand in the Charter of the United Nations.
>
> ' (2) The emergency force shall be deemed to form part of the Defence Forces established under the principal Act (which forces are hereinafter referred to as the Army), and shall consist of such officers and soldiers as are from time to time appointed or enlisted for service in the emergency force, and shall be designated by such name as the Army Board from time to time determines.'

" There can, I think, be no doubt that the expression ' Kayforce ' was the name selected by the Army to designate this emergency force."

[The Court based its judgment on numerous judicial decisions concerned with the applicable rules of municipal law. While the decision as such is of considerable interest, it raises no particular issue of international law.]

[Report: [1955] N.Z.L.R. 1003.]

V.—Effects of Outbreak of War

i.—In General

War—Effects of Outbreak of—In General—Effect on Functions of Organs of States—Trade Delegations.

See p. 235 (*Borga* v. *Russian Trade Delegation*).

ii.—On Treaties

War—Effects of Outbreak of—On Treaties—Hague Convention on Civil Procedure, 1905—Security for Costs.

HERZUM *v.* VAN DEN BORST.

Holland, District Court of Roermond. February 17, 1955.

THE FACTS.—Herzum, an Italian national, in an action against van den Borst, a Netherlands national, had refused to give security for costs on the ground that the Convention on Civil Procedure of July 17, 1905, had re-entered into force as from the date on which the Peace Treaty with Italy of February 10, 1947, had become operative as regards the Kingdom of the Netherlands. The object of the present proceedings was to seek a decision on the question whether this plea was well founded.

Held: that the plea must succeed.

The Court said: " The operation of the Convention on Civil Procedure became suspended as between the Netherlands and Italy on December 11, 1941, on which date a state of war came into existence between the two countries. The Treaty automatically revived between these two countries on February 17, 1949, the date on which the Peace Treaty with Italy of 1947 became operative as regards the Netherlands."

[Report: *N.J.*, 1955, No. 716.]

NOTE.—In this case the Treaties concerned were multilateral treaties. Article 44 of the Peace Treaty of 1947 refers only to bilateral treaties; multilateral treaties as such were not mentioned in the Peace Treaty.

See also *The Golden River* v. *The Wilhelmina* (*International Law Reports*, 1950, Case No. 112) and *Valk* v. *Kokes* (*ibid.*, Case No. 114). Uncertainty as to whether pre-war treaties with Germany would be revived was resolved when the Allied High Commission introduced a Regulation by virtue of which the German Federal Republic could, subject to the Commission's approval, enter into agreements with the Allied countries as to the re-entry into force of pre-war treaties.

iii.—On Private Contracts

War—Effects of Outbreak of—On Contracts—Trading with the Enemy—Separation Agreement between Husband and Wife—Wife Voluntarily Resident in Enemy Country—Agreed Maintenance Instalments Not Paid—Whether Agreement Abrogated or Suspended by War.

BEVAN *v.* BEVAN.

England, High Court of Justice (Queen's Bench Division).
(Sellers J.)

April 6, 1955.

THE FACTS.—In 1931, Jonathan Bevan, a British subject, married the plaintiff, Hildegard Angela Gisela Bevan, an Austrian by birth, who thereby acquired, in English law, her husband's nationality. By a separation agreement dated September 14, 1932, the husband agreed to pay his wife £9 a month for her maintenance. At the outbreak of the Second World War, on September 3, 1939, the wife was voluntarily resident in Vienna and so remained throughout the war. The husband paid the monthly instalments until June 1, 1939, but not thereafter. Three instalments totalling £27 were therefore due and unpaid when the war broke out, and were included in the wife's claim. Her substantial claim was that further monthly instalments as they accrued should have been paid to the Custodian of Enemy Property, from whom the wife could subsequently have received them. Since they were not so paid, the husband had been authorized by the Custodian by letter of September 25, 1951, to hold at the disposal of his wife all moneys payable under the separation agreement free from the restrictions imposed by the Trading with the Enemy Act, 1939.

It was contended for the husband that (1) the outbreak of war abrogated the agreement under the common law, as the wife was and remained in enemy territory and was and remained an enemy; that further performance of the agreement would have involved intercourse with the enemy and would have been for the benefit of an enemy; and that the continuance or further performance of the agreement after the war was illegal and contrary to public policy; (2) the Trading with the Enemy Act, 1939, made further performance illegal and therefore put an end to the agreement; and (3) the agreement, in the circumstances, became impossible of performance without any fault of the husband's part and was frustrated.

By the Trading with the Enemy (Enemy Territory Cessation) (Austria) Order, 1952 (S.I. 1952, No. 1923), it was ordered that Austria should for all purposes of the Trading with the Enemy Act, 1939, cease to be treated as if it were enemy territory from November 5, 1952.

Held: that public policy did not require that this agreement should terminate on the outbreak of war, and therefore further performance of the contract was not abrogated at common law. Although the wife was an " enemy " while she remained in enemy territory, the contract still subsisted at common law, and the husband ought to have paid the sums due to the Custodian. As he had not, the wife was now entitled to recover.

Sellers J. said: " At the bar it was not contended that the contract was executed. It was accepted that it was executory, by which I understand the parties to mean not that it was wholly unperformed but that there remained something to be done on both sides. The wife's obligation to live apart and the husband's obligation to leave his wife free from his control continued up to the war and the impact of the war in the circumstances tended to enforce those obligations by the necessity of the situation. There was nothing actively to be done by the wife unless it was to communicate to her husband, for the forwarding of the monthly instalments, any change from the address in Vienna which she had given him before the war broke out, or possibly to give a receipt for moneys received. It remained for the husband to make the payment each month as it fell due and to do this his bankers would have had to transmit the £9 monthly to the bank in Vienna named by the wife. No doubt this would have involved a degree of intercourse and there was the benefit to the wife as an enemy of £9 a month, which could only be the barest maintenance. The money was only payable during their joint lives but up to the war the wife had not been required to establish each month that she was still living. It had been taken for granted and the money had been sent (except for the last three instalments) and the obligation to pay could well have continued on the same understanding.

" Those are, as I see them, the features and characteristics of the contract under consideration. One is tempted to say outright that a simple insignificant contract of this character, designed to provide a very modest monthly subsistence allowance by a British subject to his wife while they were living apart and which in its ordinary performance would require the slightest formal communication by his bank to hers, could hardly be said to be against public policy and, therefore, ended for all time, with the strange result that the war removed the contractual obligation to live apart and at the same time made it very difficult for them to do otherwise.

"As the question appears to come before the courts for the first time, and there must have been many separation agreements in 1914 and perhaps more in 1939, it would seem improbable that the aggregate of any payments under such agreements would have been a great benefit financially to any country. But authority is against that attitude. Sir Arnold McNair, in his work on *The Legal Effect of War*, 3rd ed., at p. 84, discusses the matter and quotes Lord Porter's observations in *Sovfracht V/O* v. *Van Udens Scheepvaart en Agentuur Maatschappij* (*N.V. Gebr*) [1943] A.C. 203, 251:[1]

'The question, however, whether a given act is against public policy must, I think, be decided on general principles. It is not permissible to say that a particular act will not in fact assist the enemy. The proper inquiry is whether that act is of a class which is likely to assist him, and it is immaterial to ascertain whether in the individual case he may or may not be found to profit from it.'

"It is necessary, therefore, to consider the law and I take first the position at common law. This has been stated and summarized in recent cases which have reviewed the authorities. I take one extract from Lord Porter's speech in *Schering Ltd.* v. *Stockholms Enskilda Bank Aktiebolag*, [1946] A.C. 219, 258:[2]

'It is, no doubt, generally true that the further performance of contracts made before the outbreak of war and not fully performed on either side is prohibited as contrary to public policy provided that such performance involves intercourse with an enemy as abrogation of the contract though the contract itself is not abrogated, but further performance alone forbidden. There are however, exceptions and limitations upon this doctrine. So far at any rate as concerns benefit to the enemy, the further performance of contracts which have been completely performed on one side and in which all that remains is payment by the other are suspended, not dissolved, and in the same category are to be placed certain contracts particularly those which are really concomitants of the rights of property though still executory: see *per* Lord Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co. Ltd.*, [1918] A.C. 260, 269. In each case therefore before deciding whether a contract is abrogated or merely suspended on the outbreak of war it is essential to determine its exact construction and effect.'

"In *Arab Bank Ltd.* v. *Barclays Bank* (*D.C. & O.*), [1954] A.C. 495, 523[3] Lord Morton of Henryton took two passages from Lord Dunedin's speech in the *Ertel Bieber* case as correctly stating the common law:

'Lord Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co. Ltd.* stated the common law of England as to trading with the enemy as follows—" My Lords, the proposition of law on which the judgment of the courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or anyone voluntarily residing in the enemy country. I use the expression ' often phrased commercial intercourse ' because I think the word ' intercourse ' is sufficient without the epithet ' commercial '. As to this I agree with the judgment of the Court of Appeal in the case of *Robson* v. *Premier Oil and Pipe Line Co. Ltd.*, [1915] 2 Ch. 124, 136, where Pickford L.J., delivering the judgment of the court, Lord Cozens-Hardy M.R., himself and Warrington L.J., said ' The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either of principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction ' ". That so expressed it is an incontrovertible proposition admits, I think, upon the authorities of no doubt.

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[1] *Annual Digest*, 1941–1942, Case No. 165.]

[2] *Ibid.*, 1943–1945, Case No. 105.]

[3] *International Law Reports*, 1954, p. 443.]

' Lord Dunedin went on to point out that there are certain exceptions to the general rule. He said: " There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey* v. *Lowenfeld*, [1916] 2 K.B. 707. In other words, the executory contract which is abrogated must either involve intercourse, or its continued existence must be in some other way against public policy, as that has been laid down in decided cases.'

" It was argued for the husband that this was a clear case where further performance of the contract would involve intercourse with the enemy and was for the benefit of an enemy as the wife was a resident in enemy territory, and therefore the contract was abrogated. For the wife it was submitted that the facts of this case made it an exception to the general rule as it was closely analogous in principle to those contracts which are really ' the concomitants of rights of property, which even so far as executory are not abrogated,' to use Lord Dunedin's phrase in the *Ertel Bieber* case, or to the payment of a debt by instalments as in the *Schering* case, where the instalments fell due for payment after the war had commenced and the war did not abrogate or discharge the debt.

" In support of the first submission by the wife it was argued that the contract of marriage is not affected by war: McNair on *The Legal Effect of War*, pp. 100, 101, *Fasbender* v. *Attorney-General*, [1922] 2 Ch. 850.[1] Marriage is not affected because it is a contract creating a status and the status continued; and reliance was placed on the definition of ' status ' by Brett L.J. in *Niboyet* v. *Niboyet* (1878) 4 P.D.1, 11:

' Marriage is the fulfilment of a contract satisfied by the solemnization of the marriage, but marriage directly it exists creates by law a relation between the parties and what is called a status of each. The status of an

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[[1] *Annual Digest*, 1919–1922, Case No. 144.]

individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community. That relation between the parties, and that status of each of them with regard to the community, which are constituted upon marriage are not imposed or defined by contract or agreement but by law.'

"A separation agreement, it was argued, was a contract affecting or modifying the status of the married parties and was, therefore, a concomitant of status and should avoid abrogation by war, as do payments under a lease or it may be under a settlement by deed. In *Roe* v. *Roe* [1916] P. 163, 164, Shearman J. used this expression:

> 'Having separated by consent, if the document or contract under which they so separated comes to an end, then from the moment when it comes to an end . . . the status conferred by it comes to an end also,'

and from that it was submitted that the separation agreement established a status of marriage modified by the several disabilities which the contract created; the inability to claim relief in the courts for desertion, the husband's inability to complain if anyone harboured his wife, restrictions on the wife's right to proceed for maintenance on grounds of wilful neglect to maintain, and alteration in the husband's common law relationship with the rest of the community as regards his liability for his wife's necessaries. I doubt whether Shearman J. intended the word 'status' as so used to have any technical meaning. The parties to this agreement have remained husband and wife throughout and have retained their marriage status. The agreement has not deprived them of any right or obligation of that status but it may afford evidence that rights have not been infringed and that obligations have been performed. It may be difficult to regard the spouses as having a modified status, but the payment does arise out of the husband's obligation to maintain his wife where she has committed no matrimonial offence and is therefore, quite different from a trading contract, which is the kind of contract most frequently held to be abrogated in the cases, although it has been authoritatively held that contracts other than commercial contracts may be abrogated by war.

" In *Robson* v. *Premier Oil and Pipe Line Co. Ltd.* the judgment of Pickford L.J. from which Lord Dunedin quoted in the *Ertel Bieber* case, contained also this passage:

> 'We do not think it necessary to decide whether the principle extends to intercourse, if such there be, which could not possibly tend to detriment to this country or to advantage to the enemy; it is enough to such detriment or advantage, whether commercial or not, if, to use the language of the learned judge before mentioned, inconsistent with the state of war between the two countries and therefore forbidden.'

" It is difficult to conjecture any executory contract which would not require for its further performance at least an address, receipt or acknowledgment from the party in enemy territory. If the husband had given his wife some real property in this country or some shares in an English company which produced £9 a month, then the wife's right would have been preserved. No such permanent provision was made, perhaps for the reason that the husband had not the means so to do or that he contemplated his wife's early return to him. These are all considerations which indicate some injustice if the further performance of this contract is held to be abrogated but the exigencies of war may involve many injustices and the question is whether in the public interest the contract is one which the law has stigmatized, or should stigmatize, as being against public policy.

"I turn now to consider *Schering's* case, where the contract was held not to be abrogated by war. Nothing remained to be done under the contract but to discharge an accrued debt by instalments. The debt had accrued before the outbreak of war but the payments of the majority of the instalments were outstanding and the fifth of 14 instalments fell due on October 28, 1939. It was held that as all that remained to be done was to discharge an accrued debt by instalments the war did not abrogate or discharge a debt incurred before the declaration.

"The *Schering* case was closely analysed in the course of the speech of Lord Morton of Henryton in *Arab Bank Ltd.* v. *Barclays Bank* (*D.C. & O.*), [1954] A.C. 495, and was referred to and applied by other members of the House. Lord Morton said: 'In the *Schering* case there was no existing right of action to recover the remaining instalments, for these instalments had not yet become payable; yet this House held that the right to receive these instalments when they fell due was a right which survived the outbreak of war. Having regard to this decision, I do not think that the right which was vested in the appellants at the outbreak of war can be held to have been destroyed merely because no action could be brought to recover it without a previous demand. I am content, without elaborating the matter further in words of my own, to adopt the reasoning of Jenkins L.J., when he said, speaking of the *Schering* case:

'If, as was recognized in the case just cited, a debt contracted before the outbreak of war, but made payable by instalments on dates occurring after such outbreak, is not abrogated by such outbreak, but merely suspended as regards enforcement, and this notwithstanding the right of the debtor to an acknowledgment and transfer of a security, upon the payment of each instalment, I fail to see why it should be held that a debt contracted before the outbreak of war should be cancelled merely because it is payable on demand. By parity of reasoning a credit balance kept by an enemy with a bank in this country on terms that it was to be payable against production of a passbook or deposit receipt would be cancelled by the outbreak of war. Once the exception of accrued rights is accepted, and once the basis of it, viz, that the law in its concern to prevent benefit to enemies does not go the length of confiscating enemy property, is recognized, I see no reason in principle or common sense why a debt for the recovery of which some formality, such as a demand for payment or the production of some indicia of title, is made requisite, should on that ground be excluded from the benefit of the exception.'

"The differences between the *Schering* case, where the debt had accrued and where a contrary decision would have meant confiscation of proprietary rights and the present case do not seem from the point of view of public security and public policy in time of war so cogent as the similarities. That which would have been involved in communication with the enemy in the payment of the instalments there and the monthly instalments here appear to be almost identical. Lord Reid observes that the preservation of debts from abrogation is to some extent anomalous, and he quotes a passage from Lord Goddard's speech in the *Schering* case, which points out that the differences between abrogation and non-abrogation are not always logical. Lord Morton refused to attempt the task of formulating an exhaustive description of the rights which do and the rights which do not survive the outbreak of war. The courts have, I think throughout dealt with each case as it has arisen and viewed it from the standpoint of public policy rather than rigid precedent or rule.

"In my judgment, public policy did not require that this contract should terminate on the outbreak of war. It continued to exist and statutory provisions required the husband to make his payments after the war had started to the Custodian of Enemy Property.

"Although the case came before the court on a different issue the observations of Lord Greene M.R. in *In re Furness* [1944] 1 All E.R. 575, 578, lend support, I think, to the view I have expressed. The succeeding Lord Furness was attempting to enforce a forfeiture clause in a settlement made by the late Lord Furness in favour of his wife. At the outbreak of war and up to the death of Lord Furness they were both living in the South of France, an area which became enemy territory on July 10, 1940. Lord Furness died on October 6, 1940. The Master of the Rolls said:

> 'So far as the instalments payable between July 10, 1940, and the date when Lady Furness on her return to England ceased to be an enemy for the purposes of the Trading with the Enemy Act are concerned, admittedly, on the basis that there was no forfeiture, they are payable to the custodian.'

"Secondly, the husband relies on the Trading with the Enemy Act, 1939. The wife was admittedly an 'enemy' within the Act so long as she remained in Austria or other enemy territory but her agreement with her husband could have been equally well performed by her quitting there for England or a neutral country, for it was agreed that she might live where she thought proper. I accept Mr.

Skelhorn's submission that the Trading with the Enemy Act and the rules thereunder would not revive a contract abrogated by the outbreak of war to provide for any performance of it. But I have found that the contract subsisted at common law and if that is so it is not defeated by the Act of 1939. The Act prohibited certain dealings and made provision for the collection of enemy debts and the custody of enemy property. I do not think I need develop this further. It was not disputed that if the contract subsisted the husband should have paid the instalments when due each month to the Custodian of Enemy Property.

" Neither need I deal at any length with the third defence, that the contract was frustrated. If I am right in the views I have already expressed, then clearly the contract was not frustrated even if it ever was the kind of bargain to which the doctrine could be applied. The House of Lords, in *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*, [1952] A.C. 166, expressed, it would seem, a preference for Lord Simon L.C's view in *Constantine's* case as to the basis on which the doctrine of frustration is founded. That is stated in *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* [1942] A.C. 154, 163, in the course of which Lord Simon L.C. said:

> ' The most satisfactory basis, I think, on which the doctrine can be put is that it depends on an implied term in the contract of the parties.'

Later he said:

> ' Every case in this branch of the law can be stated as turning on the question whether from the express terms of the particular contract a further term should be implied which, when its conditions are fulfilled, puts an end to the contract.'

" I am inclined to think it would be a wild conjecture to frame the term which the parties or an officious informed bystander would have inserted into this contract to deal with the situation of war arising between the respective countries or territories in which the parties were at the time respectively residing, but it could be hazarded that the obligation to live apart would continue and that the monthly instalments be paid to the custodian from whom the wife would have some hope of retrieving them in time. It seems hardly likely that the husband would be released from his financial obligations by this fortuitous event.

" In my judgment, the husband has no defence to this claim, although it may seem burdensome to him if he has not put on one side the instalments as they fell due, for the total has grown to a large figure. I give judgment for the wife, and the precise amount after the appropriate tax has been deducted must be calculated."

[Report: L.R. [1955] 2 Q.B. 227.]

iv.—On Enemy Subjects with regard to—

(a) THEIR PERSONAL STATUS IN THE TERRITORY OF THE BELLIGERENT. *PERSONA STANDI IN JUDICIO.*

War—Effects of Outbreak of—Statute of Limitations—Non-resident Enemy Aliens—Closing of Courts to—Right of Action of Individual—Right of Action as Shareholder of Corporation—Termination of War—The Law of the United States of America.

DREWS *v.* EASTERN SAUSAGE & PROVISION CO., INC., *ET AL.*

United States, District Court, Southern District, New York.
October 25, 1954.

THE FACTS.—The plaintiff sued individually on four causes of action and as a stockholder on behalf of corporations on four other causes of action. In the midst of the disputed transactions, the plaintiff had left the United States and returned to Poland, immediately prior to the German invasion. He had remained there as an enemy alien for the period of the Second World War. The defendants moved for summary judgment and dismissal on the ground, *inter alia*, that the causes of action had been barred by the statute of limitations.

Held: that the motion for summary judgment must be denied, and that the motion for dismissal must be granted as to certain of the causes of action and denied as to others. The statute of limitations was tolled (barred) while an enemy alien was disabled to sue, under Section 27 of the New York Civil Practice Act. However, the New York Act did not toll the statute as to a corporation's right of action. A stockholder in a derivative action had no better right than the corporation, and the statute of limitations was accordingly not tolled as to the stockholder's derivative cause of action.

After disposing of the motion for summary judgment, the Court said: " The serious problems raised by the motion to dismiss are whether the causes of action have been barred by limitations. The transactions out of which the first three individual causes of action grow have their origin in 1939, and it is safe to assume that those causes could not have arisen earlier. The plaintiff Drews, a German resident and national, was a non-resident enemy alien from the date of the United States' entry into the war until at least 1951. Under the Trading With the Enemy Act, 50 U.S.C. Appendix, § 1, et seq,. 50 U.S.C.A. Appendix, § 1 et seq., the courts within the United States were closed to non-resident enemy aliens as parties plaintiff, during the period of the state of war. *Ex parte Colonna*, 314 U.S. 510, 62 S.Ct. 373, 86 L.Ed. 379.[1] That period commenced with

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[[1] *Annual Digest*, 1941–1942, p. 454.]

the declaration by Congress on Dec. 11, 1941, Joint Resolution Dec. 11, 1941, 50 U.S.C.Appendix, note preceding § 1, that a state of war existed between the United States and Germany, and ended October 25, 1951, when the President of the United States proclaimed the termination of that state of war. Proclamation No. 2950, 50 U.S.C. Appendix, p. xx. Section 2, Trading With the Enemy Act. The suit was filed on December 15, 1953. Therefore, more than fourteen years elapsed between the accrual of the causes of action and the filing of suit. But under § 27 of the New York Civil Practice Act, the statute of limitations is tolled while an enemy alien is disabled to sue. Consequently, subtracting the approximately ten years of disability from the fourteen to fifteen year lapse, the individual causes of action are not barred whether the ten or the six year period of limitations is applicable.

" But the derivative causes of action stand on a different footing, vulnerable to the defense of limitations. It is commonly said that in a stockholders' suit the cause of action ' belongs to the corporation ', not to the stockholders individually or collectively, and that the instigator of the action on behalf of the corporation is a mere nominal plaintiff. . . .

" It must still follow, then, that if the corporate right is barred, the individual's right is barred, unless the wartime tolling statute for the benefit of enemy aliens alters that result.

" True it is that § 27 of the Civil Practice Act speaks in terms of a ' person . . . disabled to sue ' and not in terms of the incidence of the cause of action affected by the disability. It is further true that the plaintiff here is a person who was disabled to sue, and in a derivative action where his basic claim is ownership of all the stock of a corporation there was no one else to instigate the action before the running of the limitations period. Thus, the corporation would be deprived of a day in court and the plaintiff prejudiced in some rights unless he were permitted to prosecute the derivative action as one who had been disabled to sue. The obvious purpose of the tolling statute was to prevent the forfeiture of the rights of enemy aliens resulting merely from the lapse of time during which they were unable to protect them. But if the corporation and the individual plaintiff are to be completely protected in all rights, the tolling statute must be interpreted in such a way as to alter basic law and theory applicable to stockholders' suits, an interpretation that I am unwilling to accept. The result is no doubt harsh, but insofar as the wartime tolling legislation fails to dovetail nicely with the general body of corporate law in such a manner as to protect all rights, then to that extent must some rights be counted a casualty of war. Section 27 of the Civil Practice Act is unavailable to toll the running of the statute of limitations in the derivative actions. . . ."

(The Court then examined the application of these principles to the various causes of action and considered the defendant's motion to require the posting of security for costs.)

[Report: 125 F. Supp. 289.]

NOTE.—In *Borelli* v. *Rochester Transit Corp. et Al.* 285 App. Div. 230, 136 N.Y.S. 2d 315 (1954), the Supreme Court of the State of New York, Appellate Division, Third Department, *held* that Section 27 of the New York Civil Practice Act, referred to in the above case, and Section B, Annex XVI, of the Treaty of Peace with Italy, dated at Paris, February 10, 1947, 61 Stat. 1245, 1476, *T.I.A.S.* No. 1648, dealing with suspension of limitation of rights of action for the period of the war, not only tolled the statute of limitations as to an action under the Workmen's Compensation Law but also avoided the effect of a provision of the statute which limited benefits if the claim were made over seven years after the injury or death.

(b) THEIR PROPERTY AND OTHER RIGHTS.

War—Effects of Outbreak of—On Enemy Property—Expropriation of Enemy Property—Nature of Ownership of Expropriating State.

UNDER-SECRETARY OF STATE FOR FINANCE *v.* X.

Holland, Supreme Court. April 6, 1955.

THE FACTS.—X. was an enemy subject in the sense of Article 2 of the Decree on Enemy Property of October 20, 1944 (No. E 133), passed by the Netherlands Government-in-Exile. By virtue of Article 3 of that Decree his property had *ipso facto* been vested in the State of the Netherlands. Nevertheless, he was assessed by the Receiver of Taxes for an increase in capital. He filed a written objection against the assessment with the Receiver, who dismissed the objection. X. then appealed to the Board of Tax Appeals at Zwolle. The Receiver of Taxes claimed that for the purpose of a tax-levy a transfer of title on the ground of X.'s property being vested in the State need not be taken into account because the transfer of title under Article 3 of the Decree on Enemy Property was in the nature of a fiduciary transfer of ownership which could not preclude the levying of a tax. The Board rejected this argument, whereupon the Inland Revenue Service appealed to the Supreme Court.

Held: that the appeal must be dismissed. The transfer of property under the Decree on Enemy Property was in the nature of a full transfer of title under private law. The State of the Netherlands must therefore be considered as the owner of the property in question. Accordingly, the respondent was not liable for the capital gains tax.

The Court said: "The Under-Secretary of State for Finance holds that the transfer of property by virtue of Article 3 of the Decree is not in the nature of a civil law transfer of title but that it is a specific measure of public law of a conservatory nature and therefore does not preclude the levying of taxes on the property of an enemy subject. He bases this finding on the Decree and the Explanatory Memorandum to the Decree. That Memorandum states that the principal purpose of the Decree is to seize the property of enemy States and of their subjects in order to facilitate the subsequent adjustment of claims for damages which the State of the Netherlands may have against the enemy. The Memorandum then proceeds to explain that for this purpose a choice must be made between three systems, namely, blockade, sequestration and expropriation. The choice had been made of the third system, that is, for transfer of title. The Memorandum then goes on:

'It should be stressed that such transfer of ownership is not identical with confiscation or expropriation without confiscation. As is the case with blockade and sequestration, the system proposed here is of a conservatory nature. It would only become of a confiscatory nature if neither the conditions of an armistice nor the treaties of peace should provide for measures imposing on the enemy States the duty to compensate their own dispossessed nationals for damage and losses incurred by them as a consequence of such expropriation.'

" The foregoing leads the Under-Secretary of State to claim that the purpose of the Decree is simply to take the property assets into custody, which is not identical with a transfer of ownership in civil law. The Memorandum, however, makes a clear distinction between blockade and sequestration, neither of which entails a transfer of title, on the one hand, and expropriation in the sense of the Decree, on the other hand. It treats expropriation together with blockade and sequestration as being of a conservatory nature. It is of a conservatory nature only in so far as it is not expropriation without compensation, because the enemy States will have to compensate their dispossessed nationals for damage and losses incurred by them as a consequence of such expropriation. The Memorandum cannot, therefore, be a basis for the assertion that a transfer of ownership under Article 3 is not in the nature of a civil law transfer of title. The State of the Netherlands must be considered as the owner of the property concerned."

[Report: *N.J.*, 1955, No. 357.]

NOTE.—See, in the same sense, *Kweekbedrijf* v. *Receiver of Taxes, Roermond*: *International Law Reports*, 1951, Case No. 160.

War—Effects of Outbreak of—On Enemy Property—The Law of Belgium—Property of Enemy Nationals Resident on Belgian Territory—Rights of Heirs Not Resident on Belgian Territory.

SCHAFER *v.* OFFICE DES SÉQUESTRES.

Belgium, Court of Cassation. March 3, 1955.

THE FACTS.—The Office des Séquestres (Custodian of Enemy Property) had vested in himself the assets of Anna Schafer, a German national, in pursuance of the Decree-Law of August 23, 1944. Anna Schafer died on January 10, 1949, at Eupen, where she was born: she had maintained a residence there since 1933, and had resided there without interruption from 1940 until her death. The Law of July 14, 1951, concerning the liquidation of German goods, rights and interests provided, in Article 20, for the release of assets of persons regularly residing in the territories of Eupen, Malmédy and St. Vith. The heirs of Anna Schafer, who were German nationals not themselves resident in these territories, thereupon sought to obtain the release of her assets. The Court of Appeal of Liége, by decision of May 20, 1954, held that the assets could not be released on the ground that Anna Schafer had never been able to acquire the right to their release, while her heirs did not satisfy the conditions for their release. This was an appeal from that decision.

Held: that the appeal must be dismissed.

The Court said: " It appears, both from the preparatory work and from the text of Article 20 of the Law of July 14, 1951, that the Legislature intended to enact a measure of grace for the benefit of persons who, at the time of the coming into force of the Law, satisfied the conditions laid down therein. In requiring that the beneficiaries should be regularly resident in the recovered territories, the Legislature wanted to obtain a guarantee of the ' attachment of these persons to their region of origin '.

" The provision in question does not retroactively exclude from the application of the Decree Law of August 23, 1944, the goods, rights and interests of German nationals who, had they lived, would have satisfied the conditions of Article 20 of the Law of July 14, 1951, on its coming into force. It merely releases goods, rights and interests which, at the time of its coming into force, belong to persons satisfying these conditions.

" It appears from the decision of the lower Court that Anna Schafer, who died on January 10, 1949, was never able to benefit from the measure of grace provided by Article 20 of the Law of July 14, 1951, and that on the other hand her heirs, the present appellants, are not able themselves to claim the benefit of that provision."

[Report: *Pasicrisie Belge*, 1955, I, p. 725.]

War—Effects of Outbreak of—On Enemy Subjects with Regard to their Property or Other Rights.

In re PETERS.

Mexico, Supreme Court. August 16, 1954.

THE FACTS.—In 1951, the Executive Power of Mexico issued a Decree, approved by the Legislature, providing, *inter alia*, that " all property seized, intervened upon, or frozen " by virtue of emergency laws enacted during the Second World War with respect to alien property shall belong to the United States of Mexico. Pursuant to this Decree, the Government attempted to take possession of a building owned by Adolfo Peters, an enemy alien, whose properties had been placed under custody during the war. The owner interposed a writ of "*amparo*", on the ground that the Decree was unconstitutional inasmuch as it involved confiscation of his property in violation of constitutional guarantees which had been fully re-established immediately after the end of the war. *Amparo* was granted by the Court of La Lagua District (Torreon, Coahuila).

The Mexican Government appealed from this judgment to the Supreme Court. The Attorney of the Public Ministry contended that the Decree was constitutional, inasmuch as " it was based on International Law and on treaties entered into, and thus was not affected by the fact that it was issued after the re-establishment of constitutional rule ". The right to dispose of enemy property was based on international custom and, as such, was superior to the Constitution itself. This was not strictly a matter of confiscation but of payment to Mexico for damage caused by the enemy. The Attorney said (at p. 1463): " If it is argued that this right is limited by some constitutional principle, the inescapable consequence would be that, since the limitation is obligatory for Mexicans but not for foreigners, the Government of Mexico would be placed in highly unequal circumstances with respect to other countries. . . . Accordingly, it is a false doctrine, and one which is extremely dangerous to the autonomy of Mexico, to hold that constitutional guaranties are superior to the rules of International Law which govern the law of war. If it were true, in a foreign war Mexico could not use reprisals, retaliation, or confiscation, nor could it, in short, deny individual guarantees to the enemy." The Nation would thus be deprived of an unquestionable right, recognized by treaties in force, to obtain indemnity for the damage caused by the war. In support of this argument, the Government Attorney referred to various treaties signed by Mexico, and particularly to Conclusion XIX adopted by the Conference on Problems of War and Peace, held in Mexico in 1945, which recognized

> "that the economic, political and military activities of the enemy constitute a threat to the peace, welfare and security of the American Republics and that Germany and Japan will attempt to conceal their property in order to finance, during the postwar period, activities of every sort inimical to the security and safety of the Western Hemisphere."

In the dispositive section it was provided

> "That the American Republics expressly agree that their rights in property vested, affected, seized or intervened upon to the present time or which may [be so vested, etc.] in the future, shall remain, with respect

to the final disposition of each of such properties or of their proceeds, in *status quo*, until the American Governments individually reach final decisions regarding such dispositions, or enter into international agreements in this respect, in so far as they consider it in their respective interests."[1]

He contended that that Treaty had the force of law under the Constitution, and therefore the instant Decree, issued in implementation thereof, should be considered valid and the writ of *amparo* should be vacated.

Held: that the judgment of the District Court granting *amparo* must be affirmed. Even though " the taking of property intervened upon by the Government cannot be a ground for a claim in a suit based on constitutional guarantees against the applicable laws, since these are emergency laws enacted in time of war and of suspension of individual guaranties, the ' *amparo* ' should be granted against the Decree of 1951 inasmuch as the latter involves an expropriation without legal justification and an unexpected and transcendental [*sic.*] penalty, particularly because of the war. This view is not contrary to the agreements reached at the Conference of Chapultepec. It should be understood that, in its reference to vested property, the resolution of the Conference makes a distinction between the juridical situation where property has already been ' vested ' and that where property has been only ' affected ' or ' intervened upon ', which creates a different situation in each case. Furthermore, it is evident that the Conclusion of the Conference was inspired by motives of international good faith, prescribing the *status quo* pending a definitive decision upon the disposition of the property to which it refers; and it is clear that, in the case of property ' affected ' or ' intervened upon ', the final decision with respect thereto should be governed by the constitutional principles which guarantee the use of property in its full integrity."

[Report: *Semanario Judicial de la Federación* (5*a Época*), vol. 121, Part 2, p. 1450.]

War—Effects of Outbreak of—On Property Rights—Sequestration of Enemy Property—Restoration after Termination of War—The Law of Ecuador.

CARSTANJEN *v.* GOVERNMENT OF ECUADOR.

Ecuador, Supreme Court. December 5, 1955.

THE FACTS.—Otto H. Carstanjen, acting as manager and authorized agent of " Ecuapetrol, Compañía Petrolera y Comercial, S.A.", brought suit against the Government of Ecuador for the restitution of the property of the Company as well as for compensation for its seizure. The Company was one of those included in the Proclaimed Lists of Certain Blocked Nations which were issued by the Governments of Great Britain and the United States during the Second World War. Its property was blocked by Ecuador, in pursuance of recommendations made in the Final Act of the Inter-American Conference on Systems of Economic and Financial Control, held at Washington from June 30 to July 10, 1942. The Government, acting under authority of Executive Decree No. 854 of June 11, 1942, sold machinery, equipment, and other property belonging to Ecuapetrol to the " Shell Company of Ecuador ". By Executive Decree No. 290 of July 5, 1944, Ecuapetrol's forty-year Concession for petroleum exploration and exploitation was cancelled; the Concession was later sold to "Anglo-Ecuadorian Oil Fields, Ltd.". On March 2, 1945, the National Assembly issued a Decree nullifying all judgments and transfers of blocked property made in pursuance of Decree No. 854 of June 11, 1943. In the present case, the Government challenged the competence of Carstanjen to initiate an action on behalf of the Company and moved the dismissal of the suit.

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[1] Pan American Union, *Congress and Conference Series*, No. 47 (1945), p. 47. [Ed. note.]

Held: that the claimant had standing to sue and that the claim must be allowed. Control of blocked property constituted suspension, not termination, of previous ownership. After the war such property must be restored or compensation paid to the rightful owner.

The Supreme Court said: " Democratic States, such as Ecuador, regard the Constitution as the foundation of public life. Our Constitution guarantees that every person in the Republic shall be protected under the law, that contracts shall be respected and acquired rights be inviolate. It follows, then, that the contract could not be unilaterally terminated by the Government as a contracting party without judicial proceedings, for such action would be *ultra vires* the executive power. Even accepting the argument of the Procurator-General to the effect that ordinary civil legislation may not be applied in a situation such as that which confronted the United Nations during the Second World War, and which led the countries of this Hemisphere to join forces in concerted action through the Inter-American Conferences whose resolutions were ratified by the National Congress and were incorporated into our law, the truth is that the recommendations so formulated, the legislative decree approving them, and the executive decree implementing them, did not provide nor could they provide for the seizure of property without compensation.

" The property of persons whose names were included in the Proclaimed Lists issued by the United Nations was subject to blocking. As this was the only justification for an act contrary to general principles of law, then the effects of the blocking cease with the termination of the cause which gave rise to the act. It follows, then, that the transfers of property and contract are null and void and that the same must be restored to the previous owners. . . . However, as this property is no longer in the possession of the State, having been sold to private firms, it is ordered that the Government pay an indemnity to Otto H. Carstanjen in his capacity as manager and agent of Ecuapetrol Compañía Petrolera y Comercial, S.A."

[Report: *Gaceta Judicial*, Series VIII, No. 9 (September-December 1955), p. 873.]

War—Effects of Outbreak of—On Enemy Subjects with regard to Their Property—Seizure of Yacht by Belligerent Navy.

See p. 953 (*Beaumont Claim*).

War—Effects of Outbreak of—On Enemy Subjects with regard to Their Property—Sequestration of Property—Conversion of Premises for Use as Air-Raid Shelter.

See p. 301 (*Currie Claim*).

War—Effects of Outbreak of—On Enemy Subjects with regard to Their Property—Seizure of Yacht by Enemy Navy—Measures of Control.

See p. 966 (*Grant-Smith Claim*).

War—Effects of Outbreak of—On Enemy Subjects with regard to Their Property—Sequestration and Sale of Enemy Property—Compensation under Provisions in Peace Treaty.

See p. 307 (*MacAndrews & Forbes Company Claim*).

War—Effects of Outbreak of—On Enemy Subjects with regard to Their Property—Sequestration of Enemy Property—Conservatory Nature of—Distinction between Administrative and Judicial Sequestration.

See p. 317 (*Re Rizzo and Others* (*No.* 3)).

vii.—Trading with the Enemy

War—Trading with the Enemy—Loan Contract Made before Outbreak of War—Whether Contract Abrogated by War—Effect of German Moratorium Law of 1933.

See p. 480 (*In re Claim by Helbert Wagg & Co., Ltd.*).

War—Trading with the Enemy—Contracts—Statutory Law and Common Law—Intercourse for Recognized Religious Purposes—Strict Condition *ratione temporis*.

See p. 698 (*Jiday* v. *C.E.O. Haifa and Another*).

War—Trading with the Enemy—Power to Control Enemy Property—Survival until Termination of War—The Law of the United States of America.

See p. 932 (*National Savings and Trust Co. et Al.* v. *Brownell*).

VI.—Enemy Character—

i.—Of Individuals

War—Enemy Character—Of Individuals—Trading with the Enemy—National of Belligerent State Voluntarily Resident in Enemy Territory—The Law of the United States of America.

ECKER *v.* ATLANTIC REFINING CO. *ET AL.*

United States, District Court, District of Maryland. October 26, 1954.

Court of Appeals, Fourth Circuit. May 14, 1955.

THE FACTS.—This was an action for a declaratory judgment that the plaintiff remained the owner of premises in the State of Maryland which had been vested by the Alien Property Custodian pursuant to the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C.App. §§ 1 *et seq.*

The plaintiff and her husband had come to the United States from Austria in 1909 and had been naturalized in 1921. In 1922 they returned to Austria, where they bought a house and vineyard. They made only temporary visits to the United States during the next seven years. On his last visit to the United States in 1932, the plaintiff's husband leased the property they owned in Maryland to a company which later assigned the lease to the defendant Atlantic Refining Company. In 1939, the plaintiff's husband applied for German citizenship but was not granted it. The plaintiff joined the National-Socialist Women's League, the women's auxiliary of the National-Socialist Party.

The property in Maryland was vested in 1943 and sold to the defendant by private sale in 1946. In 1951, the plaintiff returned to the United States for the first time since 1929, her husband having died in 1948. A claim had been filed for the return of the property, and the Custodian in 1951 returned the proceeds of sale, after a determination that this return was " in the interest of the United States ". The plaintiff contended that the seizure and private sale of her property were improvident and illegal and that she continued to be the owner thereof, subject only to the unexpired lease with Atlantic.

Held (by the District Court): that the action must be dismissed. The plaintiff and her husband were voluntarily resident in enemy territory and were therefore enemy nationals within the meaning of the Trading with the Enemy Act. The Alien Property Custodian had authority to sell the property at private sale. [Report: 125 F.Supp. 605.]

The plaintiff appealed.

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed on the same grounds as those adduced by the District Court.

The Court said: " We think Judge Chesnut was clearly correct in holding that the Eckers were ' enemies ' as that term is used in the Trading with the Enemy Act, 50 U.S.C.A.Appendix, §§ 1–40. By Section 2 of the Act, the word ' enemy ' is defined to include:

> ' (a) Any individual . . . of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war . . .'

It is quite clear that the word ' resident ' here connotes less than ' domicile ' and that, as Judge Chesnut found, the Eckers were ' residents ' of Austria.

' . . . To become a sojourner no intention whatever is necessary, simply the fact of personal existence in the place. For residence there is an intention to live in the place for the time being. For the establishment of domicile the intention must be not merely to live in the place but to make a home there.' (Beale, *The Conflict of Laws* (1935), Vol. 1, p. 109.)

See, also, *Guessefeldt* v. *McGrath*, 342 U.S. 308, 72 S.Ct. 338, 96 L.Ed. 342;[1] *McGrath* v. *Kristensen*, 340 U.S. 162, 175, 71 S.Ct. 224, 95 L.Ed. 173;[2] *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480, 68 S.Ct. 174, 92 L.Ed. 88.[3]

" We find no merit in plaintiff's attack on the constitutionality of the Trading with the Enemy Act. From Judge Chesnut's opinion we quote:

' Viewed as a whole, the purpose and effect of the Trading with the Enemy Act as applicable here is that any property in the United States even though owned by a citizen of the United States resident within an enemy country (including Austria in this case) could be seized and vested by the Alien Property Custodian, and the sole remedy provided for an improper seizure was given by section 9(a) of the Act which provided that a claim might be filed by the owner with the Alien Property Custodian and suits could be brought against the Alien Property Custodian by the claimant for a return of the property. It is this provision of the Act which gratifies the constitutional requirement of due process. *Becker Steel Co. of America* v. *Cummings, Attorney General*, 296 U.S. 74, 56 S.Ct. 15, 80 L.Ed. 54.'

See, also *Wickard* v. *Filburn*, 317 U.S. 111, 129, 63 S.Ct. 82, 87 L.Ed. 122; *Commercial Trust Co. of New Jersey* v. *Miller*, 262 U.S. 51,

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[1] [*International Law Reports*, 1952, p. 580.]

[2] [*Ibid.*, 1950, p. 234.]

[3] [*Annual Digest*, 1947, p. 192.]

43 S.Ct. 486, 67 L.Ed. 858; *Stoehr* v. *Wallace*, 255 U.S. 239, 41 S.Ct. 293, 65 L.Ed. 604; *Central Union Trust Co. of New York* v. *Garvan*, 254 U.S. 554, 41 S.Ct. 214, 65 L.Ed. 403.

" Plaintiff further insists that there is error in Judge Chesnut's conclusion:

' I conclude, therefore, as a matter of law, that the plaintiff's property was duly seized and vested by the Custodian and thereafter duly sold to the Atlantic Refining Company as a result of which a good title was transferred to and vested in the defendant, and that the sufficiency of this title cannot be further litigated in this suit against the purchaser.'

" We think this conclusion was altogether correct. To quote Judge Chesnut further:

' The Alien Property Custodian also had power and authority to sell the property at private sale after the highest bidder at the public auction had refused to complete the sale. Counsel for the plaintiff contends to the contrary on reference to section 12 of the Act which provides that ordinarily the sale of real property shall be at public sale after due advertisement unless the President, stating the reasons therefor, in the public interest shall otherwise determine. However, it appears from the Act and Executive Orders that the President with due authority did delegate the determination of this question to the Custodian by Executive Order No. 9095 above quoted. This is not disputed by counsel for the plaintiff who, however, contends that the President could properly have delegated it only to some one other than the Custodian. No authority has been cited in support of this contention and I know of none.

' Counsel for the government say that private sales have very frequently been made by the Custodian; but while there are apparently only a few reported judicial decisions on the point, private sales have been upheld in at least two cases. *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 47 S.Ct. 1, 71 L.Ed. 131, and *Lippmann* v. *McGrath*, D.C., 94 F.Supp. 1016. It is also to be noted that by section 12 of the Act the Custodian is given the power of a common law trustee in the management and disposition of property lawfully seized by him. And section 7(c) of the Act provides that where property has been sold by the Custodian the only remedy of the claimant is to secure from the Custodian the net proceeds of the sale. *Becker Steel* [*Co. of America*] v. *Cummings*, *supra.* In the instant case the net proceeds of the sale of the property to the Atlantic Refining Company have been heretofore paid to the plaintiff, or at least there is no controversy here about that. If anything further is due on this account it could not be adjudicated in this case.'

Judge Chesnut further found that the purchase price of $22,000 ' was a fair and reasonable price for this property ' at the time.

" We find, as did the District Judge, that there was no reasonable basis for plaintiff's contention that Atlantic fraudulently conspired with Schneider, or possibly some person connected with the Custodian, to deprive the plaintiff of valuable property rights to her damage.

" We advert briefly to a point not considered by either the District Judge or counsel in this case. It was raised by questions from the bench during oral argument. Was the plaintiff estopped from questioning the validity of the sale to Atlantic by her acceptance of the proceeds from this sale? Since it is unnecessary for our decision in this case, we do not pass on this point."

[Reports: 222 F.2d 618; *certiorari* denied, 350 U.S. 847, 100 L.Ed. 754, 76 Sup. Ct. 84 (1955).]

NOTE.—In *Rusche* v. *Brownell et Al.*, 136 F. Supp. 835 (D.D.C. 1955), a federal District Court *found* that a claimant to vested properties who had contended that he was domiciled in Switzerland during the Second World War was in fact a resident of Germany until 1944 and was therefore an enemy within the meaning of the Trading With the Enemy Act. The claimant was also found to have enemy character by reason of his having done business in Germany and having been employed by a German company during the War. In *Akata* v. *Brownell*, 125 F. Supp. 6 (D. Hawaii 1954), a Japanese national, resident in Hawaii before the Second World War and interned and removed to the mainland in 1942, was *held* not to be "resident within" enemy territory from 1945 to 1952 and therefore not an "enemy", notwithstanding the fact that he had voluntarily sought repatriation to Japan and had lived there from 1945 to 1952, before returning to Hawaii in 1952. In the circumstances he had not freely and voluntarily abandoned his permanent residence in Hawaii with the intention of taking up a new and permanent residence of his own choice in Japan.

Enemy Character — Stateless Persons — Persons Deprived of Nationality for Serious Violation of Duties as Citizens—The Law of Belgium.

MARQUET *v.* OFFICE DES SÉQUESTRES.

Belgium, Court of Cassation. November 24, 1955.

THE FACTS.—The Office des Séquestres, Custodian of Enemy Property, in 1945 vested in himself, as enemy property, the assets of one Joseph Dehottay. Dehottay had acquired Belgian nationality by operation of the Treaty of Versailles, but was deprived of that nationality in 1935 in pursuance of a Law of July 30, 1934, for serious violation of his duties as a Belgian citizen. At the time of the vesting he was thus stateless.

Joseph Dehottay died in 1946 leaving as heir his son, Conrad Dehottay. The appellants in this action, the widow and son of a man who had been denounced to the enemy by that same Conrad Dehottay, had obtained judgment against him for damages. They now sought to obtain the release of the assets vested in the Office des Séquestres for the purpose of satisfying the judgment debt therefrom.

The Court of Appeal of Liége, by a decision of July 8, 1953, rejected the claim on the ground that the assets in question were enemy property. The Court pointed out that only Belgian, Allied or neutral persons were entitled to the release of assets, and took the view that " while it may be permissible to assimilate to neutrals stateless persons who lost all links with any country as a result of circumstances beyond their control, or even by voluntary action, it would be contrary to the spirit of the Law concerning enemy property so to assimilate persons who lost Belgian nationality for serious violation of their duties as citizens."

This was an appeal from that decision. It was contended on behalf of the appellants that only the property of German or Japanese nationals could be regarded as enemy property, and that all persons who were not either German or Japanese nationals must fall into the category of " Belgian, Allied or neutral persons ", who were entitled to claim the release of their assets.

Held: that the decision of the lower Court must be set aside and the case sent back to the Court of Appeal of Brussels for retrial. Any person who was not a national of a belligerent country, including a stateless person, must be regarded as a neutral.

The Court said: "Article 1 of the Decree Law of August 23, 1944, provides for the vesting of all property, rights and interests which directly or indirectly are in the ownership, under the control or at the disposal of an enemy State, institution or national. Article 1 of the Decree Law of August 1, 1945, defines enemy nationals for this purpose to mean German and Japanese nationals.

" The Court of first instance found that Joseph and Conrad Dehottay, who possessed Belgian nationality in virtue of the Treaty of Versailles, were deprived of that nationality in 1935 in application of the Law of July 30, 1934, and thereby became stateless. The aforementioned Articles of the Decree Laws of August, 23, 1944, and August 1, 1945, do not provide for the vesting of the property, rights and interests of stateless persons.

"Article 3 of the Decree Law of August 23, 1944, provides that every Belgian, Allied or neutral person whose assets had been illegally vested shall be entitled to obtain their release. The term ' neutral ' covers every person who is not a national of a belligerent country. This is true of stateless persons. The decision of the lower Court distinguished between the circumstances in which the person concerned had become stateless, and thereby placed upon the pertinent legal provisions a discriminatory interpretation which they do not support."

[Report: *Pasicrisie Belge*, 1956, I, p. 281.]

War—Enemy Character—Of Individuals—Definition of Enemy National—The Italian War Law.

See p. 443 (*Mergé Claim*).

ii.—Of Corporations

Enemy Character—Of Corporations—Company Incorporated in Territory of One Belligerent Whose Share Capital is in Hands of Nationals of Other Belligerent.

SOCIÉTÉ ANONYME COMPAGNIES RÉUNIES DES HUILERIES DU CONGO BELGE ET SAVONNERIES LEVER FRÈRES "HUILEVER" *v.* OFFICE DES SÉQUESTRES.

Belgium, Court of Cassation. January 13, 1955.

THE FACTS.—The Office des Séquestres, Custodian of Enemy Property, had vested in himself the assets in Belgium of Sunlight A.G. Berlin, a company incorporated in Germany, in pursuance of the Decree Law of August 23, 1944, which provided for the vesting of all goods, rights and interests directly or indirectly in the ownership, under the control or at the disposal of an enemy State, body or individual. The appellants sought to obtain the release of these assets on the ground that the entire share capital of Sunlight A.G. Berlin was in Allied hands. They relied on Article 1 of the Law of July 14, 1951, concerning the disposal of enemy property, which provided for the release of assets of companies which had been considered to be under German control, but whose entire capital was in Allied hands. The Court of Appeal of Brussels, by decision of November 7, 1953, held that assets which were the property of a German company were properly vested.

On appeal,

Held: that the appeal must be dismissed.

The Court said: "The Law of July 14, 1951, and particularly Article 1 thereof, must be interpreted in the light of the principles which determined the drafting of the basic law, *i.e.*, the Decree Law of August 23, 1944. Article 1 of that Decree Law applies to goods, rights and interests directly or indirectly in the ownership, under the control or at the disposal of an enemy State, body or individual. That Article, deliberately drafted in the widest terms, is general and mandatory in scope. Its rigour is tempered by the fact that the vesting is merely a measure of conservation freezing the assets, as distinguished from the measures of liquidation provided for in later legislation.

"Article 1 of the Law of July 14, 1951, does not have the meaning ascribed to it by the appellants, which would be contrary to the intention of the Decree Law which it interprets. That Article only applies to one of the categories of goods, rights and interests referred to in Article 1 of the Decree-Law, namely, those which are 'considered to be under German control'. It does not apply to those which are the property of an enemy body or enemy national. Such goods are only released in the cases provided for in the ' modifying ' provisions of Section II of the Law of July 14, 1951; the conditions for such release laid down in Article 29 are particularly intended to safeguard the interests of Belgian, Allied or neutral nationals in companies incorporated under German law in which they owned more than fifty per cent. of the share capital.

"Accordingly, the lower Court rightly deduced from the finding that the assets in dispute were the property of Sunlight A.G., a German company, that they had been properly vested."

[Report: *Pasicrisie Belge*, 1955, I, p. 484.]

Enemy Character—Of Corporations—Proof of—Production of Records in Foreign State.

See p. 184 (*Société Internationale pour Participations Industrielles et Commerciales S.A.* v. *Brownell, Attorney-General, et Al.*).

iv.—Of Goods

War—In General—Enemy Character—Of Goods—Of Individuals.

See p. 1008 (*Ministerio della Marina* v. *Van Beek* (*The Maria*)).

VIII.—Enforcement of the Laws of War

ii.—Punishment of War Crimes and Crimes against Humanity

War—Enforcement of Laws of—Punishment of War Crimes—Rules Governing Composition of Tribunal—Geneva Convention of 1929—Geneva Conventions of 1949—Whether Rules Governing Composition of Tribunal Applicable to Civilians—Material Date for Status of Accused.

Re OBERG AND KNOCHEN.

France, Court of Cassation. February 10, 1955.

THE FACTS.—Oberg and Knochen, both German subjects, were found guilty of war crimes committed in France during the Second World War. Their trial took place before the Permanent Military Tribunal of Paris and resulted in their being sentenced to death. They appealed against conviction and sentence and contended, *inter alia* and as far as here material, that the Tribunal by which they had been tried had not been properly constituted. In support of that contention they relied on the alleged fact (found to be unsubstantiated) that they had held military rank in the German army and were accordingly entitled to be tried by a tribunal consisting of officers of the same rank as would have been entitled to try officers of the Detaining Power of equivalent rank to their own, as provided in Article 63 of the Convention relative to Prisoners of War of July 27, 1929; and that, as the Tribunal which had tried them had been composed of officers of lower rank, the trial was irregular. In the alternative, they relied on violations of a similar nature of provisions of the Geneva Convention on Prisoners of War of August 12, 1949, which they alleged to be applicable to the present case.

Held: that (1) the appellants had failed to prove that they had held military rank in the German army, and in so far as concerned the contention that the Tribunal had not been properly constituted, they were not therefore entitled to rely upon a violation of the Geneva Convention of 1929; (2) even if the contention of the appellants that after their capture in France they had been treated as prisoners of war were to be accepted, the Geneva Convention of 1929 would nevertheless not be applicable because it applied only to those who, at the time when they committed the crimes charged, were members of the armed forces of the enemy; (3) the Geneva Convention of 1949 was not applicable in the present case because the crimes charged were committed in the course of a war with the German Reich and not with the Federal Republic of Germany, which alone was a Party to the Convention of 1949.

Accordingly, the appeals must be dismissed.

The Court said in part: "Although the Geneva Convention on Prisoners of War of August 12, 1949, was ratified by the Federal Republic of Germany by the Law of August 21, 1954, and although the instruments of ratification were deposited in Berne on September 3, 1954, the appellants were charged before the Permanent Military Tribunal with crimes committed in the course of a conflict involving, as a belligerent, not the Federal Republic of Germany but the German Third Reich; this conflict was therefore governed by the Conventions then in force, and in particular the Convention of July 27, 1929. Dealing with the contention that the Tribunal was allegedly not properly constituted, as required by Article 63 of the Geneva Convention of July 27, 1929, the judges of the Tribunal, in holding the Tribunal to have been properly constituted, stated that Oberg was not a member of the German army at any time and that Knochen did not possess the status of a prisoner of war nor had he proved—or even begun to prove—that the American army regarded him as a prisoner of war with colonel's rank. In so holding, the Tribunal evaluated the evidence put before it and justified its composition. The provisions of Article 10 of the Code of Military Justice for the Armed Land Forces which modify the composition of military tribunals in accordance with the rank of the accused do not apply to civilians even if they are subsequently made prisoners of war. The exception to this rule contained in Article 63 of the

Geneva Convention of July 27, 1929, is concerned only with prisoners of war who, even though captured after the events concerned, belonged to the German army when these events occurred. This contention must therefore be rejected."

(The Court then dealt with certain subsidiary grounds of appeal, such as superior orders and the question of mitigation, and in the result dismissed the appeals.)

[Report: *Bulletin de la Cour de Cassation,* 1955, p. 167.]

IX.—Prisoners of War

Prisoners of War—Duty of Obedience—Relationship to Unauthorized Communication with Enemy as Prohibited by Own State—Geneva Prisoners of War Covention of 1949—The Law of the United States of America.

UNITED STATES *v.* DICKENSON.

United States, Court of Military Appeals. September 30, 1955.

THE FACTS.—The accused, a soldier of the United States Army, was charged under Article 104 of the United States Uniform Code of Military Justice with having had unauthorized communication, correspondence, and intercourse with the Chinese Communist forces in a Chinese prisoner of war camp in Korea. Article 104 provides:

> "Any person who—
>
> " (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other thing; or
>
> " (2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;
>
> shall suffer death or such other punishment as a court-martial or military commission may direct."

Dickenson had informed on his fellow prisoners with regard to such matters as escape plans and had engaged in propaganda against the United States. He was found guilty by a court-martial. The findings and sentence of the court-martial were affirmed by an Army board of review (CM 374659, 17 C.M.R. 438 (1954)). The accused appealed to the Court of Military Appeals contending, *inter alia,* that Article 104 of the Uniform Code of Military Justice prohibits only such communication or correspondence with the enemy as goes " across the lines, from territory under United States control to the enemy " and that it could therefore have no application to his conduct while a prisoner of war. He also maintained that since a prisoner of war must converse with his captors regarding food, shelter, medical care, and other necessaries of everyday living, the prohibition of Article 104 is a limited one and applies only to the communication of " intelligence " to the enemy.

Held: that the decision of the board of review must be affirmed. In addition to dismissing a number of contentions by the accused which turned on issues of the domestic law of the United States and of fact, the Court admitted that communication with the enemy regarding the necessaries of life was authorized communication, recognized by customary international law and the Geneva Prisoners of War Convention of 1949, and therefore not within the prohibition of Article 104. Whatever the place, whether within or without an area controlled by the United States, there must be no unauthorized intercourse between a citizen of the United States and an enemy.

The Court said in part: "As we read Article 104, none of the acts enumerated is conditioned upon, or restricted by, another. Rather, the Article prohibits separate and distinct acts, each of which is sufficient by itself to constitute the offense. Whether the two subsections of the Article state separate offenses, or are merely different modes of committing the same offense, need not detain us. See *United States* v. *Redenius*, 4 USCMA 161, 15 CMR 161. Suffice it that no word in the statute indicates that the act of giving 'intelligence' to the enemy qualifies or restricts the act of 'communicating' or 'corresponding' or 'holding intercourse' with the enemy. But to interpret the Article in the way urged by the accused would require us not only to substitute and add words, but to juxtapose words. We would have to change the language to make the statute read substantially as follows: 'or communicates or corresponds or holds any intercourse with the enemy by *giving intelligence to it*.' The accused contends that such a drastic change in the language and sense of the Article is required by the special conditions incident to a prisoner of war status.

"Article 104 is said to demand 'absolute nonintercourse.' *Manual for Courts-Martial*, United States, 1951, paragraph 183*d*, page 339. From that premise, the accused reasons that the Article cannot be applied to a prisoner of war because the prisoner must converse with his captors in regard to his food, shelter, medical care and other necessaries of everyday living. In short, the accused maintains that a prisoner is 'not required to starve' at the risk of violating Article 104. He argues, therefore, that the only wrongful communication that a prisoner of war can be guilty of is a communication of 'intelligence.' The flaw in this argument is obvious.

"Not every communication is prohibited by Article 104. The entire subsection in issue is qualified by the phrase 'without proper authority.' Consequently, a communication with the enemy which is authorized is not a violation of the Article. Service custom, which merely recognizes the applicable laws of war, authorizes a prisoner of war to disclose his name, rank, and service number. The laws of humanity authorize communications in connection with the necessities of life. Long past are the days of 'no quarter' when a prisoner of war was summarily put to death on capture. A prisoner of war has a recognized claim to life. In furtherance of this claim, he may demand sustenance from his captors. He may ask for, and is entitled to receive, ' food, clothing if necessary, and proper lodging and medical attendance.' Winthrop's *Military Law and Precedents*, 2d ed, 1920 Reprint, page 789. Moreover, the laws of war authorize communications between prisoners of war and their captors in regard to matters other than the bare necessaries of life. So, for example, a prisoner of war is required to conform to the laws, regulations, and orders of the place in which he is confined. Winthrop, supra, page 792. See also: Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, which the United Nations Command declared that it would apply in the treatment of its war prisoners. If he is required to communicate with the enemy in the course of compliance with these regulations and orders, the communication is authorized, and, therefore, not a violation of Article 104. It is thus apparent that the practicalities of the prisoner of war status are not such as to justify an interpretation of Article 104 different from that indicated by the plain language of its provisions.

"Also lacking in merit is the accused's claim that the specification laid under Article 104 does not state an offense because the communication did not pass ' across the lines ' between the United States and the enemy. The impassable ' line ' between belligerents is not geographic. The geographic line merely marks off the territory subject to the separate control of each belligerent and provides a convenient basis for establishing defensive and offensive measures. The true line between enemies is philosophical. That line is not measured by the inches, yards, or miles separating the opposing military forces. It is established and measured by the existence of a state of war. *The Prize Cases*, 2 Black 635, 688, 17 L ed 459; *Hiatt* v. *Brown*, 15 Wall 177, 21 L ed 128; *United States* v. *Grossmayer*, 9 Wall 72, 19 L ed 627.

" Whatever the place, whether within or without an area controlled by the United States, there can be no unauthorized intercourse between a citizen of the United States and an enemy. In *Hiatt* v. *Brown*, *supra*, the Supreme Court held that even the courts of each belligerent are closed to the citizens of the other. We hold, therefore, that a prisoner of war in the hands of the enemy is bound by the provisions of Article 104. He is not exempt from the provisions of that Article because he is outside an area subject to the control of the United States. . . ."

(The Court then went on to examine the questions of fact and of domestic law presented by the case.)

[Reports: 6 U.S.C.M.A. 438; 20 C.M.R. 154.]

NOTE.—While the decision of the Court is based on considerations of domestic law of the United States and while the reference to the Geneva Convention of 1949 is incidental, the decision appears to be of sufficient general interest to call for inclusion in this volume.

War—Prisoners of War—Trial for War Crimes—Permissible Punishment—" Military Degradation " as Form of Punishment—Geneva Convention of 1929.

Re KAHRS.

France, Court of Cassation. February 2, 1955.

THE FACTS.—Article 49 of the Geneva Convention of July 27, 1929, relative to the Treatment of Prisoners of War provided that " no prisoner of war may be deprived of his rank by the Detaining Power ".[1] A German prisoner of war was tried by a French court and found guilty of war crimes. He was sentenced to 15 years' hard labour and " military degradation ", the latter being a form of punishment known to French military law.

Held: that the sentence of " military degradation " was contrary to Article 49 of the Geneva Convention, 1929, and must accordingly be quashed.

The Court said: "Article 49 of the Geneva Convention of July 27, 1929, which was ratified by the Law of May 9, 1935, and promulgated by decree dated December 10, 1945, provides that " no prisoner of war may be deprived of his rank by the Detaining Power ". The judgment under appeal found Kahrs, an ensign in the German Navy, guilty of crimes against the persons of French nationals, contrary to the laws and customs of war, and sentenced him to 15 years' hard labour and 20 years' banishment from French territory and, in addition, to military degradation in pursuance of Article 192 of the Code of Military Justice. In inflicting this latter punishment upon a member of the armed forces of a foreign country who was a prisoner of war, the Naval Tribunal violated the provision of the Convention referred to above, and this punishment must therefore be quashed."

[Report: *Bulletin de la Cour de Cassation,* 1955, p. 136.]

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[1] An identical provision is now contained in Article 87 of the Prisoners of War Convention of August 12, 1949.

War—Prisoners of War—Trial for War Crimes—Material Date for Prisoner of War Status—Geneva Convention of 1929—Geneva Convention of 1949.

See p. 924 (*Re Oberg and Knochen*).

XI.—Non-hostile Relations between Belligerents, especially Armistices

War—Non-hostile Relations between Belligerents—Capitulation—Terms of Treaty of Surrender—Provision for Surrender of Property—Effect on Legal Title.

DE DECKERE *v.* BELGIAN STATE.

Belgium, Court of Appeal of Ghent. April 2, 1955.

THE FACTS.—In the spring of 1940 the appellant was entrusted with some material which formed part of the stocks of the Belgian Army. After the war the Belgian State sought to recover that material. The appellant denied the title of the Belgian State to the property in question with reference to the Protocol of Surrender signed by Belgium and Germany on May 28, 1940, and which provided that " all stocks for the provisioning of the Belgian Army shall be handed over intact to the German authorities ". The Court of first instance held that the Belgian State had not thereby lost title in the property; that title would have passed only when the occupant in fact claimed the property in question; and that there was no evidence that the occupant had ever so claimed the property. This was an appeal against that decision.

It was contended on behalf of the appellant that the contested material had become the property of the German authorities by virtue of the mere signature of the Protocol of Surender, in conformity with Article 1138 of the Belgian Civil Code, which provides that the obligation to deliver is perfect as soon as the contracting parties agree, and makes the creditor the owner.

Held: that the appeal must be rejected. A Protocol of Surrender could not be assimilated to a contract governed by Article 1138 of the Civil Code. In case of surrender, even by treaty, the stocks of the army constituted booty of war. Title in booty of war passed to the belligerent only when he had effectively taken possession.

The Court said: " The Court of first instance rightly held that the Belgian State had not lost title in the contested material, which was part of the stock of the army and which had been entrusted to the appellant in the spring of 1940, by virtue of the Protocol of Surrender of May, 28, 1940. It is true that the Protocol of Surrender provided, in Annex II, point No. 5, that all stocks stored for the provisioning of the Belgian army ' shall be handed over intact ' (to the German authorities). However, the lower Court rightly considered that this does not mean that the German authorities automatically acquired title in all these goods, but means only that they have the right to claim the property, and that they acquire title if they so claim it.

" Surrender is a form of armistice (see François, *Volkenrecht*, 1950, vol. II, p. 844); it is military, is imposed by the will of the conqueror, and establishes a situation in which the state of war between the belligerents formally continues to exist. Such a surrender is binding on the State and must, in conformity with Article 35 of the Hague Convention of 1907 and according to international law, be scrupulously observed by the two parties. A violation of the Protocol of Surrender would, according to international law, confer on the other signatory the right to denounce it (François, *op. cit.*, p. 841). The provisions of a Protocol of Surrender cannot, however, be assimilated to the clauses of a contract governed by the law of obligations to which Article 1138 of the Civil Code would apply.

"Accordingly, the contention of the appellant that the contested material became, as army stock, property of the German authorities on the signature of the Protocol of Surrender, in virtue of an immediate transfer of title *solo consensu* in conformity with Article 1138 of the Civil Code, is unfounded. In case of surrender, even by treaty, movable property such as the stocks of the army constitutes booty of war. Title in booty of war passes to the belligerent only when he has effectively taken possession of the enemy property (François, *op. cit.*, vol. II, p. 554), *i.e.*, when he has exercised the right to claim this property. The Court of first instance, for reasons which this Court makes its own, considered that the appellant—upon whom lies the burden of proof—had not shown that the material was confiscated by the occupant without written receipt."

[Report: *Pasicrisie Belge*, 1956, II, p. 41.]

War—Armistice—Nature of.

See p. 443 (*Mergé Claim*).

Armistices—Object and Effect of—Termination of War—Israel and Lebanon.

See p. 5 (*Custodian of Absentee Property* v. *Samra*).

Non-Hostile Relations between Belligerents—Armistices—Hostilities in Absence of Declaration of War—Suspension of Hostilities by an Armistice during the Korean Conflict—Whether War for Purposes of United States Military Law.

See p. 896 (*United States* v. *Sanders*).

XII.—Termination of War

War—Termination of—By Act of Legislature or by Treaty—"War" for Purposes of International and Municipal Law—Termination of War Powers—Trading with the Enemy—The Law of the United States of America.

NATIONAL SAVINGS AND TRUST CO. *ET AL. v.* BROWNELL, ATTORNEY-GENERAL.

United States, Court of Appeals, District of Columbia Circuit.

March 3, 1955.

THE FACTS.—This was an action, brought by the Attorney-General under section 17 of the Trading With the Enemy Act, 40 Stat. 425, 50 U.S.C. App. § 17, seeking enforcement of vesting orders issued by him under the authority of that Act. The Attorney-General had determined that the subject matter of the controversy, notes and securities held in trust, was owned or controlled, and held on behalf of, nationals of Germany, an enemy country. In 1948 he issued so-called "right, title and interest vesting" orders in respect of the property, and in February and May 1951 issued so-called "*res* vesting" orders, by the terms of which he purported to vest in himself the right to immediate possession of the property.

The District Court granted enforcement of the vesting orders, and the trustees appealed. They contended that the power of seizure sought to be exercised by the Attorney-General was derived from the war power conferred by Article I, section 8, clause 1, of the United States Constitution; that at some moment of time following the cessation of hostilities, the rules of international law, the Fifth Amendment to the Constitution (forbidding the taking of property without due process of law), and applicable treaties became effective to protect property of aliens from seizure; that the existence of war conditions was a valid subject of judicial inquiry; and that the constitutional power to seize property had terminated before these vesting orders were issued.

On appeal,

Held: that the judgment of the District Court must be affirmed. There had been no termination of the constitutional war power so long as neither the President nor the Congress had declared the end of the war. The Attorney-General accordingly had power to seize the property of an enemy alien pursuant to the Trading with the Enemy Act.

The Court said: "The President declared the termination of hostilities of World War II on December 31, 1946.[1] Treaties of peace with Italy, Roumania, Bulgaria and Hungary were concluded on February 10, 1947.[1] By a joint resolution approved July 25, 1947, many wartime statutes were repealed.[2] Congress, by a joint resolution of October 19, 1951,[3] declared the 'end of the war' with Germany. So at the time of the vesting orders here involved hostilities had ceased and many factual circumstances premised upon peace had occurred; but no treaty of peace with Germany had been executed, and neither the Congress nor the President had formally declared the end of the war with Germany.[4]

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[1] Proclamation No. 2714, 61 Stat. 1048, 50 U.S.C.A.Appendix § 601 note.

"Our appellants, the trustees, are met at once by the well-established propositions that an action brought by the Alien Property Custodian under Section 17 of the Trading with the Enemy Act is a possessory action only—a libel, Justice Holmes called it—not to be delayed by defenses,[5] and that a claimant is left to such judicial proceedings as he (the claimant) may bring under Section 9(a) of the Act[6] and such administrative proceedings as he may initiate under Section 32.[7] And appellants are also met by the provision in this statute which defines 'end of the war' for its purposes as meaning 'the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date'.[8] But appellants say their argument cuts across those propositions. They say the war power itself had ceased to exist by the time these vesting orders were issued and so the very right to seize had ceased to exist and the orders were null and void. Thus a bald problem of constitutional law is posed. By the Constitution power 'To declare' war was vested in the Congress.[9] From that language and upon constitutional principle it would seem that a state of war, constitutionally speaking and as between nations, is a matter of congressional declaration and not a matter of determination from facts and circumstances.[1] The Constitution gave the President, with the advice and consent of the Senate, power to make treaties,[2] and of course a treaty of peace is within that power. So it would seem that, as a matter of constitutional law, the end of war would be either by a declaration by the Congress or by a treaty duly ratified. But the courts have not followed so simple a rule,[3] and the point is presently in a murky area. One author says that one date can be used for some purposes and other dates for other purposes as the end date of war.[4]

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[1] 61 Stat. 1369, 1799, 1953 and 2109, respectively.

[2] 61 Stat. 449.

[3] 65 Stat. 451, 50 U.S.C.A.Appendix note preceding section 1.

[4] The President did issue such a proclamation on October 24, 1951, No. 2950, 66 Stat. C3, 50 U.S.C.A.Appendix note preceding section 1.

[5] *Central Union Trust Co. of New York* v. *Garvan*, 1921, 254 U.S. 554, 41 S.Ct. 214, 65 L.Ed. 403; *Commercial Trust Co. of New Jersey* v. *Miller*, 1923, 262 U.S. 51, 43 S.Ct. 486, 67 L.Ed. 858; *Silesian-American Corp.* v. *Clark*, 1947, 332 U.S. 469, 68 S.Ct. 179, 92 L.Ed. 81 [*Annual Digest*, 1947, p. 187]; and see *Cummings* v. *Deutsche Bank*, 1937, 300 U.S. 115, 57 S.Ct. 359, 81 L.Ed. 545 [*Annual Digest*, 1935–1937, p. 492].

[6] *McGrath* v. *Zander*, D.C.Cir., 1949, 85 U.S.App.D.C. 334, 177 F.2d 649; *Becker Steel Co. of America* v. *Cummings*, 1935, 296 U.S. 74, 79, 56 S.Ct. 15, 80 L.Ed. 54; *Josephberg* v. *Markham*, 2 Cir., 1945, 152 F.2d 644 [*Annual Digest*, 1943–1945, p. 362]; *Clark* v. *Uebersee Finanz-Korp.*, 1947, 332 U.S. 480, 68 S.Ct. 174, 92 L.Ed. 88 [*Annual Digest*, 1947, p. 192]; *Zittman* v. *McGrath*, 1951, 341 U.S. 471, 71 S.Ct. 846, 95 L.Ed. 1112.

[7] See *Guessefeldt* v. *McGrath*, 1952, 342 U.S. 308, 314–315, 72 S.Ct. 338, 96 L.Ed. 342 [*International Law Reports*, 1952, p. 580].

[8] 40 Stat. 412 (1917), 50 U.S.C.A.Appendix § 2(c).

[9] Art. I, § 8, cl. 11. In the report of the Committee of Detail of the Constitutional Convention, the power given Congress was "To make war". 2 Farrand, Records of the Federal Convention 143, 168, 182 (1927). On the floor of the Convention the word "make" was stricken and the word "declare" inserted. There was a short debate, in which Mr. Elseworth pointed out the difference between making war and making peace, remarking, "War also is a simple and overt declaration. Peace attended with intricate & secret negociations." *Id.* at 319. A motion to add "and to make peace" was unanimously rejected. *Id.* at 313, 319.

"In no case has the Supreme Court held, as a matter of decision, that war does not cease until a declaration or treaty. But it has held repeatedly that various combinations of circumstances do not terminate a war, absent formal political action to that purpose.[5] These cases seem to establish that the war power, once existent, continues to exist until either a declaration by the Congress or a proclamation specifically to that effect by the President. In *Commercial Trust Co. of New Jersey* v. *Miller*[6] a joint resolution declaring the state of war with Germany (World War I) at an end had been adopted by the Congress and the President had issued a proclamation of peace, but the Supreme Court held valid the reservation by Congress of the Trading with the Enemy Act from the legislation ending the war. Thus the Court held valid a congressional reservation of a war power even after a declaration otherwise ending the war. In the case at bar we need go no further than the cited cases go. The sum of the facts and circumstances enumerated by our appellants does not total a termination of constitutional war power, so long as neither the Congress nor the President had declared the end of the war."

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[1] See *Montoya* v. *United States*, 1901, 180 U.S. 261, 267, 21 S.Ct. 358, 45 L.Ed. 521, 524, quoting from the concurring opinion of Mr. Justice Washington in *Bas* v. *Tingy*, 1800, 4 Dall. 37, 40, 4 U.S. 37, 40, 1 L.Ed. 731, 733.

[2] Art. II, § 2, cl. 2.

[3] An interesting discussion is in the opinions of the Justices, delivered *seriatim*, in *Bas* v. *Tingy*, 1800, 4 Dall. 37, 4 U.S. 37, 1 L.Ed. 731. See also *Freeborn* v. *The Protector*, 1872, 12 Wall. 700, 79 U.S. 700, 20 L.Ed. 463; *Burke* v. *Miltenberger*, 1874, 19 Wall. 519, 86 U.S. 519, 22 L.Ed. 158; *Prize Cases* (*The Army Warwick*), 1863, 2 Black 635, 67 U.S. 635, 17 L.Ed. 459; *The Pedro*, 1899, 175 U.S. 354, 20 S.Ct. 138, 44 L.Ed. 195; *United States* v. *Anderson*, 1869, 9 Wall. 56, 76 U.S. 56, 19 L.Ed. 615; *Lamar* v. *Browne*, 1875, 92 U.S. 187, 23 L.Ed. 650; *McElrath* v. *United States*, 1880, 102 U.S. 426, 26 L.Ed. 189; *Jacob Ruppert, Inc.*, v. *Caffey*, 1920, 251 U.S. 264, 40 S.Ct. 141, 64 L.Ed. 260.

[4] Hudson, "The Duration of the War Between the United States and Germany", 39 *Harv.L.Rev.* 1020, 1021 (1926).

[5] *Ludecke* v. *Watkins*, 1948, 335 U.S. 160, 68 S.Ct. 1429, 92 L.Ed. 1881 [*Annual Digest*, 1948, p. 515]; *Woods* v. *Miller Co.*, 1948, 333 U.S. 138, 68 S.Ct. 421, 92 L.Ed. 596; *Fleming* v. *Mohawk Co.*, 1947, 331 U.S. 111, 67 S.Ct. 1129, 91 L.Ed. 1375; *Hamilton* v. *Kentucky Distilleries Co.*, 1919, 251 U.S. 146, 40 S.Ct. 106, 64 L.Ed. 194. And see *Citizens Protective League* v. *Clark*, D.C.Cir., 1946, 81 U.S.App.D.C. 116, 121, 155 F.2d. 290, 295, *certiorari* denied, 1946, 329 U.S. 787, 67 S.Ct. 354, 91 L.Ed. 674; *Feyerabend* v. *McGrath*, D.C.Cir., 1951, 89 U.S.App.D.C. 33, 189 F.2d 694; *In re Miller*, 2 Cir., 1922, 281 F. 764, 775.

[6] 1923, 262 U.S. 51, 43 S.Ct. 486, 67 L.Ed. 858.

[Reports: 95 App. D.C. 370, 222 F.2d 395; *certiorari* denied, 349 U.S. 955, 99 L.Ed. 1279, 75 Sup. Ct. 885 (1955).]

War—Termination of—Effect on Continued Right to Seize Enemy Property—Trading with the Enemy—The Law of the United States of America.

LADUE & CO. *v.* BROWNELL, ATTORNEY-GENERAL.

United States, Court of Appeals, Seventh Circuit. March 18, 1955.

THE FACTS.—This was an action by a corporation dealing in securities to recover property seized by the Attorney-General, as successor to the Alien Property Custodian, under the authority of the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. §§ 1 *et seq.* The property, consisting of certain stocks and securities and the accruals thereon, had been vested on April 13, 1953. The complaint alleged that the plaintiff corporation had, since its incorporation in 1948, always been a citizen of the United States and that it was neither an enemy, the ally of an enemy, nor a national of any foreign country within the meaning of the Trading with the Enemy Act or any regulation, proclamation, or order issued thereunder.

The Government moved to dismiss the complaint on the ground that the plaintiff had not filed the notice of claim required by section 9(a) of the Trading with the Enemy Act. The plaintiff in its brief in the Court of Appeals had not mentioned its failure to file the required notice of claim and apparently relied on its contention that the seizure, having been made after the official termination of the war in 1951, was unconstitutional and that a notice of claim was therefore unnecessary. The District Court dismissed the complaint, and the plaintiff appealed.

On appeal,

Held: that the judgment of the Court below must be affirmed. Although a Joint Resolution of the United States Congress of October 19, 1951, 65 Stat. 451, had terminated the state of war between the United States and Germany, that Resolution had specifically provided that property which was subject to vesting prior to January 1, 1947, or which had been vested would continue to be subject to the Trading with the Enemy Act as if the Resolution had not been adopted. The retention of the power of seizure beyond the date of the termination of war was a proper exercise of the war power, since the exercise of that authority was necessary to guard against the renewal of war and in order to settle claims and other matters arising out of the war. The seizure in this case, being within the war powers of the Government, was not a denial of the due process guaranteed by the Constitution. The plaintiff was therefore required to file a notice of his claim under section 9(a) of the Trading with the Enemy Act.

The Court said: " The plaintiff cites as supporting this contention several decisions in which there are various statements which plaintiff contends support its position. In *Brownell* v. *Edmunds*, D.C., 110 F.Supp. 828, the interest of the German nationals under a last will and testament did not vest until after the termination of the war. The Alien Property Custodian issued a vesting order in 1946 attempting to seize the interest of the German nationals before the interest was vested. The court there properly held that such a vesting order was invalid because at the time it was issued there was no interest in German nationals subject to seizure. The Joint Resolution by its terms only reserved the right to seize property which was ' prior to January 1, 1947, . . . subject to vesting or seizure under the provisions of the Trading With the Enemy Act. . . ' 65 Stat. 451.

" *Stoehr* v. *Wallace*, 255 U.S. 239, 41 S.Ct. 293, 65 L.Ed. 604, concerned a seizure during war. In the opinion, 255 U.S. at page 245, 41 S.Ct. at page 296, the Supreme Court said:

> ' That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable.'

That opinion was not concerned with whether such seizures might be made after the formal termination of the war. *Orme* v. *Northern Trust Co.*, 410 Ill. 354, 102 N.E.2d 335, certiorari denied. *Von Hardenberg* v. *McGrath*, 343 U.S. 921, 72 S.Ct. 677, 96 L.Ed. 1334, also involved property seized prior to the formal termination of the war.

" In *Miller* v. *Rouse*, D.C., 276 F. 715, a demand, signed before the date of the proclamation of peace in World War I, was served three days after the proclamation. The court there held, contrary to the contention of the Custodian, that the mere signing of the demand was not sufficient; that the property did not become the ' subject ' of a demand until all steps were taken which would vest the property in the United States; that such vesting did not occur until the demand was served, which demand, coming after the declaration, was too late.

" In *Matheson* v. *Hicks*, D.C., 10 F.2d 872, 873, it was also held that a demand served after the termination of World War I was too late to transfer the property to the Custodian.

" In *Application of Miller*, 2 Cir., 288 F. 760, 767, it was held that the Custodian, having properly made demands for property of an enemy alien could maintain action after termination of war to enforce a seizure which had already been effected by a proper demand. There the question was only as to the effect, if any, of the peace declaration on the claim of the United States to enemy property which had been seized prior to the termination of the war. The court there pointed out that the Joint Resolution of July 2, 1921, terminating World War I, United States Statutes at Large, Vol. 42, Part 1, pages 105, 106, expressly provided that:

> 'All property . . . of all German nationals which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, . . . shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law. . . .'

This resolution did not purport to deal with any property except that seized during the war.

" None of these cases cited by the plaintiff decided that the Congress could not, by proper language in the Joint Resolution terminating World War II, have reserved the power to continue to seize enemy property.

" The appellant concedes, as it must, that the courts of this country have uniformly upheld the right of the Government to seize enemy property during time of war on the theory that the right is a necessary adjunct to the ability to wage war successfully. *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 475, 68 S.Ct. 179, 92 L.Ed. 81;[1] *Stoehr* v. *Wallace*, 255 U.S. 239, 245, 41 S.Ct. 293, 65 L.Ed. 604; *Orme* v. *Northern Trust Co.*, 410 Ill. 354, 102 N.E.2d 335.

" But the appellant insists that where, as here, the Government seeks to use its war powers to seize property of enemy aliens after the state of war has been officially terminated, such a seizure of property may not be justified on the theory that it is a proper exercise of the war powers granted by Article I, Section 8, Clause 11, of the Constitution of the United States.

" In the instant case the Joint Resolution which officially terminated the war with Germany expressly reserved and extended the power of the United States to seize for its own use all property located in the United States which prior to January 1, 1947, was subject to vesting or seizure under the Trading with the Enemy Act, and which was owned by nationals of Germany. The reservation of this power was an integral part of formally bringing the war to a close. Cessation of hostilities between the United States and Germany had occurred with the unconditional surrender of Germany on May 8, 1945. From that date to October 19, 1951, when the Joint Resolution was approved, only a technical state of war had existed between the United States and Germany. During that period of more than six years the Government had continued to seize property in this country belonging to German nationals.

" In recommending to the Congress the adoption of the Joint Resolution declaring the end of the war the President explained

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[[1] *Annual Digest*, 1947, p. 187.]

(see Legislative History, U. S. Code Congressional and Administrative Service, 1951, pages 2354 to 2359) that the resolution reserving the seizure power was for the purpose of applying the proceeds of the property seized to pay just and legitimate claims against the United States arising from the war in accordance with the War Claims Act of 1948, 50 U.S.C.A.Appendix, § 2001 *et seq.*, and that if the seizure power were permitted to lapse immediately the Government would find it difficult to wind up the program in an orderly way or to carry out its commitments for the equitable settlement of intergovernmental differences relating to enemy property. The President stated that there was nothing unusual about continuing, even after the conclusion of peace, the power to seize wartime enemy property as part of the peace settlement, citing as examples the treaties the United States had made at the conclusion of World War II with Bulgaria, Romania, Hungary and Italy, all of which treaties had authorized the continued seizure by the United States of property belonging to the nationals of each of those countries. In each of those cases the continuation of the seizure power was provided for in the bilateral peace agreements between this nation and each of the enemy nations involved. We can perceive no real difference between the power of the Government to retain such seizure power, as against individuals, in a treaty and in the unilateral declaration by this nation of the termination of the state of war. In each case the retention of the seizure power beyond the date of the termination of the war was a proper exercise of the war power. As said in *Stewart* v. *Kahn*, 11 Wall. 493, 507, 78 U.S. 493, 507, 20 L.Ed. 176, the exercise of the war power is not limited to actual combat. ' It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.'

" In the reservation of the power to seize the property of German nationals Congress may have had in mind that such seizures would tend to serve as a deterrent to a third war with Germany, but it is certain from the Legislative History of the Joint Resolution, as stated above, that the proceeds of the property seized were to be used to remedy the evils which had arisen from the war; that the proceeds of the seized property were to be used to pay the just and legitimate claims against the United States arising from the war in accordance with the War Claims Act of 1948. Seizure of the property of enemy aliens for this purpose was clearly a proper exercise of the war powers. Under the facts of this case it was not necessary that the actual seizure occur before the approval of the Joint Resolution formally terminating the state of war. Here the Congress considered it necessary to complete the work of cleaning up the aftermath of the war after the effective date of the formal declaration of peace. This was therefore incidental to the war and within the war powers. The Congress and the President may well have considered this work essential to a just and lasting peace, just as essential as the preparation for possible war by the training of armies when the United States was engaged in no war. In *United States* v. *Henderson*, 7 Cir., 180 F.2d 711, 713, this court held that the Congress under its power to raise and support armies could conscript and train men in peace time; that it was not necessary to wait for actual war before starting such training."

[Report: 220 F.2d 468.]

NOTE.—To the same effect see *Brownell* v. *Schering Corporation*, 129 F. Supp. 879 at 893 (D.N.J. 1955), affirmed *per curiam*, 228 F.2d 624 (3d Cir. 1956), *certiorari* denied, 341 U.S. 954, 100 L.Ed. 1477, 76 Sup. Ct. 849 (1956).

The United States Court of Appeals for the Second Circuit *held* in *United States* v. *China Daily News, Inc., et Al.*, 224 F.2d 670 (2d Cir. 1955), *certiorari* denied, 350 U.S. 885, 100 L.Ed. 780, 76 Sup. Ct. 138 (1955), that since the emergency arising out of the Second World War had not been declared terminated at the time of the initiation of the Korean conflict, no new delegation of authority by the President of the United States to the Secretary of the Treasury was necessary in 1950 in order to permit the Secretary, under the Trading With the Enemy Act, to establish Foreign Assets Control Regulations having application to Communist China.

In *Re Bahrenburg's Will*, 208 Misc. 829, 145 N.Y.S. 2d 280 (Surrogate's Court, Kings County, 1955), it was *held* that a provision of a will calling for the payment over of the principal of a trust when " a Treaty of Peace has been signed between the United States of America and Germany " became effective by 1955, even though no treaty of peace had been concluded, by reason of the termination of the state of war between the two countries by the Joint Resolution of October 19, 1951, and by the conclusion of a new Treaty of Friendship, Commerce and Navigation between the two countries on July 27, 1955.

In *Syquia* v. *United States*, 129 Ct.Cl. 555, 124 F. Supp 638 (1954), the United States Court of Claims *held* that a lease " for the duration of the war and six months thereafter " which was executed in the Philippines in 1945 expired six months after the formal surrender of Japan on September 2, 1945.

A statute of the State of South Dakota which required that certificates of nomination of independent candidates be filed at least ninety days before the date of the general election (in order to permit the casting of absentee ballots) was to remain in force " during such period as the existing World War II shall continue and until six months after a declaration of the termination thereof by the President of the United States. . ." The Supreme Court of that State *held* in *Tennyson* v. *Sayler*, 75 S.Dak. 390, 66 N.W.2d 393 (1954) that the war had not yet been terminated by presidential proclamation, notwithstanding the issuance of a presidential proclamation on April 28, 1952, which, after reciting that the last of the existing states of war had been terminated by the coming into force of the Treaty of Peace with Japan, terminated the national emergencies declared to exist on September 8, 1939 and May 27, 1941.

War—Termination of—War between United Kingdom and Germany—Devise of Property on Condition " Peace be declared "—Whether Condition Satisfied by Declaration of July 9, 1951.

In re GROTRIAN.

COX *v.* GROTRIAN AND OTHERS.

England, High Court of Justice (*Chancery Division*). *March* 2, 1955.

(Danckwerts J.)

THE FACTS.—A testator, by clause 7 of his will dated September 25, 1939, devised and bequeathed certain freehold and leasehold properties to his trustees upon trust for his son absolutely " if he shall be living at the date of my death and if the present war with Germany shall have been terminated and peace have been declared . . ." Clause 8 of the will provided: ". . . if my said son . . . shall survive me and subsequently the present war with Germany shall terminate and peace be declared my said son shall thereupon become absolutely entitled to my said properties ". The testator died on November 10, 1939; the son survived his father, and died on June 17, 1954.

By a Declaration dated July 9, 1951, and published as a supplement to the *London Gazette* of July 6, 1951, it was declared:

> " Privy Council Office, July 8, 1951. It is notified that the formal state of war with Germany is terminated as from four o'clock p.m. to-day, July 9, 1951.
>
> " On the instructions of His Majesty's Principal Secretary of State for Foreign Affairs the United Kingdom High Commissioner in Germany addressed, on July 9, 1951, a communication to the Federal Government of Germany in the following terms: His Majesty's Government in the United Kingdom, bearing in mind that on September 3, 1939, a state of war was notified with the German Reich, that active hostilities were ended by the declaration regarding the surrender of the German Reich issued on June 5, 1945, but nevertheless the formal state of war with Germany has continued to subsist so far as the municipal law of the United Kingdom is concerned, and will so continue until the appropriate action is taken by His Majesty's Government to terminate it, that through circumstances beyond German control it has as yet proved impossible to conclude a treaty which would dispose of questions arising out of the state of war with the German Reich, have determined that, without prejudice to the Occupation Statute, or to the decision of the questions the settlement of which must await the conclusion of a treaty, the formal state of war between the United Kingdom and Germany shall be immediately terminated. A notification is, therefore, being published that the formal state of war with Germany has been terminated as from four o'clock p.m. on July 9, 1951. . . ."

This hearing was on a summons to determine the destination of the property. It was argued, *inter alia*, for the son's widow and children, that though the war had terminated, peace had not been declared. It was clear from the Declaration of 1951 and from the Bonn Convention of 1952, that a peace treaty was contemplated. There was now, therefore, a twilight period which did not amount to a state of peace.

Held: that by the Declaration of July 9, 1951, the state of war between the United Kingdom and Germany had been terminated and peace had been declared within the meaning of clause 8 of the will. Accordingly, the personal representatives of the son's estate were entitled to have transferred to them the property in question.

Danckwerts J. said: "The testator made his will on September 25, 1939, that is, after hostilities had broken out between this country and Germany. The testator died on November 10, 1939. It is material to note (in order to see how the question which I have to decide arises) that the testator's son died on June 17, 1954. [His Lordship read the relevant portions of the will and the Declaration in the London Gazette and continued:] Lord Macnaghten, in the well-known case of *Janson* v. *Driefontein Consolidated Mines Ltd.*, [1902] A.C. 484, 497, said:

> 'I think the learned counsel for the respondent was right in saying that the law recognizes a state of peace and a state of war, but that it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace nor war. . . . In every community it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace and war.'

If that statement by Lord Macnaghten applies to the present case, it seems to me plain that the Declaration or Proclamation of July 9, 1951, not only terminated the state of war between the United Kingdom and Germany, but it also brought about coincidentally a state of peace between the two countries. It is argued, however, on behalf of those who oppose the claim of the personal representatives of the son, that, in the somewhat different circumstances which have prevailed since the breaking out in September, 1939, of the second world war, the statements by Lord Macnaghten are no longer applicable to the present situation.

"Reference has been made to cases decided as a result of the end of the war of 1914 to 1918; *Kotzias* v. *Tyser* [1920] 2 K.B. 69,[1] and *Lloyd* v. *Bowring* (1920) 36 T.L.R. 397, in aid of the arguments on behalf of both parties. Those decisions, however, seem to me to have nothing whatever to do with the problem which I have to decide to-day; both those decisions depended upon a situation which was essentially different from that which arises in the present case, and in particular it is to be noted that in 1918 a statute was passed specifically for the purpose of providing for the point, which was called the Termination of the Present War (Definition) Act, 1918,

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[[1] *Annual Digest*, 1919–1922, Case No. 307.]

and which enabled His Majesty to declare by an Order in Council what was the exact date when the war was taken to have been determined. By the Order in Council of February 9, 1920, the date of the termination of the war and the substitution of peace was determined by not only the making of a peace treaty between the United Kingdom and Germany, but by the ratification of that treaty in a particular manner, and the date selected for that purpose was January 10, 1920.

"After the cessation of hostilities on May 9, 1945, between the United Kingdom and Germany on the occasion of the last war the matter was not dealt with in the same manner. It might have been dealt with in a similar manner, but it was not; and it does not seem to me to follow that thereby the situation could not be determined in some other manner than by a statute as in 1918. It seems to me as plain as can be that the Order in Council or the Declaration of July 9, 1951, not only determined the state of war between the two countries but also brought about a state of peace.

"It seems to me, therefore, that according to the terms of clause 8 of the will the condition therein mentioned was satisfied, because the present war with Germany thereupon terminated, and peace was declared. It is true that the Declaration did not in terms refer to peace, but in my view it is still true to say, in a situation of this kind, that the termination of war and the declaration of peace are coincident events, and that the declaration, therefore, which declared the determination of the war, by inference, necessarily declared a state of peace to arise again between the two countries concerned.

"There is, however, another point which has been taken against the personal representatives of the son, and that is that the provisions of clause 8 of the will offend against the rule against perpetuities, because the termination of the war might be regarded as such an uncertain event when this clause was put in the will, at any rate by pessimists, that the war might continue for a longer period than lives in being and for 21 years from the death of the survivor. The pessimistic view is one which must be regarded as a possible view. If, therefore, this is the effect of the clause, it would seem that the event to take place before the son's interest came into being might result in his interest being avoided by the rule against perpetuities. It seems, on the face of it, rather a hard and somewhat unnatural situation. But, fortunately, I think that there is a construction which can fairly be put upon the clause which prevents that point having any application. The clause concludes, after reference to the event which is to decide the matter, that the son shall thereupon become entitled to the testator's properties in Yorkshire or to the proceeds of any part thereof which may in the meantime have been sold or the investments representing such proceeds, and that the testator's trustees are thereupon to transfer to his said son such properties, proceeds and investments accordingly. It is plain to me from that provision that the testator did not contemplate the event of the proceeds or property being transferred to the executors or administrators of the son's estate, and I think that it is a fair reference that the testator contemplated that the clause was only to apply upon the occasion of the event in question happening during the son's life-time. That being so, of course, it was an event which was limited to the duration of a lifetime in being and no trouble arises by virtue of the rule against perpetuities. The event, as I have already held, happened in 1951, and the son did not die until 1954.

"Accordingly, in my judgment, the conditions of the clause were satisfied, and the testator's son during his lifetime became absolutely entitled to the property referred to in the summons."

[Report: L.R. [1955] 1 Ch. 501.]

War — Termination of — Armistice — Unconditional Surrender — Effect of—Effect on Continued Existence of the State—Unconditional Surrender of German Forces in 1945 — Status of Civil Servants and Armed Forces.

The German Civil Service Case.

German Federal Republic, Federal Constitutional Court.

December 17, 1953.

After the unconditional surrender of the German Reich in 1945 a large number of established civil servants lost their employment, and the Government of the German Federal Republic took the view that their rights under previously existing contracts of employment had been extinguished by the collapse of the German Reich and could not therefore be asserted as against the Federal Republic. The issues considered by the Constitutional Court were mostly issues of German law, but the Court had occasion to refer to general principles concerning the status of Germany in international law, and related matters. With regard to these, the views of the Court may be summed up in the following propositions:—

(1) The unconditional surrender of the German Reich and the complete collapse of all governmental authority resulting from the capitulation of Germany did not result in the disappearance of the German State.

(2) The continued existence of the German State did not justify the conclusion that the legal status of civil servants of the German Reich survived the unprecedented collapse of all governmental authority in Germany.

(3) The contracts of all civil servants were accordingly extinguished with effect from May 8, 1945, the date of Germany's unconditional surrender.

(4) The status of civil servants under the National-Socialist régime which required allegiance to a dictator, and not to the State as such, was so abhorrent to normal constitutional principles that civil servants serving under that régime could not be regarded as civil servants under a democratic régime, and for this reason also their contracts of employment must be considered as having come to an end with the disappearance of the National-Socialist Government of the Reich.

(5) In view of the foregoing it was immaterial whether the Federal Republic could be regarded as being identical in law with the former German Reich, and whether for that reason the Federal Republic might be bound to assume the obligations of the former Reich.

Similar issues were raised in the *German Professional Soldiers' Case* (decided by the same Court on February 26, 1954) by a number of professional soldiers previously serving in the armed forces of the German Reich whose status under German law was similar to that of established civil servants. They contended that the Federal Republic was bound to assume all obligations previously owing to them by the German Reich. The Court laid down the following propositions:

(1) The German armed forces ceased to exist in law on the date of the unconditional surrender of the German Reich.

(2) Thereafter there was no legal basis for the continued existence of the legal relationship previously existing between professional soldiers and the German State, and all contracts of employment of members of the armed forces were accordingly extinguished with effect from May 8, 1945.

(3) The treatment of captured members of the German armed forces as prisoners of war was a matter regulated by international law and entirely irrelevant in so far as concerned their legal status *vis-à-vis* the German State.

[Report: *Jahrbuch für Internationales Recht*, 4 (1954), pp. 140 and 147.]

War—Termination of—Armistice—Israel and Lebanon.

See p. 5 (*Custodian of Absentee Property* v. *Samra*).

War—Termination of—Termination of Hostilities—Taking of Prizes Subsequent thereto.

See p. 1011 (*The Eilenau*).

War—Termination of—Termination of Occupation—Germany and Berlin—Effect on Jurisdiction of Occupation Courts—Reserved Powers of Former Occupant.

See p. 987 (*In re Kraussman*).

XIII.—Effects of Treaties of Peace—

i.—In General

Peace Treaties—Effects of—In General—Political Nature of Peace Treaties—Element of Constraint and Inequality—Limitation on Sovereignty of Defeated State—Necessity for Consent of Defeated State—Performance of Peace Treaties—Restitution and Reparation.

See p. 443 (*Mergé Claim*).

iv.—Miscellaneous

Peace Treaties—Effects of—Miscellaneous—Conciliation Commission Set up under Peace Treaty—Whether Possessing Exclusive Jurisdiction to Adjudicate on Disputes arising out of Treaty—The Law of Italy.

See p. 882 (*Combes de Lestrade* v. *Ministry of Finance*).

Peace Treaties—Effects of—Miscellaneous—Provision for Review of Prize Court Decisions—Whether Reviewing Authority has Power to Decide on Merits of Case.

See p. 1008 (*Ministerio della Marina* v. *Van Beek* (*The Maria*)).

XIV.—Performance of Peace Treaties

Peace Treaties—Performance of—Restitution and Reparation Provisions—Compensation for Loss Suffered as a Result of the War—Loss Resulting from Measure Taken before Outbreak of War—Meaning of Expression " as a result of the war "—Interpretation of Treaties—Principles and Rules of—" Ordinary meaning " of Provisions—Interpretation by Reference to Decision of Another Tribunal—Interpretation by Reference to Contemporary Memorandum Submitted by Signatory State.

ARMSTRONG CORK COMPANY CLAIM.

Italian-United States Conciliation Commission. October 22, 1953.

(Scanlan, Sorrentino, da Matta.)

THE FACTS.—In 1940 the claimants, the Armstrong Cork Company, incorporated in the United States, purchased in Algeria 2,395 bales of cork. On June 3, 1940, the cork was consigned to the claimants and placed on board an Italian ship, the *Maria*, bound for New York. On June 6, 1940, the Italian Government, in contemplation of war, published an Order recalling all ships of the Italian merchant marine and, in compliance with that Order, the *Maria* interrupted its voyage, changed its course and arrived at Naples on June 9, 1940. The cork was unloaded and placed in the shipping company's store at Naples. Owing to war conditions the claimants were unable to deal with the cork and they left it in store. In June 1941 the shipping company applied to the Italian Ministry of Foreign Trade for authority to sell the cork and to retain the proceeds against storage and other charges. In August 1941 the Naples Court authorized the sale of the cork for the sum of 167,747.75 lire.

The claimants now alleged that they had lost the cork as a result of the war and more especially as a result of circumstances due to causes beyond their control brought about by the Order of June 6, 1940, and they claimed compensation under Article 78, para. 4, of the Peace Treaty with Italy of 1947.

On behalf of the Italian Government it was contended that: (a) the claimant Company had been informed of the unloading of the cork at Naples and had been invited to take what measures it believed would be useful; (b) the legal proceedings commenced by the shipping company for the purpose of obtaining payment of their debt could not result in a liability on the part of the Italian Government; (c) the defendant Government could only regret the interruption of the voyage of the *Maria* and the measures which followed, as well as the judicial sale of the merchandise; (d) the interruption of the voyage did not create an international responsibility on the part of the Italian Government, in view of the fact that the measures were adopted before the existence of a state of war and before the date of June 10, 1940, to which express reference was made in Article 78 of the Treaty of Peace with Italy; (e) Article 81 of the Treaty of Peace recognized the legitimacy of the Italian shipping company's claim to obtain payment of a debt resulting from obligations which were in existence prior to the existence of a state of war and, consequently, the forced sale which followed the non-payment of the freight and storage charges could not constitute the subject of an international claim; (f) in the instant case there was no causal relationship between the fact of the war and the economic damage suffered by the Armstrong Cork Company; (g) the Order of June 6, 1940, did not establish the Italian Government's responsibility, in view of the fact that it was not of a discriminatory nature and did not constitute an act of war—it was no more than the simple carrying out of a maritime police measure at a date when a state of war had not yet been declared and did not exist from an international point of view; (h) Article 4 of the Memorandum of Understanding signed by the two Governments at Washington on August 14, 1947, considered as pre-war claims all claims arising out of contracts and obligations prior to December 8, 1941; and (i) under the terms of Article 78 of the Peace Treaty Italy's obligations of an economic nature towards nationals of the

United States of America started from December 8, 1941, since a state of war did not exist between the two Governments prior to that date.

Held: that the claim must be rejected. The Order of June 6, 1940, was issued before Italy entered the war, and after Italy had declared war nothing which could be called a war measure had been taken in regard to the claimants' property.

The Commission said:

"A. Among the problems which have called forth the meeting of the Italian-United States Conciliation Commission, completed by the Third Member, the most important one appears to be the question as to whether the responsibility of the Italian Government, as defined in para. 4(*a*) of Article 78 of the Treaty of Peace, extends to all losses that the war has caused to a United Nations national as owner of property in Italy on June 10, 1940, or exclusively to the losses which are the consequence of acts of war. We shall see later whether the provisions of the aforementioned Article are applicable to this Petition.

" It is necessary first of all to analyse certain questions arising from this Petition.

" I. *Recall of ships of the Italian merchant marine by the Order of June* 6, 1940.—Following the Order of the Italian Government issued on June 6, 1940, all ships of the Italian merchant marine had to return immediately to Italian ports. The vessel ' Maria ' was thus forced to interrupt her voyage, change course, and she arrived at Naples on June 9, 1940. Hostilities commenced on June 10, 1940. This is the starting point of the series of acts which led to the loss suffered by the claimant Company.

" Obviously, the Order issued in contemplation of war was the determinant cause of the situation which faced the American corporation, the Armstrong Cork Company, with regard to the cork, its rightful property. The facts which occurred and the ensuing loss were the result, direct or indirect, of the Order of June 6, 1940. It is not a case in which to invoke the generally accepted doctrine according to which, in case of external war, a State may be induced to hold in its ports all national or foreign commercial ships (*vide*, among many others, Albrecht, Basdevant, Alberic, Rolin) for the simple reason that Italy was not yet at war; war against France and Britain was declared on June 10, 1940, and against the United States much later, on December 11, 1941.

" The instant case involves a fact which occurred prior to the existence of a state of war. And prior to the declaration of war it is the peacetime obligations which control (Fauchille, *Manuel de Droit International Public*, p. 1028).

" But it must be pointed out that if Italy was still at peace, nevertheless she may not escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law:

> ' One must consider as illicit actions (as has been stated by Strupp, *Das Völkerrechtliche Delikt* (1920)), producing the responsibility of those performing such actions and allowing the State which has suffered or whose subjects have suffered damage to demand reparation, all actions of a State which are in contradiction with any rule whatsoever of international law.'

Are we confronted by actions which are only the application of maritime police rules, as has been alleged by the Italian Government? Or, on the contrary is there the injury to a right?

" The responsibility of the State would entail the obligation to repair the damage suffered to the extent that said damage is the result of the non-observance of the international obligation.

"And in the case under discussion the international responsibility of the State would be direct, in view of the fact that it would arise out of an act performed by the Italian Government.

" It is not necessary to say that the act performed by the State within the limits of its rights or inspired by the protection of its own defense does not constitute an illegal international act (*vide* Fiore, Oppenheim). And one must not confuse the right of legitimate defense, which is the legitimate protection of the right of preservation of the State, with the right of necessity which very often is only an expedient created in order to legalize the arbitrary. In the instant case, therefore, and in agreement with the great majority of writers, the Italian State is obligated to indemnify. We shall see whether the way that has been adopted is the one which is most in accordance with the law and the provisions of the Treaty of Peace.

" II. *Can the Order of June* 6, 1940, *be considered as a war measure*?—This Order was issued four days before the outbreak of hostilities: it was on June 10 that there occurred the passage from the state of peace—normal juridical régime—to the state of war—extra-juridical régime.

" Therefore, legally, it is the date of June 10 which fixes the time from which the Italian Government can be considered responsible, as a result of the war, for the damage caused to the Allied and Associated Powers or to their nationals.

" Whatever the relationship between the measure adopted by the Italian Government on June 6, and the declaration of war, under the strictness of principles, the responsibility of the State is not therein involved with respect to the provisions of the Treaty of Peace. It is very reasonable to assume that the purpose of the measure taken by the Italian Government was to avoid the capture, seizure or sinking of ships of the Italian merchant marine located in the Mediterranean.

"And one cannot invoke, as was done by the United States of America, the Italian War Law, approved by Royal Decree of July 8, 1938, which could have been applied even prior to the existence of a state of war, because, according to Article 3, its application depended upon the publication of a Royal Decree. Now, this Decree was published only on June 10. Therefore, a measure taken before the war cannot be considered to be a war measure. And one could argue together with the Italian Government, and also in accordance with a large part of legal literature, that ships are not automatically considered as being in a state of war as a result of the application of the War Law: a specific order of mobilization or of war operation would be necessary. When the vessel 'Maria' arrived at the port of Naples it had not been the subject of any measure on the part of the military authorities (control, sequestration, etc.).

" III. *Interference of the Italian authorities in the actions pertinent to the sale of the cork.*—Here too there are two viewpoints, one opposed to the other; the American Government claims to see in the authorization accorded by the Ministero per gli Scambi e Valute for the sale of the cork the proof of the Italian control over the merchandise, and at the same time the act giving rise to the loss. According to the Italian Government, authorization is an act which, by its nature, excludes all responsibility of the authority granting it: it is a question of a permission, not an imposition. The authorization was necessary even in normal times, in peacetime. The documents which have been produced and the observations which have been made are not sufficient to invalidate this viewpoint.

" B. Let us come back now to the question which was set forth above and which has been considered to be the essential question: the application of the provision of Article 78, para. 4(*a*) of the Treaty of Peace to the instant case. In case the Italian Government's responsibility could be admitted in the light of the principles, could that responsibility come under the Treaty of Peace? This is what matters with regard to the solution of this claim in view of the fact that the Decision of the Conciliation Commission, completed by the Third Member, must be limited to the specific terms of the Petition.

"Article 78, para. 4(*a*), is worded as follows:

> 'The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, *as a result of the war*, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Italian nationals.'

" Thus the problem hinges on the phrase *as a result of the war.* It has been stated that, in the instant case, the letter of the Treaty is so clearly stated and so formal that any interpretation appears to be useless, even dangerous.

" We all know the rule which is very frequently quoted: ' It is not permitted to interpret that which does not require interpretation ', and ' when a document is worded in clear and precise terms, when its meaning is manifest and does not lead to anything absurd, there is no reason to deny the meaning which such document naturally presents.' This comes from Vattel. It is the theory of the ordinary meaning, so frequently invoked in arbitral and judicial proceedings, but its drawback is that it postulates as an established fact that which remains to be proved: it takes as a starting point of the research that which, normally, should be the result thereof.

"As has been stated by Professor Hyde, in his noteworthy study on the interpretation of treaties (*International Law, Chiefly as Interpreted and Applied by the United States* (1945), vol. II, p. 1470) '. . . one must reject as unhelpful and unscientific procedure the endeavor to test the significance of the words employed in a treaty be reference to their so-called " natural meaning " . . .' This could not, at best, be treated other than as a presumption *juris tantum* which can be rebutted.

" One must always follow the methods of logical interpretation in determining the content of the legal rule, especially in cases like that of Article 78, para. 4(*a*), of the Treaty, where the text is very far from revealing the intention behind it. The wording adopted can give rise to different interpretations as regards the extent of Italy's economic obligations towards United Nations nationals.

" It must first of all be stated that we can only agree with the viewpoint of the Government of the United States of America that an interpretation of the Treaty of Peace contained in a decision of other Conciliation Commissions is in no way binding for the Italian-United States Conciliation Commission. This does not prevent one from analyzing the arguments formulated in similar cases, which have been the subject of discussion and decision by other Conciliation Commissions, such as the *Pertusola* case,[1] submitted to the Franco-Italian Conciliation Commission, and to which the Agent of the Italian Republic has made special reference. Moreover, the American Government, in the Memorandum of October 1, 1953, has extensively discussed the decision of the Franco-Italian Conciliation Commission on this question.

" We shall not follow all this lengthy discussion, which is not necessary in our case. We shall limit ourselves to pointing out the conclusions arrived at by the two parties.

[[1] *Recueil des Décisions*, Part III, p. 67; *International Law Reports*, 1951, Case No. 129.]

" In order that the right to compensation of United Nations nationals against the Italian Government may be invoked, it is necessary, according to the decision of the *Pertusola* case:

" 1. that these nationals have suffered a loss;

" 2. that there exist a link of causality between the loss and the war;

" 3. that the loss be in connection with the property located in Italy;

" 4. that this property have been owned by the United Nations national on June 10, 1940;

" 5. that this property suffered injury or damage;

" 6. that the loss to be made good be the consequence of said injury or damage.

" And since one must exclude an intentional redundancy on the part of the legislator, as would be the case in speaking of a loss suffered by reason of damage, the expression damage must mean an act due to the state of war touching the property.

" According to the letter and the spirit of Article 78, para. 4(*a*), that which has to be indemnified is not the loss caused by the state of war to the United Nations national as owner of property in Italy, but the loss resulting to him from a damaging act, from an injury by which said property has been stricken as a result of the state of war.

" War damage is said to be damage caused by acts of war. The American party does not admit this conclusion: even if it were accepted that the damage presupposes a specific act as the cause of a loss, there is nothing to show that this specific act must be an act of war, either because the phrase ' war damage ' does not appear in paragraph 4(*a*) of Article 78, or because the wording used was proposed by the American Delegation and, in contrast with Italian and French legislation, American legislation has never adopted the continental expression, ' acts of war '. And the statement made was curiously weakened by saying that it is *above all and first of all* as a result of acts of war that the state of war injures *property*.

" The comparative study which was attempted of the expressions adopted in other articles of the Treaty has not brought forth any elements for the solution of the problem; the terminology of the Treaty, which was not submitted to the technical competence of the Legal and Drafting Commission, lacks all scientific precision and no attention was given to the problems of concordance (Vedovato, *The Treaty of Peace with Italy* (1947), p. xxiii). Alongside incomplete provisions there are some superfluous provisions. One must not forget that there existed the necessity of reaching an agreement between the victorious Powers whose interests were often divergent on several political, military and economic questions.

"An imperfect analysis of the sources led to erroneous conclusions in the *Pertusola* case.

" The attitude taken by the Italian Government at the Peace Conference and which is revealed by the Memorandum presented at the time is proof that Italy clearly recognized that her obligation to indemnify was larger than that which resulted from acts of war. It should be added that the expression ' war damage ' is not a technical expression with the same content in all countries: it is a general concept with a large variety of meanings, not necessarily limited to damage due to acts of war.

" The error committed in the *Pertusola* case is due to the desire to interpret according to the continental technique the provision of a Treaty the origin of which is Anglo-Saxon: it is also due to the desire to assert a theoretical, abstract conception of causality in the interpretation of the Treaty, discarding the normal doctrines of causality. Besides, as was stated in the reasoning in the *Pertusola* case,

' the question whether in a specific case, a loss has been suffered by reason of injury or damage caused to property in Italy, which in other words is whether the damage has a sufficiently direct causal connection with the war for the Italian Government to be obligated to compensate, is a question of interpreting a concept set by the Treaty which does not, in this connection, refer to any national legislation on compensation for war damage.'

"C. I have just set forth in their general lines the opposite viewpoints on the interpretation of Article 78 of the Treaty of Peace and I have done this for the simple reason that the two parties have considered this interpretation as if it were at the base of the decision to be made. Nevertheless, this analysis was not necessary, in my opinion. The claim of the Armstrong Cork Company is not admissible inasmuch as it finds no basis in Article 78, paragraph 4(*a*), of the Treaty. Not by virtue of the interpretation that has been given to the so much disputed expression ' *du fait de la guerre* ', ' as a result of the war ', but for the following reasons:

" (a) the act chargeable to the Italian Government, that is, the Order issued on June 6, 1940, is prior to the declaration of war. Consequently, there is not involved, legally, an act or measure of war, whatever the meaning that may be attributed to this expression, notwithstanding the fact that the Order had been issued in contemplation of war. War did not yet exist, not only in the relations of Italy with the United States of America, but also in the relations with all the other Powers. One could not apply the law of war, the provisions of the treaty, to a country which was at peace. It was only on June 10, 1940, that war was declared on France and Great Britain.

"Article 78, in paragraph 1, took expressly, as a starting point, the date of June 10, 1940:

> " ' In so far as Italy has not already done so, Italy shall restore all legal rights and interests in Italy of the United Nations and their

> nationals *as they existed on June 10, 1940*, and shall return all property in Italy of the United Nations and their nationals as it now exists.' [Emphasis supplied.]

" (b) After war was declared, no measure was taken with regard to the case under discussion which can be considered, in international law, a war measure (control, sequestration, etc.). The evidence produced and the observations made could in no way lead to such a conclusion. If the initial action, which is fundamental, cannot come under the provisions of the Treaty of Peace and if, as has been held, the actions performed must be considered as being strictly linked together (I would say: like a complex fact), how could the subsequent, secondary actions, the consequence of the former, and performed, moreover, in harmony with ordinary Italian law, be considered as actions of war according to the Treaty? We would have the *cause action* outside of the Treaty and the *effect actions* within the same Treaty. The acts which have been committed are normal legal acts. The procedure which was followed flows from legislation which had been in force for a long time. The *legal* intervention of the Italian authorities (administrative or judicial) in no way alters the nature of the actions performed. The juridical concept of Acts of State is not involved.

" There can be no doubt in this connection. But if there were any doubt, the rule should be invoked according to which the debtor party must profit from the benefit of the doubt and also that, in case of doubt, restrictive interpretation is necessary (Podestà Costa, *Manuel de Droit International Public* (1947), pp. 197, 198; Charles Rousseau, *Principes Généraux de Droit International Public* (1944), vol. I, pp. 678 *et seq.*).

" (c) This case cannot be included within the framework of the Treaty of Peace."

[Report: Unpublished (Decision No. 18).]

NOTE.—The United States member of the Commission appended a " Statement for his Dissent ".

Peace Treaties—Performance of—Restitution and Reparation—Property Lost during War—Whether Property must have been in Enemy Territory at Date Specified in Treaty—Circumstances in which Property Lost—Proof that Ship Sunk in Enemy Territorial Waters—Claims under Treaty—Distinction between Right of Owner of Property to Claim and that of State from whose Territory Property was Taken—Measure of Damages.

BEAUMONT CLAIM (*THE EILENROC II*).

Italian-United States Conciliation Commission. October 26, 1953.

(Sorrentino, Scanlan.)

THE FACTS.—Mrs. H. M. E. Beaumont, a United States national, claimed compensation for the loss of her motor cruiser *Eilenroc II* in the following circumstances. In 1940, the claimant, on her departure from the south of France, where she had been living, left the *Eilenroc II* at Antibes. In 1943, the vessel was seized by the Italian Navy as enemy property. It was subsequently sunk by the Germans in Italian waters. A claim under Article 78 (4)[1] of the Treaty of Peace with Italy of 1947 was presented on behalf of Mrs. Beaumont to the Italian authorities, who replied that Article 78 did not apply because the vessel had been removed from French territory; any obligation which there might be could only arise under Article 75 of the Treaty [which deals with the restitution of property removed from the territory of any of the United Nations]. The dispute was referred to the Conciliation Commission.

For the claimant it was contended that since the *Eilenroc II* had been destroyed during the war, restitution could not be made by the Italian Government and hence Article 75 of the Treaty of Peace would not be applicable; that since the *Eilenroc II* could not be returned the claimant had a right to request compensation under para. 4(*a*) of Article 78 of the Treaty of Peace; that the *Eilenroc II* was included within the meaning of the term " property " as this term was defined in para. 9(*c*) of Article 78 and as this term was used in Article 78 of the Treaty of Peace. The amount claimed, two-thirds of the sum sufficient to purchase similar property, was based on a valuation made in October 1948 of 20,000,000 lire.

On behalf of the Italian Government it was contended that (a) the return of property taken from the territory of one of the United Nations was governed by Article 75 of the Peace Treaty; (b) the Treaty did not specify that compensation was payable under Article 78 for property taken from the territory of one of the United Nations when such property could not be returned by Italy because the property itself had been destroyed during the war; (c) the physical existence in Italy *on June 10, 1940*, of the claimant's property was an indispensable prerequisite to the application of Article 78 of the Treaty; (d) paras. 4(*a*) and 9(*c*) of Article 78 could be interpreted only in the light of and in a manner consistent with the first paragraph of Article 78; (e) " property " as this term is defined in para. 9(*c*) of Article 78 did not apply to vessels forcibly seized and taken to Italy during the war, and the use in that paragraph of the expression " after June 10, 1940 " referred to measures of control taken by the Italian authorities with respect to vessels found in Italian territorial waters *on* June 10, 1940, and not to vessels found or forcibly brought into Italian territorial waters *after* that date.

The Italian Government valued the vessel at 5,000,000 lire.

Held: that the claim must succeed. The claimant was entitled under Article 78 (4) (*a*) of the Treaty of Peace to a payment of 11,166·667 lire.

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[1] See *infra*, p. 955.

The Commission said: " It is the contention of the United States of America that the claimant is entitled to compensation from the Italian Government under Article 78 of the Treaty of Peace and the Agreements supplemental thereto or interpretative thereof. Paragraph 4(*a*) of Article 78 reads in part as follows:

> ' . . . In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. . . .'

" It is not disputed that the claimant was at all times pertinent here a national of the United States of America; that the *Eilenroc II* was in French territorial waters when it was seized as enemy property on May 8, 1943, by Italian naval forces; that the *Eilenroc II* was sunk in Italian territorial waters in the course of military operations and that the *Eilenroc II* cannot be returned to the claimant by the Italian Government.

" Even though *Eilenroc II* was lost in Italian territorial waters and hence at the time of the loss was ' in Italy ' during the period taken into consideration by Article 78, the Agent of the Italian Government maintains that Article 78 of the Treaty of Peace cannot be applied because the facts in the instant case are within the scope of Article 75. The essence of this argument is that since *Eilenroc II* was seized in French territorial waters the French Government alone had the right under Article 75 to present a claim to the Italian Government for the return of the said motor cruiser and that any such claim should have been presented within six months after the Treaty of Peace entered into force (September 15, 1947).

" The evidence in this case establishes that even before the Treaty of Peace with Italy entered into force, the claimant invoked the assistance of *her* Government in an attempt to learn the fate of the *Eilenroc II* and that on December 10, 1946, the Italian Ministry of Foreign Affairs informed the Embassy of the United States of America in Rome that an investigation had established that the claimant's motor cruiser had been sunk in Italian territorial waters. It is obvious that since the claimant was not a French national she would not have been entitled to the diplomatic protection of the French Government in seeking redress from Italy for the loss sustained. The Italian Government has never maintained that there was ever any possibility of salvaging the claimant's motor cruiser after the war, and the French Government has never expressed an interest in the subject matter of this dispute.

" The Agent of the Italian Republic maintains that all the provisions of Article 78 of the Treaty of Peace must be applied and interpreted in the light of and in a manner consistent with the first paragraph of Article 78 and that the existence of the claimant's property in Italy *on June 10, 1940,* is an indispensable prerequisite to granting the claimant the relief requested.

" The argument of the Agent of the Republic of Italy that Italy assumed an obligation under Article 78 to return ' property ' *only* if it was in Italy on June 10, 1940, cannot be supported either by the wording used in the Treaty of Peace or by logic or authority. Prior to the declaration of war between the two Governments on December 11, 1941, a national of the United States of America legally might have shipped to Italy for sale or transhipment certain types of property; even after December 11, 1941, a national of the United States of America might lawfully have acquired property in Italy by inheritance. Additional examples are not required to illustrate the points that a national of the United States of America may have acquired ownership of property in Italy after June 10, 1940, and it is not surprising that there is lacking in Article 78 any provision which shows an intent—either expressed or implied—to limit Italy's obligation to return such property.

" The date of June 10, 1940, is also referred to in para. 2 and para. 9(*c*) of Article 78 and an examination of these two paragraphs demonstrates the lack of foundation of the Italian argument. Paragraph 2 of Article 78 requires the Italian Government to

> ' . . . nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between June 10, 1940, and the coming into force of the present Treaty. . . .'

Clearly the obligation here is for Italy to nullify any such measure taken during the period that Italy was at war, and it is immaterial whether the United Nations property was in existence in Italy on June 10, 1940, or was brought into or acquired in Italy after that date.

" Paragraph 9(*c*) of Article 78 defines the term ' property ' as used in said Article of the Treaty of Peace as follows:

> ' " Property " means all movable or immovable property . . . the property of the United Nations and their nationals includes all seagoing and river vessels, together with their gear and equipment which were either owned by United Nations or their nationals, or registered in the territory of one of the United Nations, or sailed under the flag of one of the United Nations and which, after June 10, 1940, while in Italian waters, or after they had been forcibly brought into Italian waters, either were placed under the control of the Italian authorities as enemy property or ceased to be at the free disposal in Italy of the United Nations or their nationals, as a result of measures of control taken by the Italian authorities in relation to the existence of a state of war between members of the United Nations and Germany.'

The second sentence of this definition not only applies to all seagoing and river vessels which were in Italian territorial waters on June 10, 1940, but also to those vessels which were forcibly brought into Italian waters after that date. Clearly in this instance, too, the date of June 10, 1940, refers to the date of Italy's entrance into the war following which measures were taken by Italy to bring vessels of the United Nations and their nationals under the control of the Italian authorities.

" The claimant Government asserts and the respondent Government denies that *Eilenroc II* was property within the meaning of this term as defined in para. 9(*c*) of Article 78 *supra*. The reference to sea-going and river vessels which was included in the second sentence of para. 9(*c*) of Article 78 eliminates the basis of the argument by the Agent of the Italian Republic that this case must be governed exclusively by Article 75 of the Treaty of Peace. It is not necessary to the Conciliation Commission in reaching its decision in this case to determine the broader question of whether the Italian Government is responsible under Article 78 of the Treaty of Peace for property other than sea-going and river vessels removed during the war from the territory of one of the United Nations occupied by forces of the Axis Powers; and this more delicate question has been left aside in the instant case, as was done in a similar dispute before the Anglo-Italian Conciliation Commission (see its decision given on March 4, 1952, in the *Gin & Angostura* case[1]).

" In the instant case the *Eilenroc II* was seized on May 8, 1943, by Italian naval forces. How or when the vessel was brought to Italy has not been established by the evidence but there can be no doubt that in Italy the *Eilenroc II* was under the control of the Italian Navy and was not at the free disposal of the claimant. It was the obligation of the Italian Government to account for and to return this motor cruiser when it was established that the *Eilenroc II* had been seized by Italian naval forces, and this the Italian Government has not been able to do since the motor cruiser was lost during the war.

" The Conciliation Commission holds that the conclusive fact in the instant case which fixes the liability of the respondent Government under Article 78, and more particularly under paras. 4(*a*) and 9(*c*) thereof, is that the *Eilenroc II* was sunk in Italian territorial waters; proof of this fact alone establishes that the claimant's property was in Italy and could not be returned after the war.

"As far as the indemnity is concerned, the claimant Government has requested that this be determined on the basis of the amount necessary today to purchase similar property and has submitted with the Petition a letter dated September 8, 1948, from the Chris-Craft Motor Boat Sales Corporation in which the replacement value of a new 40-foot express cruiser fitted with two 316 H.P. Scripps engines and delivered in Cannes, France, is quoted at $32,000, equal to 20,000,000 Lire at the present rate of exchange of 625 Lire to the Dollar.

[[1] See *infra*, p. 966 (*sub nom. Grant-Smith Claim*).]

" The Agent of the Italian Government disputes this valuation and upon order of the Conciliation Commission submitted in evidence an evaluation of the claimant's motor cruiser prepared under the direction of the Italian Ministry of the Merchant Marine; an examination of this data reveals that the competent Agencies of the Respondent Government acknowledged that the actual cost in the fall of 1950 to build and equip in Italy a boat similar to the motor cruiser in question would be approximately . . . 20,740,000 Lire.

" The evaluation made in this manner by the competent Italian authorities shows only a relatively small difference from the cost of replacement quoted by the Chris-Craft Corporation in September 1948. But the competent Italian authorities maintain that from the foregoing figures there should be allowed an amount for depreciation equivalent to 48·7 per cent. on the basis that 13 years' (1938 to 1950 inclusive) depreciation had occurred. Having calculated an allowance for depreciation in this manner, the competent Italian authorities have maintained that a further reduction should be made and predicate such reduction on the following assumptions: ' (a) that the motor cruiser was found without inventory and therefore presumably with only the fixed equipment; (b) that the presumable speed, based on the data above, was around 24–25 knots and not 30 as indicated; (c) that there does not exist a market for this type of vessel whose value depreciates rapidly with time; (d) that it must be presumed, considering the international situation of the times, that it was found in a condition of abandon and imperfect efficiency since it lacked an inventory '. The evaluation of 5,000,000 Lire placed on the claimant's motor cruiser by the Italian Government was arrived at in this manner and reflects these considerations.

" In the Reply the Agent of the United States of America submitted additional evidence to support the claimant Government's contention that the *Eilenroc II* was a private pleasure craft which had been in the water less than three months during 1938 and 1939; that a sailor-watchman had been employed by the claimant to provide continuous maintenance; that the hull was mahogany; that the motor cruiser was powered by special gasoline engines and could easily develop a speed of 32 knots; that the hull and engines were in perfect condition and that all its fittings and equipment were aboard when it was seized by an officer of the Italian Navy on May 8, 1943; that only the installation of batteries (which had been stored at Villa Eilenroc) was necessary in order to permit the officer to remove the *Eilenroc II* to the Italian Naval operating base; that the seizure and removal was accomplished in a matter of hours and that the Italian Naval officer in charge thereof failed to prepare an inventory of the fittings and equipment on board the claimant's motor cruiser because to have done so at the time would have delayed the officer's departure from Cap d'Antibes (A.M.).

" On March 14, 1952, the Agent of the United States of America filed with the Secretariat a letter dated November 13, 1951, in which the Chris-Craft Corporation acknowledged that while they no longer built a motor cruiser identical to the *Eilenroc II* one of their new models was similar and quoted a price thereon of $44,300.00 for delivery in Marseilles, France, of a 42-foot motor cruiser powered by two 350 H.P. Scripps engines. It should be noted that while this letter reflects an increase in price from those quoted in 1948, the quotation of $44,300.00 is based on a slightly larger motor cruiser equipped with more powerful engines than the subject of this claim.

" Considering the provisions of para. 4(*a*) of Article 78 of the Treaty of Peace and the technical and other evidence contained in the record of this case; and considering the lack of evidence to substantiate certain assumptions made by the Italian Ministry of Merchant Marine and the inability of the Agents of the two Governments to reach agreement on the question of evaluation, the Conciliation Commission finds that at the date of this decision the amount necessary in Italy to purchase a motor cruiser similar to the *Eilenroc II* in hull, engines, equipment, age and condition is 16,750,000 Lire ", two-thirds of which sum is 11,166,667 lire.

[Report: Unpublished (Decision No. 19).]

Peace Treaties—Performance of—Restitution and Reparation Provisions—Requisition of Domestic Iron and Copper Ware—Whether Loss by Requisition Constitutes Loss by Reason of Injury or Damage—Relevance of Intention to Use Requisitioned Property for War Purposes—Requisition of Premises—Damage to Building and Contents—Whether Direct Result of Requisitioning —Concurrent Right to Compensation under More than One Clause of Treaty—Interpretation of Treaties—Principles and Rules of—Interpretation by " linguistic analysis "—*Travaux Préparatoires.*

SHAFER CLAIM.

Italian-United States Conciliation Commission. December 6, 1954.

(Matturri, Sorrentino, Sandström.)

THE FACTS.—The claimant, a United States national, was the owner of one half share in premises in Siena, Italy, known as Palazzo Ravizza, which were run as a *pensione*. During the war, the Italian authorities requisitioned an iron fence which surrounded the premises and certain copper kitchen utensils, part of the equipment of the *pensione*, and paid the claimant 1,200 and 700 lire respectively as compensation therefor. In 1944, the Palazzo Ravizza was requisitioned by the Allied forces and occupied for some eighteen months, during which time the building and certain of the contents sustained damage. Mrs. Shafer claimed compensation under Article 78[1] of the Treaty of Peace with Italy of 1947.

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[1] This Article deals with the restoration and return by Italy of the property, rights and interests in Italy of United Nations nationals and with compensation for war damage.

By agreement between the parties, the following issues were submitted to the Commission: (1) Is the Government of the Italian Republic responsible under Article 78 of the Treaty of Peace and the agreements supplemental thereto and interpretative thereof for losses and damage sustained by a United Nations national as a result of the requisitioning of property by Italian authorities during the war, not due to special measures not applicable to Italian property? (2) Is the Government of the Italian Republic responsible under Article 78 of the Treaty of Peace and the agreements supplemental thereto and interpretative thereof for losses and damage sustained as a result of the requisitioning of property by Allied military forces during the war or do such claims fall under the provisions of para. 2 of Article 76[1] exclusively?

The contentions of the parties appear from the *Held* below.

Held: that the claim must succeed. The requisitioning of the railings and the copper ware was a measure the purpose of which was to provide war material for Italy and the loss of the railings and copper ware was therefore a result of the war. The damage to the premises was a direct result of their requisition and therefore also a result of the war.

The Commission said: "A. *The requisition of the iron fence and of certain copper utensils.*—The claim is disputed by the Agent of the Italian Government on grounds which can be summarized in the following way:

" The Petition was based on Article 78, paragraphs 1 and 4(*a*).[2] The conditions required for application of paragraph 4(*a*) were not fulfilled, however. That paragraph requires that there be involved a loss by reason of injury or damage. To speak of a loss by reason of damage is tautological and therefore only the word ' injury ' is capable of giving meaning to the phrase, when it is interpreted not as a synonym for damage, that is, not as an effect but as a cause of the latter, *i.e.*, as a damaging act, as an injurious event. In connection with the condition that the loss must be as a result of the war, the conclusion must be that the loss is meant to be an effect of an act of war. As to the meaning of the expression ' act of war ', Article 2 of Italian Law No. 1543 of October 26, 1940, could be quoted:

> 'An act of war, for the purpose of compensation, is considered to be an act done by national, Allied or enemy armed forces,

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[1] Article 76, para. 2, provides:

" 2. . . . The Italian Government agrees to make equitable compensation in lire to persons who furnished supplies or services on requisition to the forces of Allied or Associated Powers in Italian territory and in satisfaction of non-combat damage claims against the forces of Allied or Associated Powers arising in Italian territory."

[[2] See *infra*, p. 967, n. 1, and *supra*, p. 949, respectively.]

> connected with the preparation for and the operations of war; and also an act which, although not connected with the preparation for and the operations of war, has been occasioned by same.'

However, Article 78 did not limit the responsibility of the Italian Government merely to acts and damage of wai alone, in the sense set forth above, but it also extended it to acts of authorities which caused damage. It must be a question of measures taken by authorities as a result of the war, and the meaning of this expression is explained in paragraph 4(*a*), in the sense that the loss or the damage must be due to special measures applied to property of Allied nationals which were not applicable to Italian property. The causal relation between damage and war exists only when the measure was applied because of the enemy nationality of the owner. The iron railings and the copper pots were not requisitioned because they belonged to an American national. This fact was unknown to the authorities. The requisition was brought about by a shortage of such materials and it affected all property of that nature, in an absolutely objective manner. Therefore, the war was the occasion, the environment which produced the cause: it was not the effective cause of the damage. For the reasons set forth, the Italian Government is not responsible under Article 78.

" In the Reply Brief, the Agent of the Italian Government adds, as a reason for the inapplicability of Article 78, that the laws on which the requisitions were founded and which were enacted in 1939 and 1940 deprived the owners of their ownership, transforming their title into a title to the correspondent indemnity, . . . the Commission is in agreement with his views in so far as he maintains that the loss must be a result of the war also in the case where the property cannot be returned, but the Commission cannot follow the arguments of the Agent any further.

" The linguistic analysis of Article 78, paragraph 4(*a*), from which he starts, is untenable. The provision in question deals with an obligation in addition to the one provided for in paragraph 1. According to the first sentence of para. 4(*a*), the property to be returned shall be restored to complete good order. There follow, in the second sentence, provisions for the situation in which the property is not returned in such good order, either because the return is impossible or the property can be returned only in an injured or damaged state. That part of the sentence which begins with the words ' or where ' envisages this latter situation. It cannot be said to contain a redundancy if one keeps in mind that the stress is on a loss by reason of *damage to property* in Italy, loss being the abstract word for detriment to one's fortune, and ' damage to property ' indicating the nature of the loss which is taken into account. Even less is it possible to take the word ' injury ' as the only one to guide the interpretation. The words ' injury ' and ' damage ' are coordinated as alternatives and they have equal weight. Neither is there any reason to see in the fact that the word ' injury ' was inserted in the original text anything other than the usual Anglo-Saxon habit of using synonyms in legal documents in order to prevent an interpretation more restrictive than has been intended. Consequently, if the interpretation of the language does not lead to a limitation of the responsibility envisaged in Article 78 to ' acts of war ', there might be another reason for such an interpretation, namely, in the fact that para. 4(*a*) of Article 78 had its origin in a proposal submitted by the Representative of the United States to the Committee of Economic Experts which assisted the Council of Foreign Ministers and that in the Report of June 5, 1946, of this Committee to the Conference of the Council of Foreign Ministers, one reads: ' The Representative of the United States believes that where, *as a result of acts of war*, the property itself cannot be restored or has been damaged, the interested party should be completely indemnified in lire ' (see Decision No. 95, *Pertusola–Penarroya Case*, French-Italian Conciliation Commission, March 8, 1951[1]).

" However, independently of the question whether the United States Representative actually used that wording, it is questionable if anything is gained by substituting the concept of ' acts of war ', which also requires interpretation, for the expression ' as a result of the war ' used in the Treaty provision. In any case, one would certainly then have to take into consideration, and also with greater reason, the definition of the expression ' as a result of the war ' contained in the American proposal:

> 'As used in this Article, the phrase " as a result of the war " includes the consequences of any measures taken by the Italian Government, of any measures taken by any of the belligerents, of any measures taken under the Armistice of September 3, 1943, and of any action or failure to act caused by the existence of a state of war.' (See Decision No. 95, *Pertusola-Penarroya Case* [*supra*]).

" On the whole, the fact that the phrase ' acts of war ' was used frequently during the negotiations of the treaty and in different Articles, does not permit an interpretation to the effect that such phrase is to be substituted for the one which was contained in the original proposal and which was preserved, that is, ' as a result of the war '. That expression, which is very general, must be deemed to include, as was contemplated also by the proposing party, at least administrative measures taken by the authorities for sustaining and increasing the war effort.

" In this connection there remains to be considered whether the fact that the Treaty in Article 78, para. 4(*d*), deals with such

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[[1] *Recueil des Décisions*, Part III, p. 67; *International Law Reports*, 1951, Case No. 129 (*sub nom. Pertusola Claim*).]

measures of a special kind, namely, discriminatory measures, can have the effect of limiting, through interpretation, the scope of Article 78, para. 4(*a*), to apply only to ' acts of war ' and to exclude administrative measures. It might have been a plausible argument that, by interpreting para. 4(*a*) to include administrative measures in general, para. 4(*d*) would thereby become superfluous. That, however, is not the case. Paragraph 4(*a*) is limited to compensation for a loss which refers only to the substance of the property, whereas para. 4(*d*) envisages a more general compensation for loss or damage due to special discriminatory measures applied to enemy property during the war, *i.e.*, all kinds of damage caused by such measures with the exception of loss of profits.

" Paragraph 4(*d*) has a function, then: but when it is only a question of damage to property, the case is covered by para. 4(*a*).

" In these circumstances there is no reason to adopt the view that para. 4(*d*) is the only provision which concerns administrative measures.

" The conclusion is that para. 4(*a*) must be interpreted as it stands. This does not mean that the responsibility of the Italian Government under para. 4(*a*) is unlimited and includes any damage to property of the United Nations or their nationals which occurred during the war. The provision was certainly not intended to be a kind of ' all risks ' insurance during the war for property belonging to the United Nations and their nationals. The limitation is to be found in the conditions required as to the cause and effect relation between the war and the damage. It is for the Conciliation Commission to establish these conditions as the cases arise.

" In the instant case, it is to be noted that Royal Law Decree No. 1805 of December 13, 1939, enacting rules for the census of scrap and manufactured, non-installed copper, and for the collection of same, invoked in its preamble the necessity because of the war, and gave the General Commissariat of War Manufacturies wide powers with regard to the items declared. And in Law No. 408 of May 8, 1940, concerning the declaration and collection of fences of iron or other metal, it was provided that the Agency of Scrap Distribution to which such goods were to be delivered should keep them at the disposal of that same Commissariat, which was authorized to issue rules for the purchase, stock-piling and distribution of the material subject to being declared, as well as all other necessary regulations for implementing the law.

" Even if the shortage of metals created by the war in Germany was taken into consideration at the time of promulgation of those laws, it is natural, besides being corroborated by the text of the laws themselves, that an important purpose was also to provide material for possible Italian participation in the war and that, after Italy's entry into the war, this became the paramount purpose of the measures taken under the laws.

"The requisitions under review took place during the war and, in view of what has been said, there has been established a sufficiently direct and close relation of cause to effect between the war and the loss suffered by the claimant to state that the loss was as a result of the war and that there is a claim under Article 78, para. 4(*a*).

"B. *The requisition by the Allied forces of the Palazzo Ravizza.*—With respect to this requisition, the Agent of the Italian Government argues that the Italian Government is not responsible because the damage caused to the *pensione* while it was occupied by the Allied forces was not caused by acts of war but resulted from abuse or bad use of requisitioned property. He further points out that, due to the undertaking of the Italian Government in Article 76, para. 2,[1] of the Peace Treaty, the claimant has the right to receive compensation for non-combat damage caused by the Allied troops in Italy, but that such remedy is not on the international level but instead under Italian domestic law.

"It is true that, in theory, it can be said that damage caused by troops, even though they are officers, in occupied premises is due to their misuse of the premises. In practice, however, it is unavoidable that premises so occupied become damaged. Such damage must be considered therefore to be a direct effect of the requisition of the premises.

"The fact that Article 78 contains provisions for non-combat damage claims against the forces of Allied or Associated Powers arising in Italian territory cannot be interpreted to exclude a claim under Article 78, which does not contain any exception to this effect.

"In view of what has been said under A [above], the claim must be considered as justified in principle."

[Report: Unpublished (Decision No. 27).]

NOTE.—The Italian representative appended a "statement of the reasons for his dissent" from this Decision, dated January 10, 1955.

Peace Treaties—Performance of—Restitution and Reparation Provisions—Compensation for Loss of Requisitioned Ship—Distinction between Requisition for Use and Requisition of Title —Whether Requisitioning a "measure taken against property" —Right of Requisitioning State to Retain Wreck—Measure of Damages for Loss.

ROSASCO CLAIM (*THE UNIONE*).

Italian-United States Conciliation Commission. May 19, 1955.

(Matturri, Sorrentino, Messia.)

THE FACTS.—The claimants were the heirs of one A. T. Rosasco, a United States national, who in 1939 entered into a contract with ship-builders for the construction of the motor ship *Unione*, and the Società Anonima Genovese Armamento e Rappresentanze (hereinafter referred to as " SAGAR ") on whose behalf Rosasco had acted. On January 24, 1942, the Italian Navy requisitioned the *Unione* " for use " and on or about June 18, 1944, it was sunk by German armed forces at Spezia. On August 27, 1944, the Italian Ministry of the Navy ordered the requisition of the title of the vessel with effect from the date of the original requisitioning for use. Subsequently, the Italian Government paid the sum of 101,646,624.39 lire for the double requisitioning of the *Unione*.

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[1] See *supra*, p. 960, n. 1.]

In 1948, the claimants (A. T. Rosasco having died) and the SAGAR Company submitted claims for restitution of the *Unione* under Article 78 (4) (*a*)[1] of the Treaty of Peace with Italy of 1947, or, if the vessel could not be raised and restored to good order, then for the payment of two-thirds of the sum necessary at the time of payment to make good the losses and damage suffered, which sum, on September 23, 1952, was estimated to be 2,200,000,000 lire, less the sum of 101,646,624.39 lire already paid by the Italian Government to the owners of the vessel.

On behalf of the claimants it was contended that " the transfer of title of the motor ship *Unione* to the Italian Government, precisely as such, constituted a measure contemplated by para. 2 of Article 78[2], a measure which the Italian Government is obligated to cancel, under Article 78, like all measures, including requisition, seizure or control, taken by it between June 10, 1940, and September 15, 1947, against property of United Nations nationals."

On behalf of the Italian Government, it was contended that SAGAR suffered no damage as a result of the sinking of the *Unione*, in view of the fact that at that time it had already lost title thereto as a result of a measure taken by the Italian Government, and that consequently SAGAR was not entitled to invoke either para. 2 or para. 4(*a*).

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[1] Article 78, para. 4 (*a*), provides:

" 4.—(*a*) The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Italian nationals."

[2] Article 78, para. 2, provides:

" 2. The Italian Government undertakes that all property, rights and interests passing under this Article shall be restored free of all encumbrances and charges of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Italian Government in connection with their return. The Italian Government shall nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between June 10, 1940, and the coming into force of the present Treaty. In cases where the property has not been returned within six months from the coming into force of the present Treaty, application shall be made to the Italian authorities not later than twelve months from the coming into force of the present Treaty, except in cases in which the claimant is able to show that he could not file his application within this period."

Held: that the claim must succeed. The requisitioning of title was a measure which under Article 78 (2) of the Peace Treaty the Italian Government was bound to cancel. The Italian Government, while retaining the title to the wreck, must pay the claimants the sum of 1,425,000,000 lire compensation.

The Commission said: "The American Petition requests restitution and restoration to good order of the motor ship, under paras. 2 and 4(*a*) of Article 78, or, in the alternative, compensation payable under the same para. 4(*a*) in the event that restitution cannot be made. . . .

"If the requisition of title had not been ordered effective as of January 1942, the claim should certainly have been accepted on the mere consideration of the ownership as of June 10, 1940, and of the act of war on June 18, 1944; but as such requisition was ordered, one cannot prescind from it, confining oneself to a statement that it is irrelevant, because, by virtue thereof, the Italian legal system, which up until January 1942 had recognized SAGAR as owner of the motor ship *Unione*, as of that date replaced the title with the right to receive a corresponding indemnity. . . . The requisition of the vessel by the Italian Navy for its own use, effected on January 24, 1942, and the subsequent requisition of title on August 27, 1945, are measures which fall within the meaning of this word as used in Article 78, para. 2, of the Treaty. For the purposes of the Italian defense, the assertion that the claimants are not entitled to invoke Article 78 because of the requisition of title is completely groundless because such requisition of title constitutes *per se* one of the measures which the Italian Government is obligated to cancel."

[Report: Unpublished (Decision No. 50).]

Peace Treaties—Performance of—Restitution and Reparation—Property Lost during War—Whether Property must have been in Enemy Territory at Date Specified in Treaty—Circumstances in which Property Lost—Burden of Proof—Claims under Treaty—Distinction between Right of Owner of Property to Claim and that of State from whose Territory Property Taken—Interpretation of Treaties—Principles and Rules of—Literal Interpretation.

GRANT-SMITH CLAIM (*THE GIN AND ANGOSTURA*).

Anglo-Italian Conciliation Commission. March 4, 1952.

(Hannaford, Sorrentino, Bolla.)

THE FACTS.—On or about August 17, 1943, the Italian Navy seized at Antibes, France, the *Gin and Angostura* (hereinafter called

" the yacht "), a yacht belonging to Mrs. M. G. Grant-Smith (hereinafter called " the owner "), and subsequently took it to Italy. In March 1948, after the coming into force of the Peace Treaty with Italy of 1947, the French Government requested the return of the yacht under Article 75 of the Treaty (which relates to the return by Italy of property removed from the territory of any of the United Nations), but the yacht could not be traced. On August 11, 1948, the British Government applied on behalf of the owner to the Italian Government for the return of the yacht under paras. 1 and 2 of Article 78 of the Treaty.[1] The Italian Government replied that the yacht having been seized in the territory of one of the United Nations, Article 75 and not Article 78 was applicable. Moreover, as the yacht in question had been destroyed, the owner had no right to claim either restitution or compensation. The British Government then submitted a claim under Article 78 for compensation for the total loss of the yacht, to the extent of two-thirds of the sum necessary at the date of payment to purchase a yacht similar to the one lost (including the gear and equipment on board). It was contended on behalf of the Italian Government that, on the one hand, Article 75 only contemplates a recovery or restitution, which is impossible when the property is lost; on the other hand, in view of the terms of para. 1, Article 78 only applies to property which was in Italy on June 10, 1940.

Held: that the claim must succeed. It was properly presented under Article 78 of the Treaty. The yacht had, after June 10, 1940, been forcibly brought into Italian waters and must be assumed to have been placed under the control of the Italian authorities. Restitution being impossible, the owner was entitled to compensation under Article 78, para. 4.

The Commission said: " The claim is based on para. 4 and para. 9(*c*) of Article 78 of the Treaty. Paragraph 4 lays down the obligation on the Italian Government in cases where property cannot be returned (to United Nations nationals in accordance with para. 1) to pay to such nationals as compensation a sum in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property. Paragraph 9(*c*) defines the term ' property ' of the United Nations and their nationals so as to include

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[1] Article 78 provides in part:

" 1. In so far as Italy has not already done so, Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists.

" 2. The Italian Government undertakes that all property, rights and interests passing under this Article shall be restored free of all encumbrances and charges of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Italian Government in connection with their return. The Italian Government shall nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between June 10, 1940, and the coming into force of the present Treaty. In cases where the property has not been returned within six months from the coming into force of the present Treaty, application shall be made to the Italian authorities not later than twelve months from the coming into force of the present Treaty, except in cases in which the claimant is able to show that he could not file his application within this period."

> ' all seagoing and river vessels, together with their gear and equipment, which were either owned by United Nations or their nationals, or registered in the territory of one of the United Nations, or sailed under the flag of one of the United Nations and which, after June 10, 1940, while in Italian waters, or after they had been forcibly brought into Italian waters, either were placed under the control of the Italian authorities as enemy property or ceased to be at the free disposal in Italy of the United Nations or their nationals, as a result of measures of control taken by the Italian authorities in relation to the existence of a state of war between members of the United Nations and Germany.'

" The Italian Government opposes the claim, arguing that the field of application of Article 78 is precisely determined in its first paragraph and that, therefore, neither its para. 4 nor *a fortiori* its para. 9(*c*)—which merely defines some expressions used in the preceding paragraph—can have effect on property which, like the yacht in question, was not in Italy on June 10, 1940.

" The argument of the Italian Government presupposes that para. 1 of Article 78 has in view only those properties of the United Nations or their nationals to which two conditions apply simultaneously—one relating to place (their existence in Italy) and the other to time (before June 10, 1940). It also presupposes that these two conditions were expressed in para. 1 in such a way as to exclude the possibility in the succeeding paragraphs of exceptions or modifications, however clearly expressed.

" The Conciliation Commission does not consider that it can uphold these arguments, at any rate to the extent to which the Italian Government maintains them. In the first place, in the light of a literal interpretation, the date, June 10, 1940, is mentioned in para. 1 only in regard to Italy's obligation in respect of the restoration of legal rights and interests but not in regard to Italy's obligation in respect to the restitution of property. As there appears to be no plausible reason for a distinction, in this respect, between legal rights and interests on the one hand and property, which [is not the same thing as] legal rights and interests, on the other (supposing that such an opposition were conceivable), it is permissible to admit that the date of June 10, 1940, is assumed in para. 1 to be only the start of the period of Italian responsibility, meaning that she is not responsible for acts and events before June 10, 1940, and denying the restoration of anything as it existed earlier than June 10, 1940. In fact, the Treaty has no reason whatever to exclude Italy's responsibility for property acquired in Italy by the United Nations or their nationals after June 10, 1940. Italy having declared war on some of the United Nations, such as the U.S.S.R. and the United States of America, after June 10, 1940, it is conceivable that these United Nations or their nationals acquired property in Italy after June 10, 1940, [and] it is therefore difficult to understand why the United Nations should have imposed on Italy for such property obligations less comprehensive than those in respect of property which existed in Italy on June 10, 1940. Moreover, the possibility cannot be excluded that a national of one of the United Nations already at war with Italy from June 10, 1940, may have, after such date, legitimately acquired property in Italy, for example, through inheritance; the United Nations cannot allow such a national to be treated worse than one of his fellow nationals who possessed property in Italy on June 10, 1940.

" This interpretation is strengthened by the consideration that para. 2 of Article 78 also mentioned that date, June 10, 1940, but specifically to affirm Italy's obligation to nullify all the measures, including those of requisition, sequestration or control, which may have been taken in respect of properties of the United Nations or their nationals within that date and the date of entry into force of the Treaty, the date on which the properties came into ownership of the United Nations or their nationals being of little importance.

" Nor can the inclusion of the words ' in Italy ', which occur in the two parts of para. 1 of Article 78 as also in the title of Section 1 of Part VII of the Treaty, be taken to exclude in the following paragraphs the fact that the Treaty puts Italy under an obligation with regard to property existing originally outside Italy, as such property, having been brought to Italy before the Treaty came into force, acquired the character of property '*appartenant en Italie*' to the United Nations and their nationals.

" Therefore, within the frame of para. 1 of Article 78 a special provision dealing with property not existing in Italy on June 10, 1940, but brought there after such date, would not have been necessarily required in the succeeding paragraphs. However, such a special provision is given precisely in the second sentence of para. 9(*c*) relating to ships. This provision, [which is] clearly worded, does not apply only to ships which were in Italian waters at June 10, 1940, it applies also to those which were brought there forcibly after that date. Certainly, the date of June 10, 1940, appears to be solely the starting point of the control measures taken by Italy against the vessels themselves as enemy property, but the phrase ' whether they were in Italian waters or had been brought there forcibly ' refers, in its second part, to forcible transport into Italian waters between June 10, 1940, and the date of the control measure, seeing that prior to June 10, 1940, Italy could not bring vessels of the United Nations or their nationals forcibly into her waters as enemy property. The phrase quoted cannot but refer to two categories of vessels: those which were in Italian waters at June 10, 1940, and those which were therein subsequently '*amenés de force*'; the only ones which are excluded—which is understandable—are those vessels of the United Nations or their nationals which sailed voluntarily into Italian waters after June 10, 1940, thus accepting the attendant risks. If the phrase were to be given the interpretation maintained by the Italian Government, the words '*ou qu'ils y aient été amenés de force*' would be superfluous, the vessels supposed to have been brought forcibly into Italian waters prior to June 10, 1940, being necessarily included amongst those which were in Italian waters at June 10, 1940, failing which the Treaty would have had no reason to concern itself with them.

"The Italian Government contends that from the closing words of para. 9(*c*) which mentions the existence of a state of war between members of the United Nations and Germany, it is clear that the Treaty here considers Italy to be in a position of neutrality or at any rate of non-belligerence; therefore, the period of time considered for the forcible transport of ships to Italy would necessarily be prior to June 10, 1940. This objection overlooks the consideration that the control measures taken by the Italian Government and which carry for Italy the liability referred to in the second part of para. 9(*c*) are of two kinds: those taken against vessels as enemy property, and therefore necessarily subsequent to June 10, 1940, and the others taken by the Italian authorities as a neutral State and in consequence of the existence of a state of war between members of the United Nations and Germany, therefore prior to June 10, 1940, but which as a result had the effect, after that date, of causing the property to cease to be at the free disposal of the legitimate owners. The objection of the Italian Government does not consider this distinction which is clear from the wording of the Treaty.

"But can the subsidiary thesis put forward by the Italian Government be accepted, that the provision of the second part of para. 9(*c*) would affect, besides ships which were in Italian ports on June 10, 1940, only those which were seized subsequently on the high seas and thus taken to Italian waters? In fact, the text does not distinguish between the place of seizure of vessels '*amenés de force*' to Italian waters, and it is not permissible [in interpreting this provision] to introduce a distinction between seizure on the high seas and seizure in the territorial waters of a United Nation. Moreover, such distinction would not make the provision under discussion conform to para. 1 of Article 78, even if the too arbitrary interpretation put forward by the Italian Government was accepted, because the high seas are always outside Italian territory. It is begging the question to claim that the provisions of Article 78, para. 9(*c*), do not cover vessels taken from the territorial waters of one of the United Nations, as the special ruling of Article 75 already covers them. In fact, the latter Article does not give a right of action as regards ships, for even partial compensation, in case of their loss, a right of action which, on the other hand, does result from the combined effect of para. 4(*a*) and para. 9(*c*) of Article 78.

" The Italian Government objects that Article 78 cannot be correctly interpreted without taking Article 75 into account; the latter applying to property removed from the territory of any one of the United Nations whilst the former applies to property of the United Nations or their nationals as it existed in Italy on June 10, 1940; Article 75 gives a right of action to the State from the territory of which the property was taken, which State has an interest in the recovery of the property as a part of its economy, independently of the nationality of the owner, while Article 78 gives a right of action to the owner of the property, the Government of his country only taking a part in the international dispute as the representative *ad litem* of its national: Article 75 only allows for an action for recovery (with replacement in kind only for properties belonging to the cultural heritage under the special conditions of Article 75, para. 9), while Article 78 contemplates both an action for recovery and the liability of the Italian Government; and the conditions for an action for recovery are different in the two provisions and more onerous for the Italian Government under Article 75 (reversal of the burden of proof, Article 75, end of para. 7; greater expense for the Italian Government, Article 75, para. 3, and Article 78, para. 4(*a*); invalidation of any transfers, Article 75, end of para. 2, and Article 78, para. 3).

" In this specific case the French Government abandoned its claim for the return of the yacht, and was bound to do so because the yacht could not be found. The general question, therefore, of the relation between the two actions for recovery under Article 75 and Article 78 of the Treaty, as far as ships taken by force to Italy after June 10, 1940, and expressly mentioned in Article 78, para. 9(*c*), are concerned, does not and cannot arise here. To reach a decision in the present dispute it will be enough to realize that the question itself does not appear insoluble if the [Commission adopts an interpretation which], starting from the consideration that the ultimate beneficiary of the action under Article 75 must be the owner of the ship (supposing it to be private property), gives him the choice between the direct action under Article 78 and that under Article 75 through the medium of the Government from whose territory the ship was carried off and if the interpretation also allows the owner to start an action under Article 78 only when the Government which is authorized to do so has not presented a demand for restitution within the time limit fixed by the last sentence of Article 75, para. 6.

As, in the present case, restitution is impossible, Article 78, para. 4(*a*), therefore becomes applicable, that is to say, the right to two-thirds compensation arises, without the possibility of a conflict between the exercise of this right and the exercise of the faculty given to the French Government by Article 75.

"Finally, the Italian Government contests, subordinately, the existence of the conditions laid down by Article 78, para. 9(*c*), as interpreted by this Commission. Although the Italian Government admits that it was the Italian Navy which took possession of the yacht at Antibes and brought it to Italy, it is argued that such seizure would not in itself satisfy the conditions of Article 78, para. 9(*c*), since they also require that Italy should in her territory have subjected the yacht to a specific measure of control; it would, therefore, be for the British Government, according to the general principles of law, to furnish proof that such a measure had been imposed. Moreover, according to the Italian Government, the fact that the property could not be found would not suffice to found an action under Article 78, para. 4(*a*), but proof that destruction took place as a result of the war would also be required.

"The Commission is of the opinion that the conclusive fact is that the yacht, seized in French waters by the Italian Navy and brought by them to Italian waters, was not there placed by the Italian authorities at the free disposal of the owner. The captured yacht remained, in Italian waters, at the disposal of the Italian Navy, and therefore in reality was subjected to the most drastic form of control by the Italian authorities, without any specific administrative measure being necessary for the purpose.

"The circumstances in which the ship was captured and later disappeared justify, in the present case, according to the general principles of law, a reversal of the onus of proof as to the cause of its not being found [seeing that the Treaty cannot possibly have intended] that such onus of proof should be thrown upon the owner of the ship. It was therefore for the Italian Government, whose Navy captured the yacht . . ., to prove that the ship, contrary to all the probabilities, was not a victim of an act of war."

[Report: Unpublished.]

Peace Treaties—Performance of—Restitution and Reparation—Property Lost or Damaged during War—Waiver of Rights under Treaty—Necessity for Express Waiver—Whether Property must have been in Enemy Territory at Date Specified in Treaty—Seizure by Hostile Third State—Interpretation of Treaties—Principles and Rules of—Literal Meaning of Treaty—Intention of the Parties—"Illogical or Irrational" Interpretation.

GASSNER CLAIM (*THE M.Y. GERRY*).

Anglo-Italian Conciliation Commission. December 11, 1954.

(Hannaford, Sorrentino, Sandström).

THE FACTS.—In 1943 the motor yacht *Gerry*, which was the property of Andrew Gassner, a British subject, was seized at Cannes, France, by hostile forces and converted into an auxiliary naval vessel. In or about the month of April 1945, after having been brought into Italian waters, the yacht was sunk in the harbour of Genoa. In September 1946 the yacht was refloated by an Italian company at the instigation of the " Mission Française de la Marine Marchande en Italie " under the mistaken impression that it was another yacht, belonging to a French national. The French Mission subsequently discovered its mistake and a claim that the French Government had made to the Italian Ministry of Foreign Affairs for restitution of the vessel under Article 75 of the Peace Treaty was abandoned. After the discovery that the yacht was not French, the salvors requested the assistance of the Comando Marina Militare (Ufficio Requisizioni e Derequisizione Naviglio) of Genoa in tracing its owner. The Comando Marina took it out of the custody of the salvors into its own custody and appointed a watchman for the vessel. The ownership was traced to Andrew Gassner, who had died on July 1, 1946, and the representative in Genoa of his executors, Mr. David S. Neill, was requested to take over the custody of the yacht and to pay the watchman's expenses. The salvors on their side claimed payment by Mr. Neill of the salvage fees. On February 6, 1948, Mr. Neill accepted delivery of the yacht from the Comando Marina on the terms set out in a *procès verbal*, the parties to which were the salvors, the Comando Marina Militare of Genoa, and Mr. Neill. The last-named declared in the *procès verbal* that he had nothing to claim on any ground whatever from the Marina Italiana (" di non aver nulla a pretendere, per nessun titolo ").

The yacht was later taken over by the salvors in satisfaction of their claim for salvage expenses and charges. On January 15, 1953, a claim was submitted by the British Government on behalf of the personal representatives of Gassner, deceased, to the Conciliation Commission for two-thirds of the cost of purchasing a similar yacht with similar equipment, etc., on the ground that the condition of the *M.Y. Gerry* when it was handed over to Mr. Neill was virtually that of a wreck.

For the Italian Government, it was contended (i) that the claim was not admissible, the claimants having waived their rights by the declaration in the *procès verbal* of February 6, 1948; (ii) that in any event there was no evidence that the *M.Y. Gerry* was brought into Italian waters by the Italian authorities or was there subject to measures of control taken by those authorities, as required by para. 9(*c*) of Article 78[1] of the Treaty of Peace with Italy; and

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[1] Article 78 (9) (*c*) provides in part:

" . . . Without prejudice to the generality of the foregoing provisions, the property of the United Nations and their nationals includes all seagoing and river vessels, together with their gear and equipment, which were either owned by United Nations or their nationals, or registered in the territory of one of the United Nations, or sailed under the flag of one of the United Nations and which, after June 10, 1940, while in Italian waters, or after they had been forcibly brought into Italian waters,

(iii) that the property did not exist in Italy on June 10, 1940, as required by para. 1 of the same Article.[1]

Held: that the claim was admissible, and the Italian Government must pay compensation under Article 78 (4) (*a*) of the Treaty for the loss of the *M.Y. Gerry*, calculated on the basis of the condition of the vessel when it entered Italian territory. The waiver contained in the *procès verbal* of February 6, 1948, did not unequivocally extend to a waiver of the claimant's rights under the Peace Treaty. Although the requirements of para. 9(*c*) of Article 87 of the Treaty had not been fulfilled, a claim lay under the general terms of para. 4(*a*) of that Article.[2]

The Commission said: " [It is contended on behalf of the Italian Government] in the first place that the claimants have waived their rights and that the claim is therefore not admissible. That contention is based on a declaration in the *procès verbal* of February 6, 1948, hereinbefore mentioned. The Commission cannot uphold this contention. A waiver cannot be assumed unless the intention of the claimants to waive their rights under the Treaty is quite unequivocal. For interpreting the scope of the declaration in the *procès verbal* of February 6, 1948, it is necessary to consider the declaration in its connection with the correspondence which prior to it was exchanged between Mr. Neill and the Comando Marina Militare of Genoa.

"A claim had been made by the salvors to Mr. Neill to pay the salvage expenses and, in the letter in which the Comando Marina Militare requested Mr. Neill to take over the yacht, the Comando Marina had asked for payment of the watchman's expenses. In his reply dated December 13, 1947, Mr. Neill pointed out that he would not be able to take possession of the wreck on behalf of the owner until he was able to pay the salvors the charges due to them for the refloating of the yacht and that he would be able to do that only after the sale of the vessel and the collection of the proceeds. The same was to be said for the watchman's expenses. He further wrote that he would be grateful to the Comando if they would clarify

either were placed under the control of the Italian authorities as enemy property or ceased to be at the free disposal in Italy of the United Nations or their nationals, as a result of measures of control taken by the Italian authorities in relation to the existence of a state of war between members of the United Nations and Germany."

[1] Article 78 (1) provides:

" In so far as Italy has not already done so, Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists."

[2] Article 78, para. 4(*a*), provides:

" 4.—(*a*) The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary at the date of payment, to purchase similar property or to make good the loss suffered. . . ."

whether their intervention was due to the fact that the yacht at the time it was sunk was under requisition by the Italian Navy, in order that he might know how to act with regard to the submission of a claim for compensation for damage in accordance with the Peace Treaty.

"In their answer dated December 27, 1947, the Comando explained that the *Gerry* was held in custody by the Naval authorities, that the Comando Marina had intervened because the Salvage Company had asked for help in tracing the owner, that the vessel was never requisitioned by the Italian authorities, that the Comando was not in a position to furnish any further information, and that if Mr. Neill failed to take over the vessel for the owners by January 14, 1948, the Comando would be obliged to abandon the custody of the yacht.

"In view of this correspondence it is a reasonable assumption that Mr. Neill made a distinction between the claims lying against the vessel under municipal law for salvage and other charges for custody and maintenance and the claims which his clients were entitled to make under international law in accordance with the Peace Treaty; that he intended to settle the former separately, reserving the latter to be dealt with later; and that in the declaration of February 6, 1948, he envisaged only the claims under municipal law. Such a conclusion is supported by the fact that a local branch of the Italian naval administration was not the proper authority with whom to settle a claim under the Peace Treaty; moreover, no reason has been advanced why Mr. Neill should give up his clients' rights under the Treaty, nor can it be said that it was made clear that the treaty rights were envisaged. As in these circumstances the declaration of February 6, 1948, cannot be regarded as meaning that Mr. Neill intended to waive his client's rights under the Treaty, the objection raised by the Italian Government fails and the Commission declares the claim admissible.

"On the merits of the case it is contended on behalf of the Italian Government that as it has not been proved that the yacht was brought into Italian waters by Italian authorities or subjected to control measures taken by Italian authorities, the case cannot come under Article 78, para. 9(*c*). It is further contended that the general rules of Article 78 are likewise not applicable since, according to para. 1 of this Article, which governs the whole Article, they require that the property should have existed in Italy on June 10, 1940.

"On behalf of the British Government it was originally alleged that the seizure of the vessel was made by the Italian authorities in the port of Cannes in 1943 and that therefore Article 78, para. 9(*c*), was applicable. There were also reasons to presume that the seizure was made by the Italian authorities at the time, since the Italian forces occupied the city of Cannes. At the hearing, the Italian Government Agent produced certain correspondence which was exchanged between the German and Italian authorities before the seizure. Briefly, this correspondence showed that, at the request of the German authorities, the Italian authorities declared that they had no objection to the German Navy seizing the *Gerry* in order to use her as an auxiliary vessel. This destroys the force of the aforementioned presumption and creates, on the contrary, a presumption that the seizure was made by the German Navy. It has not therefore been proved that conditions existed which could bring the case under Article 78, para. 9(*c*). It must consequently be examined whether the case falls within the general rules of Article 78 as they are laid down. This paragraph reads in the English text as follows:

> ' 1. In so far as Italy has not already done so, Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists.'

" The Commission has already had the opportunity (see its decision of March 4, 1952, in *The Gin and Angostura*[1]) to consider the implications of the date of June 10, 1940, mentioned in para. 1, especially in connection with para. 9(*c*). In that case also, the Italian Government pleaded, in so far as is here of interest, that Article 78, para. 1, had in view only such property of the United Nations or their nationals as existed in Italy on June 10, 1940, and that, since the field of application of Article 78 was precisely determined in its first paragraph, para. 9(*c*), which merely defines some expressions used in the preceding paragraph, could not have effect in respect of property which, like the yacht *Gin and Angostura*, was not in Italy on June 10, 1940. The Commission did not consider that it could accept these arguments, at any rate not to the extent to which the Italian Government maintained them. In developing its views, the Commission pointed out, *inter alia*, that the date June 10, 1940, literally referred only to the restoration of legal rights and interests but did not refer to the restitution of property; that it is permissible to assume that the date of June 10, 1940, in para. 1 is only the starting-point of the period of Italian responsibility; that there was no reason whatsoever why the Treaty should exclude Italy's responsibility for property acquired in Italy by the United Nations or their nationals after June 10, 1940; that the United Nations could not allow one United Nations national to be treated worse than a fellow national who possessed property in Italy on June 10, 1940; that the inclusion of the words ' in Italy ', which occur in the two parts of para. 1 of Article 78 as well as in the title of Section 1 of Part VII of the Treaty, could not be taken to preclude [the interpretation] that in the following paragraphs the Treaty puts Italy under an obligation with regard to property existing originally outside Italy in so far as such property, having been brought to

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[1] See *supra*, p. 966.]

Italy before the Treaty came into force, acquired the character of property '*appartenant en Italie*' to the United Nations and their nationals. The Commission therefore concluded that, within the framework of para. 1 of Article 78, a special provision dealing with property not existing in Italy on June 10, 1940, but brought there after such date, would not have been necessarily required in the succeeding paragraphs. However the Commission found that such a special provision is given in the second part of para. 9(*c*) relating to ships, and the Commission further went on to analyze the meaning of that provision.

" There is no reason why the Commission should depart from the general views on para. 1 of Article 78 thus taken by them in *The Gin and Angostura*. The only question that requires further examination is whether the fact that in Article 78, para. 9(*c*), there is a special provision regarding property brought into Italy after June 10, 1940, or any other provision of the Treaty, can have the effect of giving to Article 78, para. 1, the limited scope which is claimed for it on behalf of the Italian Government.

" It seems very unlikely that para. 9(*c*), which, though in the form of a definition, is in fact a provision for a very special case, should have been meant to have this effect; and that meaning seems quite excluded by the fact that the provision is preceded by the express reservation: 'Without prejudice to the generality of the foregoing provisions'. Had the meaning claimed for it been intended, that would have had to be specially stated. In this connection it has been suggested that Article 78 could not be applied because the restitution of the property in question could have been claimed under Article 75, which refers to 'all identifiable property at present in Italy which was removed by force or duress by any of the Axis Powers from the territory of any of the United Nations'. The Commission cannot accept this view, either. A claim made under Article 75 might have had the effect of preventing a claim under Article 78 while the former was pending, but if such a claim has not been made within the time-limit fixed in Article 75, para. 6, or if the claim has been abandoned, there is nothing in the text either of Article 75 or of Article 78 which has the effect of excluding a claim under Article 78. On the other hand, to exclude, contrary to the quite general wording of Article 78, para. 1, such a claim on the assumption that the governing idea of the framers of the Peace Treaty was to submit property removed from the territory of any of the United Nations and property existing in Italy on June 10, 1940, to two different, mutually exclusive, sets of rules, it would have been necessary for this idea to be manifested in a sufficiently clear way to be accepted. As has already been explained, however, no clear distinction is made between these two groups of property, since Article 78 neither refers expressly only to property existing in Italy on June 10, 1940, nor can it be interpreted in that sense.

Moreover, the fact that Article 75 refers to a special kind of property and outlines a special procedure for its recovery is not in itself a reason for excluding another procedure in respect of property which meets the conditions required to come under that procedure. The framers of the Treaty may very well have wished to provide several remedies for the recovery of property. In this case that is to be regarded as being so much more likely seeing that when the property clauses of the Treaty were being drafted it must have been the general and dominating tendency to give the interests of the United Nations and their nationals satisfactory protection. In the light of this general tendency there is no reason why property removed by the Axis Powers to Italy from the territory of any of the United Nations should not come within the scope of Article 78, para. 1, at least when a claim under Article 75 has not been made or has been abandoned.

" It can, no doubt, be said that with such an interpretation the Treaty will, in respect of certain cases, seem to be illogical or irrational, but that would be the case with any other interpretation that might be placed upon the text. Such deficiencies in the system of the Treaty are not surprising in view of the circumstances in which the Treaty was made and they can in any case not be allowed to import into the Treaty principles which are warranted neither by the text nor by other relevant data of interpretation.

" On the grounds hereinbefore developed, the Commission considers that in respect of the yacht *Gerry* a claim under Article 78 of the Treaty lies against the Italian Government. The owner is entitled under para. 4(*a*) of that Article to restoration to complete good order of the yacht, and as in the circumstances of the case it must be assumed that the yacht was damaged and sunk as a result of bombardment from the air, he can claim redress under the second sentence of this paragraph. In respect of that remedy, however, it is rightly contended on behalf of the Italian Government that the latter is responsible only for the damage which actually occurred in Italy. As liability under the Treaty is based on the existence of the property in Italy, it cannot extend to loss or damage suffered before the property came to Italy."

[Report: Unpublished.]

Peace Treaties—Performance of—Restitution and Reparation Provisions— Inclusion of Property in List of " Jewish Property " drawn up by Sequestrator in Italy as Constituting Treating Owner as Enemy.

See p. 391 (*Bartha Claim*).

Peace Treaties—Performance of—Restitution and Reparation Provisions—Evidence of Loss or Damage—Burden of Proof.

See p. 864 (*Batchelder Claim*).

Peace Treaties—Performance of—Restitution and Reparation Provisions.

See p. 340 (*Carnelli Claim*).

Peace Treaties—Performance of—Restitution and Reparation Provisions—Interest on Claims.

See p. 409 (*Fatovich Claim*).

Peace Treaties—Performance of—Restitution and Reparation Provisions—Meaning of Phrase "have been treated as enemy" —Whether Preliminary Sequestration Action under Anti-Jewish Legislation Constitutes Treatment as Enemy of Jewish Owner of Property—Interpretation of Treaties—By Reference to *ratio legis*.

See p. 642 (*Feldman Claim*).

Peace Treaties—Performance of—Restitution and Reparation Provisions—Sequestration and Sale of Goods—Whether Constituting a Loss as a Result of the War.

See p. 307 (*MacAndrews & Forbes Company Claim*).

Peace Treaties—Performance of—Restitution and Reparation Provisions—Naturalization of Owner of Property Subsequent to Date of Peace Treaty—Whether State of Naturalization Entitled to Submit Claim on Behalf of Owner—Whether Sequestration of "Jewish Property" in Italy Equivalent to Treating Owner as Enemy.

See p. 389 (*Menkes Claim*).

Peace Treaties—Performance of—Restitution and Reparation Provisions—Responsibility for Acts and Omissions of Sequestrator of Enemy Property—Necessity for Fraud or Negligence—Measure of Damages—Loss of Profit as Measure of Loss of Value of Claimant's Business.

See p. 312 (*Ousset Claim*).

Peace Treaties—Performance of—Duty of Conciliation Commission Set Up Under—Receiving and Evaluating Evidence.

See p. 843 (*Amabile Claim*).

Peace Treaties—Performance of—Whether Provisions Applicable to Acts Done Before Outbreak of War.

See p. 945 (*Armstrong Cork Company Claim*).

Peace Treaties—Performance of—Interpretation of Treaty—Meaning of Term " treated as enemy ".

See p. 646 (*Bacharach Claim*).

Peace Treaties—Performance of—Interpretation of Treaty—Meaning of Phrase " have been treated as enemy "—Article 78 of Peace Treaty with Italy, 1947.

See p. 642 (*Feldman Claim*).

Peace Treaties—Performance of—Interpretation of Treaty—Meaning of Expression " as a result of the war ".

See p. 330 (*Hoffman Claim*).

Peace Treaties—Performance of—Right of Victorious Party to Seize Property of Defeated Party—Exempted Property—Sequestrated Property of Nationals of Defeated Party—Responsibility for Negligence of Sequestrator—Criteria of Responsibility—Responsibility for Delay in Raising Sequestration—Implied Period of Grace.

See p. 317 (*Re Rizzo and Others* (*No.* 3)).

B—WARFARE ON LAND

II.—Appropriation, Utilization and Destruction of Enemy Property

Warfare on Land—Appropriation of Enemy Property—War Booty—Transfer of Title in Booty to Foreign Government Agency—Physical Delivery to Private Company—Whether Private Company Entitled to Claim " Proprietary Title " within Meaning of Article 2279 of French Civil Code—The Law of France.

BAECHLER *v.* SOCIÉTÉ LORRAINE ACIÉRIES DE ROMBAS-FAU.

France, Court of Cassation. December 20, 1955.

THE FACTS.—This was an action for the delivery of armoured cars purchased by the appellant in the following circumstances: Armoured cars captured by the German army in Russia during the Second World War were stored by a German company in the respondent Company's warehouse in the French province of Lorraine. At that time the respondent Company's business was being administered by another German Company. After the liberation of the province of Lorraine from German occupation the American military authorities took possession of the cars—which they treated as booty—and transferred the ownership therein to a French Government Agency, in pursuance of the Lend-Lease Agreement between France and the United States. Physical possession remained with the respondent Company. The Government Agency subsequently sold the cars to the appellant, who now claimed delivery from the respondent Company. The appellant's action was dismissed on the ground that the respondent Company which was in physical possession of the cars was entitled to rely on the presumption contained in Article 2279 of the French Civil Code.[1] On behalf of the appellant, it was contended that the presumption contained in Article 2279 was displaced by the fact that the cars which had been taken as booty by the American armed forces and subsequently transferred into the ownership of a French Government Agency in pursuance of the Lend-Lease Agreement between France and the United States, while remaining under the physical control of the respondent Company, could not be held by the latter by virtue of a proprietary title and that he, the appellant, was accordingly entitled to their delivery.

Held: that the judgment of the Court below (Court of Appeal of Colmar) was contrary to Articles 2279 and 2229 of the Civil Code and must be reversed; the appellant was entitled to an order for the delivery of the cars. The presumption contained in Article 2279 of the Civil Code could not be relied upon as against the appellant because it was displaced by the fact that the cars were war booty, the property wherein had been transferred in pursuance of the Lend-Lease Agreement between France and the United States of America, with the result that the respondent Company could not be in possession by virtue of a proprietary title.

The Court said in part: " The presumption of ownership resulting from Article 2279 of the Civil Code can be relied upon, as against a claimant of moveable property, only where the possession of the person holding the property is true and unequivocal and by virtue of a proprietary title, as provided in Article 2229 of the Civil Code.[2] On the facts as found in the judgment under appeal, armoured cars captured in Russia were stored by the German company of Eisen-und Metallaktiengesellschaft on the premises of the Société des Aciéries de Rombas while the latter Company was under German administration. These cars were captured as war booty by the American military authorities upon the liberation of the province of Lorraine. They were subsequently handed by the American authorities to the Comptoir Administratif et Financier de Récupération, in accordance with the Lend-Lease Agreement between the French and United States Governments, and in 1945 the Comptoir sold them to the appellant, who duly paid for them. The appellant asked for delivery of the cars, and the Court of Appeal (of Colmar) rejected his claim on the ground that the Société des Aciéries de Rombas, which was in possession of the cars, ' was entitled to rely on the presumption of Article 2279 of the Code Civil ', and that the appellant had failed to establish that the respondents lacked a possessory title. The judgment of the Court of Appeal finds that the cars which were the property of the Eisen-und Metallaktiengesellschaft were brought in one bulk delivery to and ' deposited ' on premises owned by the Société des Aciéries de Rombas, then represented by the Rombacher Hüttenwerke which latter Company, by virtue of certain contracts between the two German Companies, was to receive delivery of scrap-iron derived from armoured cars dismantled by the Eisen-und Metallaktiengesellschaft. Finally, the Court of Appeal finds that the armoured cars, ' which were regarded as war booty by the American army, were the subject-matter of a transfer to a French authority which, in turn, transferred them to the appellant.' On these findings, which show that the Company in physical control of the cars (*viz.*, the respondents) was not in possession by virtue of a proprietary title, the presumption resulting from Article 2279 of the Civil Code could not be relied upon as against the appellant. . . ."

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[1] Article 2279, as far as here material, reads as follows: "As regards moveable property, possession is equivalent to title."

[2] Article 2229, as far as here material, provides as follows: " Title by prescription requires possession which is continuous, uninterrupted, peaceful, unequivocal and based on a proprietary title."

[Report: *Bulletin de la Cour de Cassation*, 1955, p. 361.]

Warfare on Land—Appropriation of Enemy Property—Booty—Acquisition of Title.

See p. 930 (*De Deckere* v. *Belgian State*).

III.—Occupation of Enemy Territory

Belligerent Occupation—In General—Joint Occupation—Joint Occupation of Japan Following Second World War—Responsibility of Allied Powers for Acts of Supreme Commander for the Allied Powers in Japan—Legislative and Administrative Functions of Occupant—Act of Government of Occupied Territory Performed at Direction of Occupant—Retention of Seized Property by Government of Occupied Territory at Direction of Occupant—Whether Attributable to Occupant.

ANGLO-CHINESE SHIPPING COMPANY, LTD. *v.* UNITED STATES.

United States, Court of Claims. January 11, 1955.

THE FACTS.—This was an action by a corporation organized under the laws of Hong Kong for the alleged use of its vessel, the *S.S. Josephine Moller*, by the United States during its occupation of Japan following the termination of hostilities in 1945. The *Josephine Moller* had been seized by Japan during the war and remained in the possession of the Japanese Government until it was returned to its owners on August 4, 1950. It had been retained by the Government at the direction of the Supreme Commander for the Allied Powers, for use in the laying and repairing of submarine cables for the benefit of Japan. In 1950 the Supreme Commander directed the Japanese Government to return the vessel to the Government of the United Kingdom.

The action was brought against the United States alone on the theory that, although other States participated in the occupation, the United States was in control of the forces occupying Japan and was accordingly liable for any acts done by the Occupying Powers. The United States resisted the action on the ground that the use of the plaintiff's vessel was a use by all the Occupying Governments and that a suit could be maintained only against the group and not against the individual Governments. On the defendant's motion to dismiss,

Held: that the motion must be granted and the plaintiff's petition dismissed. The occupation of Japan was a joint venture of the United States, the United Kingdom, the Union of Soviet Socialist Republics, and China. While the use of the plaintiff's vessel was accordingly a use by all of the four Powers, it was not necessary to determine whether those nations were jointly and severally liable. The retention of the vessel by the Japanese Government and its use for the benefit of Japan did not constitute an appropriation of possession or use of the ship by the Allied Powers, even though effected at the direction of the Supreme Commander. Japan was therefore responsible for paying compensation for use of the vessel.

The Court said: " Plaintiff's position cannot be maintained. The occupation of Japan was a joint venture, participated in by the United States of America, the United Kingdom, China, and Russia; and whatever benefit the occupying powers derived from the use of plaintiff's vessel in the laying and repairing of submarine cables was derived by all of them in common and not by any one more than another. Official documents leave no doubt of this.

" To begin with, President Roosevelt, acting for the United States of America, Generalissimo Chiang Kai-shek, acting for China, and Prime Minister Churchill, acting for the United Kingdom of Great Britain and Northern Ireland, met at Cairo in 1943, and on December 1, 1943, issued a statement in which they said, among other things:

> ' The several military missions have agreed upon future military operations against Japan. The Three Great Allies expressed their resolve to bring unrelenting pressure against their brutal enemies by sea, land, and air. This pressure is already rising.
>
> ' The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. . . .'
>
> (App. 1 to Publication 2671 of the Department of State, Far Eastern Series 17.)

" Later, the representatives of the leaders of the Soviet Union, the United States of America, and Great Britain met at Yalta and on February 11, 1945, issued an agreement, 59 Stat. 1823, in which they said, among other things:

> ' The leaders of the three Great Powers—the Soviet Union, the United States of America and Great Britain—have agreed that in two or three

months after Germany has surrendered and the war in Europe has terminated the Soviet Union shall enter into the war against Japan on the side of the Allies. . . .'

(App. 2 to the above cited publication.)

"Then, on July 26, 1945, the leaders of the United States, China, and Great Britain issued the Potsdam Proclamation, reading:

'(1) WE—THE PRESIDENT of the United States, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain, representing the hundreds of millions of our countrymen, have conferred and agree that Japan shall be given an opportunity to end this war.

. . . .

'(5) Following are our terms.

. . . .

'(7) Until such a new order is established and until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth.

. . . .

'(12) The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished.

. . . .'

(App. 3 to the above cited publication.)

"On August 14, 1945, the Japanese accepted the terms of the above Potsdam Proclamation. (See App. 6 to the above cited publication.)

"On September 2, 1945, the Instrument of Surrender, 59 Stat. 1733, was signed, which reads in part as follows:

> 'We, acting by command of and in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters, hereby accept the provisions set forth in the declaration issued by the hands of the Governments of the United States, China and Great Britain on 26 July 1945, at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics, which four powers are hereafter referred to as the Allied Powers.
>
> 'We hereby proclaim the unconditional surrender *to the Allied Powers* of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated.
>
> 'We hereby command all Japanese forces . . . to comply with all requirements which may be imposed by *the Supreme Commander for the Allied Powers* or by agencies of the Japanese Government at his direction.
>
> . . . .
>
> 'The authority of the Emperor and the Japanese Government to rule the state shall be subject to the *Supreme Commander for the Allied Powers* who will take such steps as he deems proper to effectuate these terms of surrender.' (Italics ours.)

"This instrument was signed by the Japanese and by Douglas MacArthur, 'Supreme Commander for the Allied Powers,' C. W. Nimitz, 'United States Representative,' and by representatives of China, the United Kingdom, the Union of Soviet Socialist Republics, Australia, Canada, France, Netherlands, and New Zealand. (App. 8 to the above cited publication.)

"Finally, on December 27, 1945, the Foreign Ministers of the Union of Soviet Socialist Republics, the United Kingdom, and the United States of America issued the Moscow Agreement 60 Stat. 1899, setting up the Far Eastern Commission. This Agreement read in part as follows:

> 'A Far Eastern Commission is hereby established composed of the representatives of the Union of Soviet Socialist Republics, United Kingdom, United States, China, France, the Netherlands, Canada, Australia, New Zealand, India, and the Philippine Commonwealth.'
>
> 'II. *Functions*
>
> 'A. The functions of the Far Eastern Commission shall be:
>
> '1. To formulate the policies, principles, and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished.
>
> '2. To review, on the request of any member, any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission.
>
> '3. To consider such other matters as may be assigned to it by agreement among the participating Governments reached in accordance with the voting procedure provided for in Article V–2 hereunder.
>
> 'B. The Commission shall not make recommendations with regard to the conduct of military operations nor with regard to territorial adjustments.
>
> 'C. The Commission in its activities will proceed from the fact that there has been formed an Allied Council for Japan and will respect existing control machinery in Japan, including the chain of command from the United States Government to the Supreme Commander and the Supreme Commander's command of occupation forces.'
>
> 'III. *Functions of the United States Government*
>
> '1. The United States Government shall prepare directives in accordance with policy decisions of the Commission and shall transmit them to the Supreme Commander through the appropriate United States Government agency. The Supreme Commander shall be charged with the implementation of the directives which express the policy decisions of the Commission.
>
> . . . .
>
> 'The United States Government may issue interim directives to the Supreme Commander pending action by the Commission whenever urgent matters arise not covered by policies already formulated by the Commission; provided that any directives dealing with fundamental changes in the Japanese constitutional structure or in the regime of control, or dealing with a change in the Japanese Government as a whole will be issued only following consultation and

following the attainment of agreement in the Far Eastern Commission.'

(App. 12 to the above cited publication.)'

"It is clear that the occupation of Japan was a joint venture of the United States, the United Kingdom, the Union of Soviet Socialist Republics, and China; but does that absolve the individual nations from liability for an act taken on behalf of all?

"On August 19, 1946, the Supreme Commander for the Allied Powers directed the Japanese Government to report on the location of property they had seized during the war. It reported that the *Josephine Moller*, which it had seized, was at Yokohama. On December 3, 1946, the Supreme Commander notified the British Government that this vessel was available for return to its owners. Later, however, the Supreme Commander directed the Imperial Japanese Government to retain the vessel until October 15, 1948, for the purpose of laying and repairing submarine cables. Later, other directives were issued ordering further retention of the vessel and it was not until March 24, 1950, that the Supreme Commander directed the Japanese Government to return the vessel to the Government of the United Kingdom. It was actually returned on August 4, 1950.

"The Allied Powers, of course, was not a body politic. It was an association of sovereign states. Any action taken by the Supreme Commander for the Allied Powers was taken on behalf of the association, of course; but it was also taken on behalf of each one of the Allied Powers. Any action taken by him was taken as the agent of the United States of America, as the agent of Great Britain, and as the agent of China and of Russia. Whatever use there may have been of plaintiff's vessel by the Allied Powers, it was a use by all of them. The Supreme Commander was acting as the agent for each of them.

"When private parties or private corporations or municipal corporations enter into a joint venture, the parties are jointly and severally liable for the acts of their agent, and their individual property may be levied upon to satisfy any judgment, at least after the assets of the joint venture have been exhausted. Whether this rule should be applied to sovereign nations engaged in a joint enterprise has never been decided, and we do not now decide it, because we do not think any of the Allied Powers are liable, for the reasons to be stated.

"Plaintiff's vessel never came into the possession of the occupying powers. When the Japanese conquered Hong Kong they seized the vessel and it remained in their possession until it was returned to its owners. It is true the Supreme Commander directed them to retain it, but this direction was issued only because the Japanese Government was powerless to act except with the approval of the Supreme Commander.[1] The order directing retention of the vessel read:

> ' It is directed that the Japanese Ministry of Communications assume responsibility for the operation of the vessel, make the necessary arrangements to man and outfit the ship for cable laying operations and proceed with work already approved by General Headquarters, Supreme Commander for the Allied Powers. . . .'

" The laying and repairing of these cables was for the benefit of Japan. Japan itself outfitted the vessel and manned it and used it in laying and repairing the cables. The responsibility for the use of it in so doing is Japan's responsibility. The cables were not for temporary use by the Allied Powers only during their occupation; they were for long-time use extending far beyond the period of occupation. The fact that the occupying powers got an incidental benefit from the use of them during their occupation renders them no more liable for the cost of laying and repairing them than any other person who might use them. That cost must be borne by Japan. That cost includes payment for the use of plaintiff's vessel.

" Manifestly, the occupying powers are not liable for the cost of what Japan has done to rehabilitate herself, although much of the work of doing so may have been approved by or even directed by the Supreme Commander of the Allied Powers."

[Reports: 130 Ct. Cl. 361, 127 F. Supp. 553; *certiorari* denied, 349 U.S. 938, 99 L.Ed. 1266, 75 Sup.Ct. 783 (1955).]

i.—Nature and Effects of Occupation

Belligerent Occupation—Nature and Effects of—Termination of Occupation—Germany and Berlin—Effect on Jurisdiction of Occupation Courts—Reserved Powers of Former Occupant—Transition Period for Winding Up of Cases—Whether Constituting Occupation for Purpose of Statute Regarding Extradition to Occupied Territory—The Law of the United States of America.

In re KRAUSSMAN.

United States, District Court, District of Connecticut. May 6, 1955.

THE FACTS.—This was a proceeding for the extradition of one Kraussman, who was charged with having committed the crimes of embezzlement and forgery while employed by an American company in the United States Sector of West Berlin between July 1951 and November 1953. Before being apprehended in Germany, Kraussman had returned to the United States and was at the time of the proceedings resident in that country. The United States High Commissioner for Germany made a written request for his return and surrender to the jurisdiction of the United States High Commission Courts for Germany. The Government based its right to extradite on 18 U.S.C. § 3185 and sought in this proceeding a finding of probable cause, which under the statute was a prerequisite to an order by the Secretary of State of the United States requiring the return of the respondent to Germany. Section 3185 provides in part:

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[1] On September 6, 1945, the President of the United States issued the following order to General MacArthur:

" 1. The authority of the Emperor and the Japanese Government to rule the State is subordinate to you as Supreme Commander for the Allied Powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a contractual basis, but on an unconditional surrender. Since your authority is supreme, you will not entertain any question on the part of the Japanese as to its scope.

" 2. Control of Japan shall be exercised through the Japanese Government to the extent that such an arrangement produces satisfactory results. This does not prejudice your right to act directly if required. You may enforce the orders issued by you by the employment of such measures as you deem necessary, including the use of force.

. . . ."

> " whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who, having violated the criminal laws in force therein by the commission of any of the offenses enumerated [including embezzlement and forgery], departs or flees from justice therein to the United States, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the . . . chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed."

The respondent contended that the statute quoted above was applicable only if the United States exercised exclusive occupation and control, and that Germany was not under the exclusive authority of the United States but under the joint control of the United States, the United Kingdom, France, and the Union of Soviet Socialist Republics.

While the case was pending and after the hearing on probable cause, the occupation of Germany by France, the United Kingdom, and the United States had come to an end in the circumstances set forth in the body of the opinion.

On motion to dismiss,

Held: that the motion to dismiss must be granted. After the termination of the occupation of Germany, that country could no longer be considered territory under the occupation or control of the United States, notwithstanding the reservation of certain powers by the former Occupants, including the right of disposing of cases pending before tribunals of the Occupants.

The Court said: " However, the Protocol of September 12, 1944, amended November 14, 1944, and July 26, 1945,[1] between these four powers, divided Berlin into parts or sectors, one of which was designated as the American sector to be ‘ occupied by the forces of the United States of America.’ So that while there was an over-all joint authority for Greater Berlin the court can take judicial notice that there was in fact a separate sector occupied exclusively by the United States’ forces in which the judicial tribunals of the United States High Commission and the Commission’s other governing branches, had full governmental powers including cognizance of criminal offenses, to the exclusion of the courts and governing units of the other occupying nations. Under these circumstances Section 3185 might well be found to be applicable. But while this case was pending and after the hearing on probable cause, a treaty (U.S. Senate document #11, 84th Congress, First Session)[1] was entered into between the United States and Western Germany which terminated the occupation of Germany by the United States and the other signatories who were the other occupying powers except the Soviet Republic. Since that time the treaty has become effective and Western Germany has become a separate sovereign nation. The treaty, however, provided in effect that the United States High Commission courts would continue in existence for several months to dispose of cases pending or proceedings based on acts or omissions which occurred prior to the effective date of the treaty. The question which presents itself here is whether or not this right of the courts to continue to function in the heart of a foreign nation whose sovereignty has been restored, is occupation or control of part of that country by the United States within the intent and purpose of the extradition statute, Section 3185. I do not think so. The occupation and control mentioned in the statute refers to full governmental authority based upon a dominating police or military force which makes the authority effective, as the Supreme Court has said:

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[1] The reference is to a protocol adopted by the Advisory Commission for Europe. Its contents were made public in the Statement by the Governments of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the Provisional Government of the French Republic on Zones of Occupation in Germany, June 5, 1945, Cmd. 6648 (1945), p. 7; *Department of State Bulletin*, 12 (1945), p. 1052.

> ‘ . . . the name of the “ United States Military Government Courts for Germany ” was changed to “ United States Courts of the Allied High Commission for Germany.” They derived their authority from the President as occupation courts, or tribunals in the nature of military commissions, in areas still occupied by United States troops. Although the local government was no longer a “ Military Government,” it was a government prescribed by an occupying power and it depended upon the continuing military occupancy of the territory.
>
> ‘ The government of the occupied area thus passed merely from the control of the United States Department of Defense to that of the United States Department of State. The military functions continued to be important and were administered under the direction of the Commander of the United States Armed Forces in Germany. He remained under orders to take the necessary measures, on request of the United States High Commissioner, for the maintenance of law and order and to take

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[1] Article 4, Convention on the Settlement of Matters Arising out of the War and the Occupation, signed at Bonn, May 26, 1952, 6 U.S.T. 4417, T.I.A.S. No. 3425, p. 301.]

such other action as might be required to support the policy of the United States in Germany. . . .' *Madsen* v. *Kinsella*, 343 U.S. 341 at page 357, 72 S.Ct. 699 at page 708, 96 L.Ed. 988.[1]

This is no longer true of the United States in the sector it occupied in Berlin or the zone it occupied in the rest of Germany. The United States High Commission is not now in the words of the statute the ' chief executive officer in control of such foreign country '.

"Although the treaty excludes Berlin and Germany as a whole,[2] the fair implication to be drawn from this exclusion is that the retention of powers by the signatories is principally for the purpose of dealing with the Soviet Republic relative to the reunification of Germany and a peace treaty, and that, in so far as it is practically possible, local governmental authority will be turned over to the Federal Republic of Germany as soon as and to the extent that it is feasible. The Government has offered no proof that the situation in the American sector of Berlin is factually different from this. Therefore, in the face of a retention of joint over-all power de jure and a policy de facto to turn over to the Federal Republic of Germany as much of the administration of local government as possible, it cannot be said that the situation is one which comes within Section 3185.

" The treaty itself makes no provision for extradition from the United States under these circumstances. It appears, however, that if the respondent were returned to Germany and was there tried in the United States High Commission court, he might, if convicted, be placed in a German prison in the custody of the German authorities; that upon completion of his prison term he could be held by the German authorities and prosecuted in a German court for any offense he might be charged with which arose during his 1951–53 stay in Germany which was not committed in the performance of his duties for the occupation authorities or which had not been completely investigated by the United States High Commissioner. He might also be arrested by the German authorities for such an offense if he were tried and acquitted on the present charge by the High Commission Court and were freed in Germany, as there is no immunity provided.

" With the large number of American citizens in the Service of the Government in foreign countries, and the consequent moving of such personnel between those countries and the United States, the matter of extradition should be specifically covered by treaty or statute in clearly defined terms, as basic rights of the citizens of this country, be they innocent or guilty, may be involved.

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[1] *International Law Reports*, 1952, p. 602.]

[2] The reference of the Court is apparently to Article 2 of the Convention on Relations between the Three Powers and the Federal Republic of Germany, signed at Bonn on May 26, 1952, as amended by Schedule I to the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, signed at Paris on October 23, 1954; 6 U.S.T. 4121; T.I.A.S. No. 3425, p. 5.]

" It is clear that this court would not be warranted in extending the meaning of Section 3185 to include the circumstances of this case. If the statute needs broadening to include situations not foreseen when the statute was passed in 1900 or even when it was amended in 1949, Congress should make the necessary provisions."

[Report: 130 F. Supp. 926.]

Belligerent Occupation—Nature and Effects of—Public Property of the Occupied State—Article 53 of the Hague Regulations of 1899—Title to Requisitioned Property Subsequently Sold to Private Individual—The Law of Italy.

MESTRE HOSPITAL *v.* DEFENCE ADMINISTRATION.

Italy, Court of Cassation (First Chamber). April 28, 1954.

THE FACTS.—During the occupation of Italy, German troops seized a military ambulance as war material and then handed it to the Hospital of Mestre, in exchange for another ambulance which had been requisitioned for the hospital. At a later date the Hospital sold the ambulance to a private individual, one Nermann. After the war, the Italian Defence Administration recovered the ambulance from Nermann as surplus war material improperly in his possession. Nermann successfully sued the Hospital for repayment of the sum which he had paid for the ambulance. The Hospital now sued the Defence Administration for reimbursement of the sum which they had to repay to Nermann, contending that as they had, under the provisions of Hague Convention No. II of 1899, become the legitimate owner of the ambulance, the sale of it to Nermann was valid. The action was dismissed.

On appeal by the Hospital to the Court of Cassation,

Held: that the appeal must be dismissed. Although the transaction was valid under international law, it was not so under Italian municipal law which on the point in issue diverges from international law.

The Court said: " The third ground of appeal against the decision of the Court of Appeal is based on the following:

" (a) The judgment of the Court of first instance decided that the sale of the ambulance by the hospital to Mr. Nermann was void because it was contrary to the binding provisions of the Decree Laws of January 21, 1945 (No. 49) and January 20, 1948 (No. 118), which in effect forbade the sale of the ambulance because it was the property of the Defence Administration which had the power to recover—as in this case it actually did—all surplus war material illegally possessed;

" (b) The Court consequently decided that the Hospital must refund to Mr. Nermann the price paid by him for the ambulance, but the Hospital did not receive back the *res vendita*, which had been legitimately recovered by the military administration to which it belonged.

" The Appellants contend that these grounds of the judgment appealed from are not relevant to the present case, because the power to recover surplus war material, which was given by the Decree Laws cited to the public administration, must be subject to the condition that it is exercisable only if the person in whose possession the material is found cannot show that he acquired it legitimately. In the present case—according to the Appellants—the Hospital was the legitimate owner of the ambulance. In fact, the German troops legitimately acquired the ambulance as war material in virtue of Article 53 of the Regulations annexed to the Second Hague Convention of 1899 with respect to the Law and Usages of Land Warfare, brought into operation in Italy by Royal Decree No. 504 of December 9, 1900. At the same time, the right of ownership of the Italian Military Administration in the ambulance was extinguished; therefore the German troops legitimately handed it over to the hospital in exchange for another ambulance which they had requisitioned. The hospital, having properly acquired the ambulance, were not, under the above-mentioned Decrees of 1945 and 1948, bound to hand it back to the Military Administration and therefore the sale of the ambulance to Mr. Nermann should be regarded as valid.

" These remarks make it necessary for the Court to examine a preliminary problem concerning the validity in our legal system of Article 53 of the Hague Convention relative to the powers of the belligerent over war material. We must remember that the provisions of Article 53 are founded on customary international law rather than on conventional law. Therefore, both the writings of authorities and the judgment of the United Chambers of the Court of Cassation (Decision No. 2644 of 1951[1]) recognize that international law and the municipal law of a State, although they are theoretically autonomous and separate, operate each in its own legal sphere. Nevertheless, one must admit the automatic adaptation of municipal law to the customary laws of the *jus gentium*. This is the result of the compelling exigencies of coexistence in the civilised world. We must therefore admit the principle of the automatic adaptation of the Italian legal system to the rules of international law relating to *occupatio bellica*, which the Hague Convention of 1899 codified; this was true before the coming into force of the Constitution of the Republic—and this is of some importance in the present case—Article 10 of which states the principle of the adaptation of our positive law to customary international law (' generally recognised rules of international law are part of Italian law ').

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[1] *Ministero della Difesa-Esercito* v. *Salamone*: *International Law Reports*, 1951, Case No. 211.]

" This said, we must observe that according to Article 53:

> '. . . l'armée, qui occupe un territoire, ne pouvra saisir que le numéraire, les fonds et les valeurs exigibles appartenant en propre à l'Etat, les dépôts d'armes, moyens de transport, magasins et approvisionnements et, en général, toute propriété immobilière de l'Etat de nature à servir aux opérations de la guerre.'

The occupying State can therefore seize any movable property belonging to the occupied State which may be used for operations of war; it may keep the property so taken and also transfer it to other persons if such a transfer is in accordance with military needs. In turn, the State which has been the victim of the appropriation by the enemy of property belonging to it, must, because of the reception into its own internal legal system of the rules of international customary law, recognize the taking over by the occupying State of the right of ownership in the *res* and the consequent extinction of its own title to it; it must also recognize the validity of any transfer by the enemy State of the rights in the property taken, if such transfer is in accord with military needs.

"According to Article 53, therefore, when the German army authorities requisitioned the ambulance belonging to the Italian Military Administration, they became the owner of it, because it was obviously ' of a nature to be used in the operations of war ' (that is, the conveyance of wounded men); and the handing it over to the Hospital in place of another ambulance which had been requisitioned from the Hospital itself, was clearly a transaction of a military kind and was therefore legitimate.

"Although we have established that the transaction between the German Army and the Hospital was valid according to international law, we cannot say the same from the point of view of the Italian legal system which, in regard to transactions entered into by the German army of occupation, diverges from the *jus gentium.* This Court has already decided (Decisions No. 1551 of June 5, 1951, and No. 774 of March 22, 1950[1]) that in view of the terms of Article 5 of Decree Law No. 134 of March 26, 1946—which has retroactive force and which declares void any transaction between Italian nationals and the German invader—no one can validly acquire from the German Army (in this instance) a motor vehicle which formerly belonged to the Italian Government.

" It is well known that in a case where there is a conflict between municipal and international law, the court must apply the law enacted by the State of which it exercises the judicial function,

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[[1] *Colorni* v. *Ministry of War*: *International Law Reports*, 1950, Case No. 138.]

leaving to the State the responsibility for not having made its positive laws conform to its international duties.

" Therefore, by Italian law, the transaction between the German army and the civil Hospital of Mestre is void."

[Report: *Giurisprudenza Italiana*, 1955, I, 1, p. 196.]

Belligerent Occupation—Nature and Effects of—Act of Government of Occupied Territory Performed at Direction of Occupant—Retention of Seized Property by Government of Occupied Territory at Direction of Occupant—Whether Attributable to Occupant.

See p. 982 (*Anglo-Chinese Shipping Company, Ltd.* v. *United States*).

Belligerent Occupation—Nature and Effects of—Continuance of Sovereignty of Occupied State.

See p. 998 (*Conservatorio Cherubini of Florence* v. *Saba*).

ii.—Legislative, Judicial and Administrative Functions of the Occupant

Belligerent Occupation—Legislative and Administrative Functions of Occupant—Currency Issued by Occupant—Payment of Matured Debts in Occupation Currency.

MADLAMBAYAN *v.* FELICIDAD L. AQUINO.

Philippines, Court of Appeals. October 20, 1954.

THE FACTS.—Pedro Morales loaned ₱14,000 to the defendant in May 1940. The loan contract provided for repayment in not less than four nor more than ten years. As security for the loan the defendant, with the consent of her husband, Dominador Y. Dizon, gave Morales a mortgage on two parcels of land. In May 1944, while the Philippines were occupied by the Japanese forces, Dizon offered to repay the loan in Japanese occupation currency, but Morales refused to accept payment in that currency unless a provision was made for future adjustment on the basis of the relative values of Philippine and occupation currency. Dizon then sent Morales a letter in which he threatened to reveal this refusal to the authorities. Subsequently Morales, having been arrested by the Japanese military police and threatened with death if he persisted in his refusal, surrendered the certificates of title to the mortgaged land and the mortgage was discharged. The loan was repaid by a cashier's cheque drawn in occupation currency.

In September 1945, the plaintiff, as administrator for the estate of Pedro Morales, initiated this action to obtain the reinstatement of the loan contract, the return of the certificates of title, and damages for Morales' suffering while in the custody of the authorities. The

Court of First Instance dismissed the petition. The plaintiff appealed, alleging errors which may be summarized as follows:

1. The plaintiff alleged that the phrase " Philippine money ", which appeared in the loan contract, designated a particular currency as the medium of repayment, and that the trial Court erred in holding that it merely described the money loaned.

2. The plaintiff alleged that the legal remedy available to the defendant when Morales refused payment in occupation currency was *consignacion*, and that the trial Court erred in holding that the defendant's debt had been satisfied although she did not use that remedy.

3. The plaintiff alleged that Morales had not used the payment he was forced to accept, and that the trial Court erred in finding that he had spent it and by so doing had ratified the transaction.

4. The plaintiff alleged that, in any event, the trial Court should have used the Ballantyne Scale of Values to determine the relative values of Philippine and occupation currency at the time the loan was repaid.

5. The plaintiff alleged that the trial Court erred in refusing to award damages for Morales' suffering while in the custody of the authorities.

Held: that the judgment appealed from must be affirmed. Occupation currency was legal tender at the time the loan was repaid, and Morales had no legal right to insist upon payment in Philippine currency in the absence of a specific provision in the loan contract requiring repayment in that currency.

The Court said: " Counsel for appellant maintains that the amount of ' ₱14,000 moneda filipina ', which was obtained by way of a loan in 1940, should be paid in Philippine currency, and not in Japanese military notes, citing Article 1170 of the old Civil Code. Had there been a stipulation in the mortgage contract that the indebtedness shall be paid in Commonwealth currency, and not in Japanese military notes, the contention of appellant would be correct. Unfortunately, the specie with which the amount of ₱14,000, should be paid is not stipulated. The Supreme Court in passing upon a similar stipulation in a mortgage contract said—

" ' The phrase " Philippine " currency appearing in the mortgage contract was intended to describe the amount of money given as loan and not to designate a particular currency as medium of payment. And, there being no stipulation of the contrary, though the money lent to the debtors was in Philippine Commonwealth currency, it could be paid in any currency that is lawful money as legal tender in the Philippines at the time payment is to be made (40 Am. Jur., 751, Sec. 56; See also Art. 1170 old Civil Code). Thus a debt of ₱12,000 created 1876 in good coin, may now be paid by 12,000 of the Philippine silver pesos. (*Roger* v. *Smith Bell & Co.*, 10 Phil., 319.) And it has been held " that debts created when the only legal tender money was gold and silver could be paid in paper money issued by the government and which had no intrinsic value '. *Rogers* v. *Smith Bell & Co.*, *supra*; *Legal Tender Cases*, 12 Wall. 457; *Dooey* v. *Smith*, 13 Wall. 604; *Railroad Co.* v. *Johnson*, 15 Wall. 195; *Marland* v. *Railroad Co.*, 22 Wall. 105, and in the Philippines it is settled rule that Japanese military notes issued during the Japanese occupation were legal tender and could be used validly during such occupation for payment of matured debts. (*Haw Pia* v. *China Banking Corp.* G. R. No. L–551[1]) ' (*Belarmino et Al.* v. *De Mesa*, G. R. No. L–1986,[2] January 28, 1950.) "

With regard to the allegation of the plaintiff that the debt had not been satisfied because of the failure of the defendant to use the legal remedy of *consignacion* when Morales refused to accept payment in occupation currency, the Court said: " Evidently, the debtor had that in mind, for the complaint . . . was already prepared by his attorney then and ready for filing. But, when the creditor signed the deed of cancellation, the filing of said complaint then became absolutely unnecessary."

The Court sustained the refusal of the trial Court to apply the Ballantyne Scale to the repayment of the debt on the grounds that " the Ballantyne Scale of Values is not applicable to prewar debts which mature and were paid during the occupation." The Court also reviewed the evidence and concluded that the trial court had been correct in finding that the plaintiff had spent the money received in payment of the loan, and had thus ratified the transaction.

The Court rejected the plaintiff's claim for damages on the following grounds: "In the circumstances of the case at bar, the damages which plaintiff is claiming are not allowable under the old Civil Code. Besides, if the creditor suffered moral and mental tortures it was because of his own fault for refusing to accept payment in Japanese military notes which were legal tender at the time of the offer."

[Report: *Official Gazette*, 51 (1955), p. 1925.]

Belligerent Occupation—Judicial Functions of Occupant—Whether Tribunals of Occupant Foreign or Municipal Tribunals—Person Convicted of Criminal Offence by Tribunal of Occupant—Amnesty Law Enacted by Occupied Country—Application of Amnesty Law to Sentences of Occupation Tribunals—The Law of Austria.

Austrian Amnesty Case.

Austria, Court of Appeal of Vienna. June 17, 1955.

The Facts.—The Austrian Amnesty Law of 1955 provided, as far as here material, that persons sentenced to terms of imprisonment not exceeding three months were entitled to an amnesty. In this case the accused was sentenced to a term of three months' imprisonment by an Austrian court, and put on probation for three years. While on probation he was sentenced to a term of imprisonment of more than eight years by an American occupation tribunal. After serving some five years of this sentence he was released in 1955. Meanwhile, the Amnesty Law had been enacted, and the question arose as to whether the sentence of the American tribunal must be added to the term of three months' imprisonment imposed by the Austrian court in 1948, or whether, for the purpose of the Amnesty Law, it must be ignored, in which latter case the accused would be entitled to an amnesty.

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[1] *International Law Reports*, 1951, p. 642.]

[2] *Ibid.*, p. 661.] .

Held: that as the sentence of the American tribunal was the sentence of a foreign court and not an Austrian court, it must be ignored for the purpose of the Amnesty Law; the only outstanding term of imprisonment was therefore one not exceeding three months, and the accused was accordingly entitled to an amnesty.

The Court said: "According to section 1 of the Amnesty Law of 1955 an amnesty is to be granted only in respect of sentences not exceeding three months. Apart from the sentence passed by the District Court of Vienna on March 15, 1948, there is only one further sentence in existence which has been passed, *viz.* that resulting from the decision of the American Tribunal at Salzburg. This, however, is not a sentence within the meaning of section 1 of the Amnesty Law. The accused is an Austrian citizen who committed the offence with which he was charged before the American Tribunal, in Austria, and that offence is a crime against sections 8 and 90 of the Austrian Criminal Code; alternatively, it constitutes at least the offence of restricting another person's personal liberty within the meaning of section 83 of the Austrian Criminal Code. In principle, therefore, the accused is subject to the jurisdiction of the Austrian courts. Although the Occupant made this criminal matter subject to his jurisdiction, the judgment of the American Tribunal at Salzburg cannot be assimilated to the judgment of an Austrian court. Notwithstanding the fact that the seat of this tribunal is in Austria and that its activity also extends to matters directly and indirectly affecting the protection of the Austrian people, it is not an Austrian court because, as the Supreme Court pointed out in Judgment No. 132 of 1950, it is not the seat or the duties of a court which determine whether such court is an Austrian court, but the sovereign authority from which its jurisdiction is derived. As the tribunals of the Occupying Powers derive their authority from sovereignty which is foreign, they can only be regarded as foreign courts, and their judgments must therefore be treated as the judgments of foreign courts. According to section 36 (3) of the Austrian Criminal Code, the judgments of foreign penal authorities cannot be executed in Austria. The right of the Austrian State to prosecute is not extinguished by the judgment of the American Tribunal; all that happens is that the exercise of this right is suspended during the occupation of Austria. Once this obstacle to the exercise of the right of prosecution has been removed, it is—having regard to the fact that we are concerned with an offence requiring prosecution *ex officio*—for the Austrian prosecutor to take up the prosecution and to determine the right to prosecute. It follows that the only sentence to be executed is the sentence based on the judgment of the District Court of Vienna, which was passed in 1948. This sentence does not exceed three months, and section 1 of the Amnesty Law of 1955 therefore applies to it."

[Report: JB, 78 (1956), p. 55.]

Belligerent Occupation—Administrative Functions of Occupant —Limits of Powers of Occupant—Respect for Laws in Force in Occupied Territory—Legality of Order Cancelling Contract Entered into between Inhabitants of Occupied Territory—Duty of Occupant to Enquire into Legality of Order—Relevance of Article 43 of Hague Regulations of 1907.

CONSERVATORIO CHERUBINI OF FLORENCE *v.* SABA.

Italy, Court of Cassation (United Chambers). February 22, 1954.

THE FACTS.—During the German occupation of Italy, a contract which had been entered into between the Conservatorio and the respondent was cancelled by an order of the occupation authorities. It appears that the Conservatorio stood to benefit if the contract was broken, and it obeyed the order *perinde ac cadaver*, without questioning its legality. After the war, the respondent sued the Conservatorio in the Court of Florence for damages for breach of contract. In its defence, the Conservatorio pleaded that it had acted under the compulsion of the order of a superior authority. That defence was rejected and judgment given against the Conservatorio. The latter appealed to the Court of Cassation.

Held: that the appeal must fail and the judgment of the Court below must be confirmed. The Conservatorio, before obeying the order of the occupation authorities, was both entitled and under a duty to question the legality of the order.

The Court said: " In its first ground of appeal to this Court, the appellant contests the jurisdiction of the court of first instance in the circumstances of this case, contending that the competence of the court was limited to declaring the contract void; it did not extend to revoking or modifying administrative acts.

" It is quite clear, however, that the Court below has not purported to revoke or modify an administrative act; in conformity with Article 5 of the Law of Administrative Jurisdiction the Court merely did not enforce the act because it was an order unlawfully made by the occupying Power and one outside the limits of its powers. It is incorrect to state that the acts of the occupying authority are not subject to the control of the Court because they constitute a manifestation of a sovereign Power. Although Judgment No. 1228 of 1948 of this Court accepted that thesis (see *Giurisprudenza Italiana*, 1948, III, 166), Judgment No. 628 of 1948 and Judgment No. 658 of 1951 rejected it, and this Chamber has no hesitation in adopting the opinion expressed in the two last-mentioned judgments. Only those manifestations of the powers of the occupation authority which relate to the conduct of the war and to the maintenance of public order in the occupied territory are free from the control of the judicial power. The legislative or administrative activities of the occupying authority cannot be regarded as exempt from the fundamental principle which regulates every legal organization, namely, observance of the law.

" The problem now consists of examining whether or not the Court below rightly decided that the military Government did not have the power of cancelling the contract under consideration. The Conservatorio contests this on various grounds.

" In the first place, it is contended that to cancel the contract was within the power of the Military Administration; the Administration would have been able to do that in the exercise of its directive and supervisory powers over every act of Italian administration. But the power of direction and supervision was not at all *legibus soluta*. It was limited by the necessity of respecting the legal system of the occupied State.

" The sovereignty of the occupied State is not terminated or destroyed, but only limited by the belligerent occupation of its territory. This limit is stated by Article 43 of the Regulations annexed to the Fourth Hague Convention of 1907, which accords to the Occupant the power to take steps necessary to ensure public order; but, at the same time, it imposes on the Occupant the duty of respecting the laws which are in force in the occupied territory, unless he is absolutely prevented from doing so.

"Article 1, para. 3, of Decree No. 162 of July 20, 1944, supports the contention of the Conservatorio. The formal acts of the military occupying authorities became, without exception, part of the Italian legal system. It is true that the effect of the above mentioned article recognized those acts as having legal force; but although it does not say anything with regard to this, there was an implied condition that those acts should be in accordance with the principles of international law. This was a fundamental doctrine of our legal system even before it was incorporated in Article 10 of the Constitution.

" The problem must now be formulated in the following terms: the Occupant, except in cases of absolute necessity and for the purpose of ensuring public order, cannot have powers of control over the administrative activities of the organs of the occupied State larger than the powers of the authorities of the occupied State under the law of the State itself. It is therefore necessary to ascertain to which controls the contracting activity of the Conservatorio would have been subjected under the Italian legal system.

" It is assumed here by the Conservatorio that contracts entered into by it would require the approval provided by Article 19 of the Law concerning the financial administration of the State (Royal Decree No. 2440 of November 18, 1923). This Law, however, concerns the administration of the finances of the State. But in the present case it is certain that the Conservatorio has an autonomous legal personality which is separate from that of the State, and apart from any other arguments, we cannot admit that the simple, vague and general reference in the Statute of the Conservatorio to the rules which regulate public administration, is sufficient to attract to the sphere of the particular legal system of the Conservatorio a rule which the law has established, not with reference to all public administrative bodies but exclusively in relation to State activity.

" Having thus recognized the illegality of the order given to cancel the contract, we must examine the last serious objection put forward by the Conservatorio, namely, that, even conceding the illegality of the order, it was always under an obligation to obey that order. Such an obligation can be examined under two heads: as a problem of administrative law, namely, the force of the order given by a superior authority to an inferior, and as a problem of private law, namely, the relevance of the *factum principis* to the binding force of an order.

" On the first point, the Conservatorio argues that the binding force of an administrative order is regulated by Article 51 of the Criminal Code, which states a general principle, namely, the duty of obedience of an inferior authority to the order of the authority superior to it. But the extent of this duty must be limited by the necessity to obey the law. The legal system cannot—without contradicting its own fundamental principle—tolerate a superior authority taking the place of the law. If that were not so, the system of law and order would be completely upset; the intrinsic force which belongs to a legislative provision would be annulled, and the will of higher authorities substituted for it.

" This need for compliance with the law gives way only to the equally fundamental principle of absolute obedience to the order of a superior authority in such special cases as those connected with the internal and external defence of the State. It is for this reason that members of the armed forces are not permitted to question the legality of an order; but apart from this extreme case, the rule which limits the requirement of obedience to those orders only which are lawfully given, must always be observed.

"The problem is not very different with regard to the relations between the organs of the occupying State and those of the occupied State. If those relations stand within the sphere of international law, the principles of that law limit the power of the Occupant and accord to the occupied State the right of forbidding any limitations of its own sphere of sovereignty other than those which are imposed by the *ius gentium*. The current of thought which would attribute to the occupying State unlimited powers constitutes the relationship between the two States as one of mere force, devoid of all legal characteristics."

[Report: *Rivista di Diritto Internationale*, 1955, p. 368.]

Belligerent Occupation—Administrative Powers of Occupant—Whether Binding on Lawful Authorities—Invasion of Siam by Japan—Subsequent Occupation of Siam by Allied Forces—Public Sale of Public Property of Japanese Imperial Navy by Allied Occupying Authorities—Validity of Title Acquired.

PHYA SEEWIKRAMATIT *v.* MINISTRY OF COMMERCE.

Thailand, Supreme Court. July 18, 1955.

(Prawat Pattapongs, Silapasit Winitchai and Prasart Winitchai JJ.)

THE FACTS.—Prior to the Second World War, the plaintiff had let a parcel of land in Bangkok, Siam, to Mitsui Bishi Saiyee Kaisha & Co., a Japanese corporation. Siam was neutral at the beginning of the war. On December 8, 1941, Japanese armed forces invaded South and Central Siam. Immediately after the invasion negotiations took place between the two Governments, with the result that the Siamese Government was to permit the passage of Japanese troops through Siam. Mitsui Bishi Saiyee Kaisha & Co. sublet the piece of property in question to the Japanese Imperial Navy, units of which, together with other Japanese forces, were then stationed in Bangkok in accordance with the Treaty of Alliance concluded between the two Governments on December 21, 1941, subsequent to the landing of Japanese marines and armed forces in Siam. The sub-lessee, then present in Siam as foreign visiting forces[1] under the

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[1] It appeared that the presence of Japanese forces in Siam after December 7, 1941, could not in any circumstances be avoided by the Siamese Government, whether or not formal agreement regarding passage had been reached, and that the Japanese forces constituted *de facto* Occupying Authorities rather than friendly foreign visiting forces, since passage was not agreed to until after actual invasion had taken place. There would thus seem to have occurred a breach of duty on the part of the Japanese Government to a neutral country. However, at the trial of Major War Criminals at Tokyo, the defendants were acquitted on the charges of initiating and waging a war of agression against Siam. Thus in *United States and Others* v. *Araki and Others*, decided by the International Military Tribunal for the Far East on November 12, 1948, the Tribunal said: "In these circumstances we are left without reasonable certainty that the Japanese advance into Thailand was contrary to the wishes of the Government of Thailand and the charges that the defendants initiated and waged a war of agression against the Kingdom of Thailand remain unproved" (Transcript of Judgment (English translation), pp. 49,588–49,589, at p. 49,589; see also *Annual Digest*, 1948, Case No. 118 (*sub nom. In re Hirota and Others*)).

Treaty of Alliance, tore down the original buildings and harbour belonging to the lessee, and built a new harbour in its place, with new warehouses and roads. The property was occupied by the Japanese Navy and continuously used by it for public purposes until the unconditional surrender of Japan. Pursuant to the Ghandi (Colombo) Agreement of September 8, 1945, between the Allied Powers and Siam[1] the Allied Armed Forces entered the territory of Siam and remained stationed there for the purpose of disarming Japanese troops then still present in Siam and accepting their surrender. While in Bangkok, the Allied Forces sold the abovementioned warehouses at an auction sale to the plaintiff. Meanwhile, municipal legislation was introduced to create a National Commission to administer the residue of Japanese property in Siam. The defendant had been in possession of the warehouses and continued to use them on the alleged authorization by the National Commission. The plaintiff brought an action before the Civil Court for the recovery of the warehouses and claimed damages in respect of the wrongful possession of them by the defendant and of special physical damage done to the premises.

The Civil Court decided in favour of the plaintiff, ordering recovery of the warehouses, payment of damages for wrongful possession, and reimbursement of the costs of repairing the harbour and warehouses.

The Court of Appeal, on September 15, 1953, reaffirmed the judgment of the Civil Court. The defendant appealed further to the Supreme Court.

Held: that the appeal must be dismissed. The Court found, *inter alia*, that the Government of Siam had agreed to allow the Allied Forces or the Forces of the United Nations to stay in Siam with the view to disarming Japanese fighting elements there, and that, therefore, the Allied Forces, representing the victorious Powers, had rights of administration over property of the Japanese Forces, including the power of sale. The National Commission administering the property of Japanese had no power to authorize anyone to use the warehouses which the plaintiff had lawfully bought from the United Nations Occupation Authorities. The defendant must therefore be liable for wrongfully using the warehouses without the plaintiff's permission notwithstanding previous authorization by the National Commission.

The Court said: "The facts as appear from the evidence before the Court are as follows. In a lease granted by the plaintiff to Mitsui Bishi Saiyee Kaisha & Co. covering the parcel of land in question, the lessor and the lessee agreed, *inter alia*, that, upon the expiration of the lease the lessee shall have the right to remove any superstructure (*superficies*) that may have been created by the latter, while bridges, dykes, dams and other substructures, *i.e.*, structures between the land and the water and thereunder, shall become the property of the lessor, and that the lessee may sublet the land in question to the Japanese Imperial Navy.

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[1] See *infra*, p. 1004.

" Evidence submitted by the plaintiff shows that after the lease was made, Japanese Naval Forces entered into possession of the land and used the same in the discharge of their public functions (*jure imperii*). They tore down old buildings and reconstructed a harbour, some warehouses and roads, and continued to occupy the land right up to the date of Japan's unconditional surrender.

" The plaintiff gave further evidence that the Occupation Authorities subsequently sold the property in dispute, namely, warehouses Nos. 1, 2, 8 and 9, at an auction sale, and that, being the highest bidder, the plaintiff rightfully bought the warehouses in question. The plaintiff's argument is that since the defendant had obtained possession of the said warehouses without his (the plaintiff's) permission, the defendant must be held liable for wrongful possession of the same. The defendant admits that the Occupation Authorities had, in actual fact, sold the property in dispute to the plaintiff at an auction sale, but contends, on the other hand,

" (1) that the warehouses originally belonged to Mitsui Bishi Saiyee Kaisha & Co., a private corporation registered in Japan, and that under the headlease agreement, the lessee may remove them. Since it is established that Mitsui Bishi etc. & Co., is a private corporation, it follows that the property in dispute has not been used for public purposes (*jure imperii*);

" (2) that the Allied Occupying Forces had no right to sell the warehouses, and that therefore the plaintiff does not have good title and has no right of action;

" (3) that the sale of the warehouses is void for want of a memorandum in writing, since warehouses are immovables and the sale of immovables is required by law to be made in writing and registered at the Registry Office;

" (4) that the defendant is not liable for wrongful possession, since it has obtained possession of the properties in question and has used them with the consent of the National Commission set up specially to administer the property of Japanese nationals in Thailand; and

" (5) that the plaintiff has no right to claim damages in respect of the loss of rents, interest and profits.

" With regard to the defendant's contention No. 1, the Court is of opinion that, according to the evidence furnished by the plaintiff, the property in dispute was employed *jure imperii*, *i.e.*, in the performance of the activities of the Japanese Imperial Navy, right up to the end of hostilities. Since the defendant has failed to prove otherwise, the Court regards the plaintiff's evidence as conclusive. If, as proved, the Japanese Naval Forces, *i.e.*, the sublessee, actually built the warehouses in question, and it does not appear otherwise from the sublease agreement, the warehouse must be presumed to have remained the property of the Japanese Naval Forces. The fact, as the defendant contends, that the lessee is a private corporation and the agreement in the head-lease between the plaintiff and the lessee with regard to the latter's right to superstructure do not affect the above findings. The head-lease merely states that the superstructure will not automatically become the property of the plaintiff, and not that superstructures introduced by a third party shall become the property of the lessee. The question whether the lessee is a private or a public corporation therefore has no bearing on the proof of the plaintiff's title to the warehouse.[1]

" In reply to the defendant's contention (No. 2) that the Occupation Authorities had no power to sell the property in question, the plaintiff called a witness who identified himself as M. R. Seni Pramoj, a Barrister-at-Law of England, B.A. (Oxford)—which includes International Law—Professor of Law at the Bar of Thailand and Chulalongkorn University, formerly Professor of Law at Tammasart University, formerly Judge of the Civil Court, Secretary of the Supreme Court and Judge of the Court of Appeal. During the Second World War, the witness was accredited Ambassador of Siam at Washington, and immediately after the cessation of hostilities was Prime Minister of Siam. The witness then proceeded to give evidence that during his premiership, the Government of Siam was conducting negotiations with the United Nations or Occupation Authorities with the view to bringing an end to the existing state of war with Great Britain, Australia and India. British troops had entered Siam in accordance with an agreement made, prior to the witness's premiership, by the Government of Thailand at Ghandi on September 8, 1945,[2] authorizing British troops to enter to disarm Japanese Forces in Thailand and to administer their public property by reason of the fact that Japan had lost the war and was therefore rightly regarded as ' vanquished ' or ' defeated enemy '. Under international law, property of the Japanese Forces and property used in furtherance of war activities, including property belonging to private persons if employed in preparation for war activities or in the conduct of war, are liable to be confiscated or expropriated by the victorious Powers. But private property belonging to individuals and in no way whatsoever connected with war activities will not be similarly confiscated. Thus, British troops had entered Siam not solely for the purpose of disarming Japanese troops, but also with a view to administering their property in accordance with the above principles of international law. While a peace treaty was being negotiated, an Act was passed in 1945 setting out regulations for the control, detention and internment of Japanese nationals and for the administration of their businesses and property in Siam. These provisions extended also to nationals of the countries regarded as 'enemies' (*hostes*) of the United Nations (Occupation Authorities). This Act was intended primarily to facilitate and assist British troops in such matters as disarmament of the Japanese forces and disposition of their property. It was not, however, intended to curtail the powers of the Allied Occupation Authorities. Indeed, curtailment of such powers would be impossible in view of the fact that they were belligerent occupation forces. Thus properties under the management or administration of the United Nations Occupation Authorities by virtue of the power conferred upon them *qua* occupant, lie outside the jurisdiction of the local administering authority. The power of the Occupant knows no limitation. He may do what he wishes, sometimes more and sometimes less than is permitted by the (local) law, just as he may think fit at a particular time. Whenever the Armed Forces of the United Nations (the Occupation Authorities) administered the property of an individual in an arbitrary manner, and the latter complained to the witness (then Prime Minister of Thailand), the witness normally instructed an official to negotiate with the Occupation Authorities. The negotiations were sometimes satisfactory and at other times without any concrete results.

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[1] This remark appears to suggest that the public or private nature of the corporation in question may be relevant if not significant in other connections.]

[2] See also the Agreement for the Termination of the State of War between Siam on the one hand and Great Britain and India on the other, signed at Singapore, January 1, 1946: Cmd. 8140, *Treaty Series* No. 10, pp. 8–13; and Exchange of Notes: *ibid*, pp. 13–24.]

"The Court is of opinion that since the witness for the plaintiff was Prime Minister at the time the Peace Treaty was being negotiated, he should have been in the best position to recall the circumstances and to give evidence regarding the substance of the negotiations between the Occupation Authorities and Siam. The defendant, on the other hand, called no witness to refute the evidence given by M. R. Seni Pramoj. Furthermore, it can be gathered from Nai Suntorn Hongsladarom, witness for the defendant, who was at the material time Secretary of the National Control Commission, that, although the Control Commission was theoretically assigned to administer the warehouses in dispute, it could not very well do so since the Occupation Authorities had already assumed control over the warehouses and proceeded to administer them. Nor does it appear that the National Commission had any right to oppose the measures taken by the Occupation Authorities.

"The Court holds that according to the evidence given by the witness for the plaintiff, the Government of Siam had concluded an Agreement with the Occupation Authorities, whereby the latter, as victorious Powers, were permitted to enter Siam to disarm Japanese Forces and to administer their property as a matter of right since Japan was a vanquished belligerent. For this reason, the Allied Occupants had the right to dispose of the property of the Japanese

Forces in any manner they chose. Vested with such wide power, the Occupation Authorities could lawfully effect the sale of the warehouses in question either by auction or by any other form of public sale. It follows that the plaintiff, the successful bidder, had acquired a perfectly good title.

" The defendant's contention (No. 3) that the warehouses are immovables and that the sale of immovables by an agent must be made in writing and registered at the Registry Office, is also dismissed. The Court finds from the facts that the sale was on the basis that the warehouses were to be removed. It was therefore a sale of movables. Hence, neither the appointment of an agent nor the sale of the property needed to be made in writing or registered; and the fact that the purchaser happened to be the owner of the land on which the warehouses were situated does not alter the character of the property sold. Nor does it in any way affect the validity or enforceability of the sale or transfer of such property.

" Fourthly, the defendant contends that there has been no civil or tortious liability on his part, since the defendant had used the property in question with the consent of the National Control Commission, a lawful authority empowered to allocate the use of the warehouses to the defendant. The Court holds, in this connection, that when the plaintiff bought the property in question, a valid title was transferred to him. As has been previously found, the Control Commission was powerless to permit the defendant to use the plaintiff's property. It follows that the defendant did not have any legal right to assume possession and to make use of the property belonging to the plaintiff, a national of Siam, without the latter's previous authorization. Wrongful and unauthorized user of the property of the plaintiff by the defendant amounts to a tort or civil wrong against the plaintiff.

" Lastly, the defendant contends that the plaintiff has no right to claim damages in respect of loss of rents, interest and profits, since an action for payment of rent of immovables must be evidenced by a written memorandum, and that damages assessed by the Courts below are higher than the actual or probable rents of the property in question. . . . The Court holds that this is not an action for payment of rents, but for damages for wrongful possession. The measure of damages is assessable by the loss of interest, rents or profits which the plaintiff would have had, or would have been entitled to have, had the warehouses not been wrongfully possessed by the defendant. It is not an action for a breach of contract affecting immovables, but one for damages in tort or civil wrong, which need not be supported by written evidence."

[Report: S.Ct.D., 739/2948; *Report of Supreme Court Decisions* (1955), vol. II, p. 642.]

Belligerent Occupation—Legislative Measures of Occupant—Article 43 of Hague Regulations—Change in Legal System of the Occupied Territory—German Legislative Measures in Lithuania during the Second World War.

See p. 101 (*Kling and Others* v. *Lesser and Rotterdamsche Bank*).

iii.—Respect for Private Property. The Public Property of the Enemy State. Requisitions and Contributions

Belligerent Occupation—Respect for Private Property—Unlawful Requisitions—Subsequent Sale of Unlawfully Requisitioned Property—Whether Purchaser Acquires Title—The Law of France.

BLUM *v.* SOCIÉTÉ D'INJECTION RAPIDE ET DE CONSERVATION DES BOIS.

France, Court of Cassation. December 7, 1955.

THE FACTS.—Article 1 of the French Ordinance of April 21, 1945, provided that any action taken by the enemy against any person in the execution of measures contrary to the law in force on June 16, 1940, was void in law. The plaintiff was the owner of a lorry which, on June 19, 1940, was forcibly removed from his possession by members of the German armed forces who were not in possession of a requisitioning order. In December 1940 the German army of occupation organized a sale of second-hand vehicles captured or otherwise taken in France by the German armed forces. Among these vehicles was the plaintiff's lorry. It was purchased by the defendants, and in the present action the plaintiff claimed its return, relying for that purpose on Article 1 of the Ordinance of April 21, 1945 (*supra*).

Held: that the plaintiff was entitled to the return of the lorry; in the absence of a requisitioning order the forcible removal of the lorry from the plaintiff's possession was void in law, and the defendants were accordingly unable to acquire a valid title thereto.

The Court said: " On December 17, 1940, the defendant Company, at a sale of second-hand vehicles organized by the German army, acquired a Renault lorry owned by the plaintiff, a person of the Jewish faith. The lorry had been taken from the owner, without a requisitioning order, by German soldiers on June 19, 1940. The Court of Appeal (of Dijon) dismissed the action of the dispossessed owner for the return of the lorry and stated that the religious persuasion of the plaintiff was not the cause of dispossession or subsequent sale. At the same time the Court of Appeal held that this was an act of violence or of war to which the Ordinance of April 21, 1945, was not applicable. International law gives an army of occupation the right to requisition even means of transport owned by private individuals, provided that the law of the occupied country is respected as far as possible, but it does not give an army of occupation the right to sanction the transfer to private individuals of goods taken from others by acts of violence. The transfer here in issue consummated an illegal act undertaken in the execution of measures contrary to the law in force on June 16, 1940, and for this reason should have been held to be null and void. The judgment under appeal is therefore contrary to the Ordinance of April 21, 1945, and must be reversed. The case will be remitted to the Court of Appeal of Lyons."

[Report: *Bulletin de la Cour de Cassation*, 1955, p. 349.]

Belligerent Occupation—Respect for Private Property—Cancelling or Imposing of Mortgages by Occupant—Invalidity of.

See p. 335 (*Sancer Claim*).

Belligerent Occupation—Respect for Private Property—Cancelling or Imposing of Mortgages by Occupant—Invalidity of.

See p. 335 (*Spitzer Claim*).

Belligerent Occupation—Respect for Private Property—Requisition of Real and Personal Property for Use as Officers' Club by Occupying Forces—Obligation to Pay Compensation—Whether Austria Occupied or Liberated Territory.

See p. 398 (*Seery* v. *United States*).

C—WARFARE AT SEA

IV.—Prize Law—

i.—Nature and Extent of Jurisdiction of Prize Courts

Prize Law—Nature and Extent of Jurisdiction of Prize Courts—Enemy Goods—Necessity for Proof of Enemy Nationality of Owner.

MINISTERIO DELLA MARINA *v.* VAN BEEK (*THE MARIA*).

Italy, Council of State (Ad hoc Chamber). April 16, 1953.

THE FACTS.—On July 22, 1940, the Italian naval authorities of the Port of Naples took charge of certain goods seized on board the *Maria*, a ship sailing under the Netherlands flag. The Italian Ministry of Marine asked for the goods to be condemned as enemy goods. On July 25, 1941, the Italian Prize Court decided that the captured goods were enemy property on the basis of the enemy destination of the cargo, and condemned the cargo accordingly.

The Government of the Netherlands now applied, under the provisions of Annex XVII, para. A., of the Peace Treaty of 1947 with Italy,[1] for a revision of the above-mentioned decision of the Italian Prize Court, contending that the enemy character of the captured cargo must be ascertained on the basis of the nationality of the owner; only in the case of a cargo found on an enemy ship may such character be presumed.

At the same time, the firm of van Beek of Rotterdam, which was a party to the original proceedings and was joined in the present application, contended that the Counseil d'État, under the provisions of the Peace Treaty cited, had the power only to ascertain the existence of the formal requisites of the request of the Netherlands Government, *i.e.*, that it had no power to decide on the merits of the case. But the request itself concluded: " The Government of the Netherlands is confident that the Italian Government, after examining the matter, will share its opinion."

Held: (a) that the Conseil d'État had the power to review the case on its merits, and (b) that the decision of the Prize Court must be quashed. A cargo could not be regarded as " enemy goods " under international law by reason only of its enemy destination: it could be regarded as " enemy goods " only if it could be proved that the owner was of enemy nationality.

The Court said: " The purpose of the present proceedings is to decide whether the decision of the Italian Prize Court, the revision of which is requested by the Government of the Netherlands, is in conformity with international law or not.

" The Court cannot accept the contention of the firm of van Beek of Rotterdam that the present proceedings must be limited to a mere recognition of the regularity of the formal requirements of the request of the Dutch Government. Such a contention is clearly opposed to Presidential Decree No. 1307 of November 11, 1951, which brings into operation Annex XVII, para. A, of the Peace Treaty. The nature of the Conseil which is now called upon to hear the case (*i.e.*, the supreme administrative tribunal, on which our legal system has conferred the power of reviewing sentences of Prize Courts) and the fact that the rules relating to the judicial proceedings of the Conseil d'État are also applicable to the present proceedings, require something more than a decision as to the formal requisites of the ' request '.

" That interpretation of the Treaty is supported by the very terms of the request, which concludes: ‘ the Government of the Netherlands is confident that the Italian Government, after examining the matter, will share its opinion . . .’ This shows that the Netherlands Government does not intend to insist on its opinion that the capture was illegal: on the contrary, it asks the Italian Government to examine the ‘ matter ’ closely in the light of the reasons adduced in the ‘ request ’. It may therefore be assumed, on strong evidence, that the two Governments concerned do not disagree as to the purpose of the proceedings provided in the above-mentioned Presidential Decree.

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[1] Annex XVII, para. A., provides as follows:

" Each of the Allied and Associated Powers reserves the right to examine, according to a procedure to be established by it, all decisions and orders of the Italian Prize Courts in cases involving ownership rights of its nationals, and to recommend to the Italian Government that revision shall be undertaken of such of those decisions or orders as may not be in conformity with international law.

" The Italian Government undertakes to supply copies of all documents comprising the records of these cases, including the decisions taken and orders issued, and to accept all recommendations made as a result of the examination of the said cases, and to give effect to such recommendations."

“ Having thus established the nature and the purpose of the proceedings, it must be admitted that the ‘ request ’ of the Government of the Netherlands is well founded.

“ It must be noted that the capture of the cargo which is the subject of the decision of July 25, 1941, took place on July 22, 1940; this date is confirmed by the report of the capture of the goods unloaded from the ship *Maria*, drawn up by the Office of the Port of Naples; therefore the date of the capture given in the ‘ request ’ as June 9—*i.e.*, before Italy joined the war—is erroneous and, as far as this point is concerned, the capture was valid. But the Ministry of Marine requested the condemnation of the captured cargo on the ground that it consisted of ‘ enemy goods ’. Therefore, the rules to be applied in the case were not those concerning the capture of contraband goods, but those concerning the capture of enemy property on neutral ships. These rules, in conformity with international law, are the subject of express provisions, namely, Article 154 of the Law of War of July 8, 1938 (No. 1415).

“ The Prize Court considered it possible to establish, on the basis of presumptions, that the captured goods were the property of an enemy national. Now, when condemning captured goods as contraband of war, the practice of the prize courts is to accept (not without disagreeing with the opinions of the most authoritative writers), unequivocal and mutually supporting presumptions in order to prove the enemy destination of the goods, but the same does not apply in establishing the nationality of the cargo. That, as a general rule, is determined, according to international law, by the nationality of the owner. In some systems of municipal law there are derogations from this rule; for the purpose of capture, goods which according to the above-mentioned rule should be regarded as neutral are held to be enemy goods, but the legitimacy of such derogations from international law is open to grave doubt.

“ But our law, to which, in the last resort, international law should refer, does not take into consideration other presumptions concerning the nationality of the goods (which results from the nationality of the owner), with the exception of that deriving from the fact that the goods are on an enemy ship. Article 157 of the Law of War states that the goods are regarded as enemy goods if they are owned by an enemy national, and that only goods found on an enemy ship are presumed to be enemy goods, unless there is evidence to the contrary.

" Therefore the Italian Prize Court did not decide in conformity with international law (and not even with municipal law) in its judgment of July 25, 1941, when it purported to establish the enemy nationality of the captured cargo by deriving it from the enemy destination of the goods."

[Report: *Foro Italiano*, 1953, III, p. 284.]

iv.—Miscellaneous

Prize Law—Wrecks—Whether Subject to Capture in Prize—Capture after Termination of Hostilities—The Law of Norway.

THE EILENAU.

Norway, Gulatings Lagmannsrett (Court of Appeal for Western Norway). December 17, 1949.

THE FACTS.—The s/s *Eilenau*, a German merchant vessel, was attacked and sunk by British naval units in the harbour of Svolvaer, North Norway, in March or April 1941. At the time of the liberation of Norway (May 1945) it was still at the bottom of the sea. The Custodian of Enemy Property, by a contract dated May 29, 1947, assigned the rights in the ship, together with a number of other ships, to the Statens Krigskaskoforsikring (National War Insurance Board) which, in turn, assigned its rights to the Norsk Bjergningskompani (Norwegian Salvaging Company), which refloated it. On September 24, 1948, the ship was taken as prize by the Norwegian Navy.

The Company claimed that the ship was a wreck, and, therefore, could not be taken as prize and also that prizes could not be taken after the German surrender.

Held: that the ship had lawfully been taken as a prize.

The Court said: " It is clear that the *Eilenau* was a merchant ship registered in enemy territory—Germany—and that thus the conditions for capture in prize are fulfilled. The debates in the Legislature prior to the passing of the Law of May 2, 1947, on Prize and Prize Courts seem to presume that wrecks can be taken as prize. It is not necessary, however, to settle this point or to decide how this point would be decided according to the prevailing doctrine of international law, or to discuss the relations between international law and municipal law. When the *Eilenau* was taken as prize—and that is the critical date—it had been re-floated and could after more or less expensive repairs be used as a ship. In these circumstances it would be unreasonable and not in conformity with the purpose of prize law to hold that it could not be taken as prize.

"The debates leading to the Law of May 2, 1947, in conjunction with the fact that it was found necessary to substitute a new Statute for the old Orders in Council of April 18, 1944, concerning Prize Courts and of April 22, 1940, concerning substantive Prize Law, constitute a further indication that prizes can be captured after the German surrender. For the purpose of the Statute, Germany was an enemy State when the Law was enacted and we cannot see that any change has been effected since that time.

"On the basis of the literature on international law at our disposal, the legitimacy of taking prizes after surrender cannot, according to the prevailing international law and the relation between international law and Norwegian law in this respect, be seen to have been decided by international law. Under these conditions, it is clear that the Court must apply Norwegian law.

"The Court is also of the opinion that the taking of the *Eilenau* as a prize is natural and reasonable. During hostilities the vessel was put out of action by naval units belonging to an Ally of Norway and in furtherance of the war with Germany. Both at the date of the surrender and when the ship was taken as prize it was in Norway, and in such a situation that the owner could not dispose of it. It was taken as prize as soon as conditions favoured and permitted such taking."

[Report: Unpublished.]

G—NEUTRALITY

I.—Nature and Duties of Neutrality

Neutrality—Nature of—France during the Second World War—Whether a Neutral State—Determination of Neutral Status—Conclusiveness of Certificate of Secretary of State and of Determination of Director of Selective Service—Exemption of Nationals of Neutral States from Military Service—Ineligibility for Naturalization—The Law of the United States of America.

UNITED STATES *v.* BUSSOZ.

United States, Court of Appeals, Ninth Circuit. January 15, 1955.

THE FACTS.—The petitioner, a national of France, was admitted to the United States for permanent residence in 1939 and resided continuously in the United States thereafter. In 1943, during the Second World War, he claimed relief from military duty on the ground that he was a citizen of France, which he asserted to be a "neutral in the present war". He understood that in making this application "a citizen or subject of a neutral country" would, pursuant to section 3(a) of the Selective Training and Service Act of 1940, 54 Stat. 885 (then in effect) be forever debarred from becoming a citizen of the United States. Previously, the Director of Selective Service, pursuant to a regulation which defined " a citizen of a neutral country " as a " citizen of a country which is neither a cobelligerent nor an enemy country," had determined that France was a neutral country within the meaning of the regulations.

In 1949, Bussoz filed a petition for naturalization in the United States District Court for the Southern District of California. The United States objected that the petitioner was " a citizen or subject of a neutral country " who had debarred himself from citizenship by his refusal to perform military service. The petitioner submitted in evidence a letter dated August 7, 1946, from one Walkinshaw, an official of the Department of State, stating that during the Second World War France had never had the status of a neutral country. The trial Court concluded that there was a conflict between the views of the Department of State and the Director of Selective Service and made its own determination that France was not a neutral nation during the Second World War. The District Court ordered the petitioner to be admitted to citizenship, and the United States appealed.

Held: that the order of the District Court must be reversed. The determination of the status of France during the Second World War was solely that of the Director of Selective Service, and his determination that France was a neutral country was not subject to judicial review. The evidence revealed, in any event, that the Secretary of State had concurred in the determination of the Director of Selective Service as to the neutral status of France.

The Court said: " For some unclear reason, the District Court failed to take into account appellant's exhibits admitted on November 10, 1952. Had it done so, it would not have fallen into the error of incorrectly resting decision upon the predicate announced in its memorandum decision of September 29th. For respondent's (appellant here) exhibits D and E, admitted on November 10, 1952, show beyond any question whatever that not only did the Director of Selective Service determine that France was a neutral at the time in question, but also that he did so upon the *written official approval* and advice of the Secretary of State. Under these circumstances, there was no proper basis for the Court's affirmance, on November 10, 1952, of the views expressed in its memorandum decision of September 29th.

" Thus, even assuming that a conflict between State Department and Selective Service was a basis for judicial determination of the question, the Court's decision was wrong, because, in fact, there was no conflict. The decision as to France's status was by the Director of Selective Service, concurred in by the Secretary of State.

"Generally speaking, the Courts have approved the doctrine that the status of foreign countries as regards international relations is for the determination of the political or executive department of the government and not for judicial decision. Only when such determinations are obscure or unclear do the courts undertake the task. The State Department is the spokesman for the executive in foreign relations.[1] But such problems generally involve questions of status for recognition purposes.[2]

"The District Court was in error in assuming that the State Department had any power or authority whatever to determine the status of aliens under the Selective Service Act.[3]

"By Section 3(a) of the Selective Training and Service Act, the Congress fixed the conditions by which a neutral alien could be relieved from military duty. And it vested in the President the power to prescribe appropriate rules and regulations. Sec. 10[4] of the same Act authorized the President to delegate his authority to the Director of Selective Service. The latter, acting for the President *under the Act*, made the determination as to who were neutral aliens, and he classified France as a neutral. Consequently, even if it be assumed to be an issue here, it is of no moment what the Secretary of State or any other department opined as to the status of aliens under the Selective Service Act.

"This case is governed by the Selective Service Act. The decisions of the Executive, whom Congress expressly authorized to carry it out, are therefore not subject to judicial review, except in the rare event of arbitrary or capricious acts. No contention has been made that the Director acted arbitrarily or capriciously. It is only claimed that his decision was erroneous, which is perhaps just another way of saying that appellee did not agree with it.

"The District Court had no power to make its own determination in this case, of France's status."

[Reports: 218 F.2d 683; *certiorari* denied, 350 U.S. 824, 100 L.Ed. 736, 76 Sup. Ct. 52 (1955).]

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[1] The Walkinshaw letter was a mere *ex post facto* opinion of a personnel officer and not official in any sense.

[2] The Courts have many times been called upon to consider the effect of recognition or non-recognition of foreign governments and the de jure or de facto character of their governments as affecting private rights. See *Bank of China* v. *Wells Fargo Bank*, D.C., 92 F.Supp. 920, notes 1 and 2; and same case, D.C., 104 F.Supp. 59, notes 3, 4, 5, 6, 7, 9 and 10 [*International Law Reports*, 1950, p. 61].

[3] It is true that the Director of Selective Service did call upon the Secretary of State for *advice* in determining the status of foreign countries (Respondent's Exhibits D and E), but § 3(a) conferred the power to make such decisions solely upon the President and his statutorily authorized delegate.

[4] § 10(a) (3) and (b), 50 U.S.C.App. § 310 [now 50 U.S.C.A. Appendix, § 460], authorized the President "to appoint, by and with the advice and consent of the Senate . . . a Director of Selective Service who shall be directly responsible to him . . . to carry out the provisions of this Act." "The President is authorized to delegate to the Director of Selective Service *only*, any authority vested in him under this Act". (Emphasis supplied.)

Neutrality—Duties of Neutral Powers—Hague Convention No. V—Duties of Neutrals in Civil War—Spanish Civil War—Internment in France of Members of International Brigade—Whether Internment Ordered to Comply with Obligation of Neutrality or for Political Reasons—Claim of Internee to Compensation from Home State—The Law of Austria.

Re DÜRMAYER'S CLAIM TO COMPENSATION.

Austria, Administrative Court. September 22, 1955.

THE FACTS.—An Austrian Law provided, as far as here material, that persons who had been deprived of their personal liberty by reason of their political beliefs were entitled to compensation therefor. The applicant was awarded compensation in respect of certain periods of imprisonment which he had spent in various prisons, but his claim to compensation in respect of periods of detention which he had spent in internment camps in France during the years 1939 and 1940 was rejected. The applicant had been a member of the International Brigade which fought on the side of the Spanish Republican Army in the Spanish Civil War. He escaped to France where he was interned, and he now contended that he was interned " by reason of his political beliefs " and was accordingly entitled to compensation in respect of the period of detention spent in French internment camps in 1939 and 1940.

Held: that the claim to compensation must be rejected; the applicant's internment had not been ordered by France by reason of the applicant's political beliefs, but to enable France to observe her obligations as a neutral Power in the Spanish Civil War, in pursuance of Article 11 of the Hague Convention (No. V) on the Rights and Duties of Neutral Powers in War on Land.

The Court said: " The decisive question is whether the applicant's detention in French camps from February 8, 1939, to July 31, 1940, is to be considered as imprisonment for political reasons or for reasons of race, religion or nationality, within the meaning of section 13a of the Victims Compensation Law. The applicant considers himself entitled to draw the conclusion—from the fact that not all the German and Austrian citizens who were living in France at the material time were interned—that the internment of aliens at that time must have been undertaken solely for political reasons. This conclusion is not justified. It is a matter of common knowledge, which does not require proof, that prior to September 3, 1939, a large number of Germans and Austrians were in possession of residence permits in France and followed their occupations in that country. It does not necessarily follow that the internment of aliens must have been due to political reasons, because it may well have been due to measures taken in accordance with international law or in the exercise of police powers over aliens. The applicant states that in February 1939 he entered French territory as a member of the International Brigade, *i.e.*, a foreign combatant formation. By virtue of the rules of international law—Article 11 of Hague Convention No. V—France, as a neutral Power in the Spanish Civil War, was under a duty to disarm and detain troops of the belligerents who had entered her territory, just as Switzerland did in the Second World War when members of combatant formations of the belligerents crossed into Swiss territory. If the French Republic was under a duty, in accordance with generally recognized principles of international law, to intern members of the Spanish International Brigade who had entered French territory, then it is quite immaterial whether France, in addition, entered into an express secret undertaking to the same effect with the German Reich—as the applicant contends—because the observance of a generally recognized duty under international law cannot be regarded as a measure of support for the policy of persecution of the German Reich. Nor does the long duration of the internment in the present case suggest that the applicant was detained for political reasons. The expulsion of members of the International Brigade to their countries of origin—Germany or Italy—was out of the question because in those countries they would have been in danger of political persecution by reason of their membership of the International Brigade. On the other hand, in view of the large number of persons involved, their release was not feasible because they were mostly persons without means, who had no residence permits and who would have been a burden on the labour market. The decision under appeal was therefore right in holding that the internment of the applicant in French camps, certainly until July 31, 1940 (prior to which date it cannot be assumed that the German Reich exerted any pressure), was not due to political reasons or reasons of race, religion or nationality."

[Report: *Amtliche Sammlung* No. 3824 (A).]

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